SUPREME JUDICIAL COURT

THE COMMONWEALTH OF MASSACHUSETTS
DOCKET NO. SJC-12859

BANK OF NEW YORK MELLON, AS TRUSTEE ON BEHALF OF THE REGISTERED HOLDERS OF ALTERNATIVE LOAN TRUST 2006- J7, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-J7
PLAINTIFFS-APPELLANT,

v.

ALTON KING JR. AND TERRI A. MAYES-KING,
DEFENDANTS-APPELLEES.

AMICUS IN SUPPORT OF APPELLEE'S RECONSIDERATION

AMICUS BRIEF

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B. Can this Court exclude the constitutional protections to constitutional access to the courts to protect our constitutional rights to possess and own our property by excluding us as a suspect class which is disproportionally the target of racist procedures and policies of one of the wealthiest sectors of our society with an explicit history of structural racism?

C. **Can this Court disregard ensuring equal access to justice because they believe a defendant will likely not ever be able to pay a predatory mortgage and will just be foreclosed on again, making the indigent homeowner, in effect, a "lost cause", even though there is significant evidence that loan origination and predatory lending violations is what caused this loan to be "doomed to fail"?**

D. In short, having been thrown to the ground and had our hands tied by the Mortgage Industry, can this Court really put its knee on our neck until the life has gone out of us?

This Brief is submitted pursuant to Mass. R. App. P. 17 by Dawn R. Duncan and Zakiya Alake as *pro se Amici.* Your Amici submit this brief in support of Defendant-Appellant, given the interest of the homeowners and "former" homeowners of Massachusetts.

STATEMENT OF INTEREST OF AMICI

Dawn Duncan is co-chair of Bring Our Wealth Home and a Massachusetts Alliance Against Predatory Lending Board Member. She is a grant writing consultant with dual Master's degrees in Public Health and Social Work.

Zakiya Alake is co-chair of Bring Our Wealth Home and a Massachusetts Alliance Against Predatory Lending (MAAPL) Board member. One of the first paralegals trained by a law school for radicals in the 1970s, she also participates in Boston Institute for Nonprofit Journalism and has been published in Dig Boston.

Together, your Amici have over 15 years of experience fighting illegal home foreclosures in MA, by organizing and supporting supposedly foreclosed homeowners, drafting and advocating for legislation to protect homeowners and fighting the predatory **mortgage** loan industry in regards to their own homes.

As members of MAAPL and leaders of BOWH, they take it to the streets by showing up to support **homeowners** at

foreclosure auctions. They are Home Protectors and declare that Black and Brown wealth matters. Black and Brown communities as well as women heads of households were initially targeted by the predatory mortgage loan industry. Black and Brown folks in particular were refused traditional mortgages even when they qualified for them and instead offered toxic subprime mortgages.

Bring Our Wealth Home (BOWH) is a campaign of MAAPL that is led by women of color who are on the Board of MAAPL. BOWH works to inform, educate and organize in communities of color, the initial targets of the predatory mortgage lending industry.

BOWH and MAAPL have a long history of fighting for homeowner rights.

• Together, in 2010, we made it state law that after foreclosure, banks had to rent to tenants until the property was re-sold.

• Together, in 2012, we made it illegal for banks to refuse to sell the home to someone who returned it to the foreclosed homeowner.

• Together we have helped hundreds buy their homes back and hundreds more reverse illegal foreclosures through the courts.

• We have exposed hundreds of illegal bank practices.

• For 5 years, 1000s across Massachusetts stopped the banks from slashing homeowner rights so they could ratify illegal foreclosures.

ARGUMENT

The Court must reverse this Alton King decision which abandons this Court's responsibility to arrest, rather than facilitate, the mortgaging and foreclosure industry's structural racism.[1]

A. Can this Court ignore and refuse to review for civil and criminal violations the acts of the plaintiff and its purported predecessors in interest when those actors and the pattern of their actions demonstrate that the typical structural racism of the industry and the court doing so facilitates structural racism?

B. Can this Court exclude the constitutional protections to constitutional access to the courts to protect our constitutional rights to possess and own our property by excluding us as a suspect class which is disproportionally the target of racist procedures and

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[1] Amici are members of *Bring Our Wealth Home*, all homeowners of color who have been damaged, victimized and then targeted for shame by the well documented, intentional and structurally racist practices of the mortgaging and foreclosure industry through predatory lending and foreclosures – many times over – illegally and likely criminally under settled law. See, for instance, starkly disparate statistics from Boston that for 2003, over 25 percent of refinance loans provided to African-American borrowers, 19 percent to Hispanic borrowers, and only 5.6 percent to white borrowers were subprime loans, Jim Campen, Borrowing Trouble: Subprime Lending in Greater Boston 2000-2003 (Jan. 2005), Table 2; Campen's 2008 study, Changing Patterns: Mortgage Lending to Traditionally Underserved Borrowers & Neighborhoods in Boston, Greater Boston and Massachusetts, 2006 (Feb. 2008) demonstrates that this pattern of racially disparate refinancing continues. (See addended map)

policies of one of the wealthiest sectors of our society with an explicit history of structural racism?

C. **Can this Court disregard ensuring equal access to justice because they believe a defendant will likely not ever be able to pay a predatory mortgage and will just be foreclosed on again, making the indigent homeowner, in effect, a "lost cause", even though there is significant evidence that loan origination and predatory lending violations is what caused this loan to be "doomed to fail"?**

D. **In short, having been thrown to the ground and had our hands tied by the Mortgage Industry, can this Court really put its knee on our neck until the life has gone out of us?**

Massachusetts was the first state to outlaw slavery[2]. A foundation of this decision was that no statute could override the state constitution.[3] Now, more than 200 years later, with this decision, it appears that the Massachusetts SJC has abandoned the protections of an entire class of people to the Constitutional rights to property.[4]

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[2] Commonwealth V. Jennison (1783)

[3] In fact, in *Jennison*), Chief Judge Cushing, writing for this Court, established the unique powers of the Supreme Judicial Court as enforcer of Constitutional protections and its ability under the constitution to vacate a law which contravenes a Constitutional protection. This judicial principle was later established at the national level in the famous Marbury v. Madison decision (1803) when Cushing sat on the new US Supreme Court.,

[4] The Court is reminded that the Constitution puts Constitutional protections to Life, Liberty and Property on equal footing (again, Commonwealth V. Jennison)). We can testify to why having experienced the life-threatening damage of the attempted illegal taking of our

We can't breathe! As with George Floyd's life, equal rights to property are being taken away from Massachusetts homeowners in what amounts to a constitutional lynching! The analogy is stark but apparent. For Massachusetts homeowners fighting for their fundamental inalienable rights, the banks have thrown us to the ground and cuffed us. This Alton King decision is akin to the Court sitting on our necks until we die.

This Honorable Court's Adjartey[5] decision, (barely over a year old; essentially the ink isn't even dry on it) said that:

1. All indigent Court litigants, across the entire state Court system, had a right not to be barred from access to the Courts for inability to afford to participate,[6]

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homes; the Framers had just been through what appears to have been the last foreclosure crisis with rates as bad as this one has been - foreclosures in the worst years of this crisis have been estimated at 3.4 times the peak rate of 1931 in the Great Depression. The Framers apparently knew the profound human toll of illegal taking of a home; until COVID, that reality has been the hidden suffering *unjustly* for too many of us. (Informal estimates put the ratio of Massachusetts households who have lost a home as high as 1 in 12.95 households)

[5]Adjartey v. Central Housing Court, 481 Mass. 830 (2019).

[6] *Adjartey*, p. 840, "The Indigent Court Costs Law exists to "ensur[e] that the doors of the Commonwealth's courts will not be closed to the poor." Reade, supra. The equitable and consistent application of this law is therefore **critically important to safeguarding every Massachusetts litigant's ability to "obtain right and justice freely, and without being obliged to purchase**

2. Appeal Bonds are among the enumerated fees that should be waived so as to ensure that the litigant has access to the courts,[7] and
3. The consistent application of this rule was critical to the Courts fulfilling their Constitutional obligation for us all to have access to justice without paying for it.

Certainly, and as codified into our laws, we are not to have to pay for it by forgoing our basic and our family's basic necessities.[8]

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it." [Note 14] Art. 11 of the ... Declaration of Rights." [emphasis added]

[7] p.837, "See, e.g., G. L. c. 261, § 27A (describing appeal bonds as "extra fees and costs")...Under the Indigent Court Costs Law, G. L. c. 261, §§ 27A–27G, indigent parties are able to obtain waivers or reductions of various fees and costs (including, for example, filing fees, fees related to the service of process, and appeal bond costs) incurred while litigating a summary process action. See G. L. c. 261, §§ 27A, 27B; Reade v. Secretary of the Commonwealth, 472 Mass. 573, 574 (2015)." Procedures are supplied at G. L. c. 261, §27D. p.845, "If the cost of an appeal bond is considered "extra," it makes sense that the cost of audio recordings is likewise considered "extra," regardless of whether the audio recordings are required for the appeal to proceed. See generally Mass. R. A. P. 8, as appearing in 481 Mass. 1611 (2019)". Clearly, if the audio recordings which are not even 'required to proceed' are eligible for waiver to guarantee an indigent litigant can proceed, if periodic rent payments could even be ordered, they must be waivable so as not to violate our Constitutional guarantee to access the Courts without giving up the necessities of life.

[8] Adjartey, p.840–41, "An individual is eligible for a fee waiver based on indigency only if one or more of the following applies:... the individual is unable to pay

In the Alton King decision, the Court has carved out an exception that only applies to homeowners that the Industry have illegally foreclosed. We are to be barred from the Courts if we cannot afford to pay, and, if we cannot pay as much as the multi-trillion industry we are opposing. This is eerily reminiscent of the historic "poll tax" that was used to make sure that blacks could not vote in decades past. However, as with all structurally racist policies, it affected a lot of white people as well.

Wording and basis of this decision reflects the race coded prejudice behind the slogan of "having bought too much house.[9]" All of the history of the predatory

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the court fees or costs without depriving him or herself (or those dependent on him or her) of the "necessities of life," including food, shelter, and clothing. G. L. c. 261, § 27A."

[9] According to the Center for Responsible Lending, a majority of subprime loans did not go for home purchases, only one-fourth to first time homebuyers. (Subprime Lending is A Net Drain on Homeownership (Center for Responsible Lending, CRL Issue Paper No. 14, March 27, 2007)). In contrast, racial targeting of subprime loans reversed slow gains in percentage of ownership by homeowners of color; the disturbing likely outcome of that predatory lending and the disparate denial of loan modifications (which continued the structural racism), was to reverse ownership gains *and strip more than a lifetime of wealth accumulation.* Then president of the Center for Responsible Lending, Mike Calhoun stated that, because of the racial underpinnings of the subprime crisis, it "stands to likely be the largest loss of African-American wealth that we have ever seen, wiping out a generation of home wealth

loans' and the then predictable illegal foreclosures were rooted in an explicitly racist strategy by the mortgaging industry. That prejudice has now been fueled by shaming the same people targeted for these immoral and unconstitutional practices of the wealthiest industry in the world. The Alton King decision acknowledges that the Notices required might well be illegal; by law, then, the foreclosure void; the Securitized Trust without ownership and therefore no standing to evict. Yet, the Court says it will not act to address these well-established illegalities *unless the homeowner pays.* Instead, the Court strikes such homeowners' access to our courts instead of enforcing our laws against the wrong-doers *and admonishes the lower courts to do likewise.*

The *Adjartey* petition to this, Massachusetts' top court, was brought under the leadership of a black African immigrant to this country who believed in the American Dream and the right to buy her home.

We, the movement's leadership team, are writing to you to recognize and enforce our laws that can end illegal, predatory lending and foreclosures. You should

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building." Ellen Schloemer and Wei Li. "Losing Ground: Foreclosures in the Subprime Market and their Cost to Homeowners." Center for Responsible Lending. Dec. 2006.

use your powers to reverse their harm to those who were hurt first and worst, the communities that the predatory Industry explicitly and intentionally targeted for predatory loans, and the most predatory loans, in this entire era of illegal and, evidently, criminal intentional procedures by the mortgaging and foreclosure industry. That is: Communities of Color.

This Court has no right to carve out an exception to the rights to access the Court for any segment of the Massachusetts population, ever.

However, in this period where structural racism is finally being recognized by even the overwhelmingly white leadership of our state, we are shocked that this Court has exempted itself from that very recognition. The arc of justice has taken a very long time to move from a time when African American men and women were themselves property to being equally protected in their right to own property. Or so we thought.

This Court must reverse its decision because it is a continuance and (we would argue) a facilitation of *expanding one area of structural racism*. This decision puts out squarely that apparently in the eyes of this Court,

- people of color are not, in fact, equally covered under the amended version of Article I of the Constitution (the Declaration of Rights of the Inhabitants of the Commonwealth);
- they do not have an inalienable right to their property;
- they do not have an equal right to access to our courts to protect that right —and
- they, and then the white homeowners to whom the Industry gave predatory loans after the Communities of Color, are uniquely and specifically required to purchase justice in violation of our Constitution.

Not only must “Black Lives Matter" equally, but black and brown rights to own property must matter equally. If this does not happen, the Court will have abrogated being arbiter and interpreter of our Constitution and of our laws and will have abdicated its right to claim the integrity and credibility to function as the top Court in this state.

The recent COVID-19 crisis has centralized for the first time apparently since the ratification of the Massachusetts Constitution, that your home is a fundamental protection of human existence.

Even the most recent report from our State Government shows that people of color *are three times more likely to die from the COVID crisis*; it named one and only one key factor in protecting people from death: their home. (June 19, 2020 Mass.gov)

Massachusetts has already got the ignominious status of having the widest divide between homeownership by people of color and white people. The root of this foreclosure crisis was the Industry's targeting of what it internally termed as "mud people" or "ghetto loans"[10] to homeowners of color and the impact on communities of color.

If our laws had been enforced timely, it could have stopped the further broadening of the widest racial divide in homeownership rates of all states[11]. This

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[10] "Wells Fargo, ... saw the black community as fertile ground for subprime mortgages...pushed customers who could have qualified for prime loans into subprime mortgages." Wells Fargo "employees had referred to blacks as "mud people" and to subprime lending as "ghetto loans." (addended, *Bank Accused of Pushing Mortgage Deals on Blacks* By Michael Powell June 6, 2009, New York Times.). The famous federal Countrywide settlement demonstrates the Industry incentivization of discriminating against borrowers of color. (see addended press release, Department of Justice, 12-21-11)

[11] "In Massachusetts, that ratio of white homeowners to minority homeowners is 2.15…The situation has only grown worse for people of color since 2004, when minorities owned 38.7 of owner-occupied homes in Massachusetts compared to the 32 percent in 2011." Living On The Edge: Financial Insecurity And Policies To Rebuild Prosperity

reversal would have guarded against, and prevented and halted much of the massive destruction of wealth,[12] housing stability, and health[13] etc. The deplorable triple rate of deaths among people of color in our state would surely have been lessened.

We can only hope that it was unconscious prejudice by this Court that targeted an African American man's ownership of his home as the basis for this decision.

In America; Findings from the 2013 Assets & Opportunity Scorecard By Jennifer Brooks and Kasey Wiedrich, JANUARY 2013, Corporation for Enterprise Development.

[12] During the years of the peak of the foreclosures of subprime loans "From 2005 to 2009, inflation-adjusted median wealth fell by 66% among Hispanic households and 53% among black households, compared with just 16% among white households." Kochhar R, Fry R, Taylor P. Twenty-to-One: Wealth Gaps Rise to Record Highs between Whites, Blacks and Hispanics. Washington, D.C: Pew Research Center; 2011. Jul 26. "In 2016, the median wealth of white households was $171,000. That is 10 times the wealth of black households ($17,100) — a larger gap than in 2007 — and eight times that of Hispanic households ($20,600), about the same gap as in 2007." Pew Research Center, http://pewrsr.ch/2iSfbOS

[13] Life-threatening illnesses are heavily correlated with the stress of foreclosure, which on the stressful life events measure is comparable to such events as deaths. See, for instance, "foreclosure has significant effects on visits for mental health, visits for preventable conditions, and on visits for a wide range of physical conditions that are susceptible to stress including suicide attempts, heart attack, and stroke….The estimated effects are particularly large for Hispanics, though we find the largest estimated effects on heart attack and stroke among blacks." Janet Currie and Erdal Tekin, Is the Foreclosure Crisis Making Us Sick? National Bureau of Economic Research, (August,2011).

This decision blesses and enables the intentional, endemic and thorough racism of the mortgaging and foreclosure industry which is well documented from the incentivizing to originators to explicitly discriminate against people of color in the origination of mortgages, giving them the worst possible characteristics, (explicitly against Massachusetts Anti-Redlining Statute, MGL Chapter 183 §64). The distribution of the assigning of predatory mortgages shows that Massachusetts communities with the highest percentages of people of color were primarily targeted for these loans, (also in violation of anti-Redlining law, Chapter 183 §64), that the illegality of the practices to originate these loans have been enumerated in MGL Chapter 183C; they are further enumerated in the regulations that have been around since the mid-1990s, 940 CMR Chapters 7 and 8 (although these were expanded after 183C was passed.) Chapter 183C makes it clear that even in an eviction case, those violations can be raised as a defense.

As was illustrated for decades before the 1990s, redlining prevented communities of color from benefiting from the unique wealth-building opportunity of owning a home. A May 29, 2019 article in the *Dorchester Reporter*

"How Redlining Dashed Dreams, Hurt Neighborhoods", provides a historical review of the failure of the Boston Banks Urban Renewal Group (BBURG). The BBURG program included overt redlining so that "African American families could purchase homes in Dorchester and Mattapan but not in West Roxbury, Quincy, or Newton." As a result of blockbusting by realtors and FHA-insured loans made on homes that were supposed to be inspected but often were not, new black homeowners inherited homes that badly needed structural repairs. If a homeowner fell even one month behind due to repairs needed because of faulty repairs, the bank could, and often did foreclose. "More than 1,200[14] homeowners lost their homes to the "fast foreclosure" practiced by banks on FHA-insured loans." This report references lessons from 50 years ago, including "Big banks are very powerful and can hurt communities that give them their savings" and how "all these events fed a false narrative that when blacks moved in, a neighborhood would soon deteriorate. Yet the truth was that intentional acts of big banks and

[14] The exact number is not known, but a couple of thousand African Americans got mortgages from this program and were never foreclosed on. https://www.dotnews.com/columns/2019/how-redlining-dashed-dreams-hurt-neighborhoods"

realtors, and the lack of action and regulation by the government, caused the neighborhoods to decline."

We often think of redlining as the act of systematically denying credit to people based on their race. However, in our state statute, it also includes giving bad loans; this is undoubtedly part of the narrative of the events mentioned above 50 years ago. It is an insidious part of the present illegal redlining. See MGL Chapter183 §64[15].

It is this Court's constitutional and moral duty to insist upon and enforce a far expanded number of laws than those upheld in its last dozen years, which the banks, the Securitized Trusts and other Industry players must comply with before foreclosing and being allowed to evict after a purported foreclosure.

That the Court in this case stated that it was willing to accept that the bank had probably violated its own Pinti decision and admit the recognition that King's is a nonfrivolous appeals argument was not enough to stop this Court from stripping all Massachusetts homeowners who are fighting foreclosure or who have been illegally foreclosed from their right of access to the

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[15] **How 'redlining' dashed dreams, hurt neighborhoods,** Finfer; Dorchester Reporter: 05/29/19 https://www.dotnews.com/columns/2019/how-redlining-dashed-dreams-hurt-neighborhoods "

Courts. Shockingly, the exemplar that the Court uses to put down this decision is a black man. The court presumes he will never get enough money to pay a legal mortgage (the document entitled 'mortgage' the Court used as its measure is a transparently illegal one on the public record in the registry of deeds).

Further, the Court rooted its decision in the presumption that you were at fault for not paying the mortgage and because you could not afford payments that led to this foreclosure that you would not pay if it was reversed and be foreclosed again. This false misapprehension ignores the systemic reality that you, the homeowner, have been sufficiently and effectively enough victimized by mortgages (illegally far overpriced and with illegal characteristics); this made them far more expensive to pay and stripped homeowners of their wealth. That then, the Court goes on to assume that you will be forever unable to pay even if the Court holds the Plaintiff accountable and holds what is already true by law — that the foreclosure is void. Instead of expecting the Courts to then fulfill their role and repair all the illegalities and injustice of the illegal mortgage and foreclosure, the Court assumes you will be illegally foreclosed via the illegal mortgage again.

Based on these misconceptions, this Court holds that it can abdicate its responsibility to enforce the laws against the perpetrators and hold that It and all Massachusetts Courts should deny you the rights to have the original illegal foreclosure overturned. It should be noted that the decision almost exclusively focuses on King not on the perpetrators of the illegal acts.

The presumptive prediction that an illegal foreclosure if justly recognized as void will not create an opening for the homeowner to obtain further justice is either a shocking condemnation of the courts themselves or a commitment by this body to guide all the lower courts to ignore all of the industry's staggering number of legal violations; it will be essentially blessing the industry's repeated requests (to protect its own illegal and in many cases criminal behavior) that it be exempted from all laws.

In fact, perhaps the most shocking thing about this decision is the Court focused on the worthiness of the victim of the illegal and possible criminal acts, rather than requiring compliance by the party that committed the illegal act(s).

We are reminded of the historically-rooted presumption that ‘all black people are criminals; all

black people deserve to be enslaved; and all black people and other people of color deserve to be barred from white neighborhoods'.

237 years and 5 days ago, this Court (with an African American man in front of it) recognized that all people are guaranteed liberty under the Commonwealth's Constitution, and outlawed slavery (and the existing statue). Thereby, it established the fundamental principle that our Constitutional guarantees override any law that would contravene them and established the role of a top court in our three-part form of a Constitutional democracy. This *Jennison* decision of 1783 defined the role of a top court as the enforcer of Constitutional guarantees, even where the other branches of our government might limit or circumscribe them.

459 days ago, this Court continued in its unique role and held in *Adjartey* affirming previous case law (with a lead litigant of a black African immigrant) that access to our courts is Constitutionally guaranteed, even if you are indigent.

26 days ago, (with an African-American man in front of it) this Court held the absolute opposite: that one statute can override any Constitutional guarantee — including those in Article I as Amended by amendment

CVI, Articles XI and XV. And it chose a case where stereotype and prejudice might make that startling and unconscionable reversal get a pass?

Where a Massachusetts resident has been the victim of the structurally racist practices of the banks and their securitized trusts, and only for this population, the Court reversed the fundamental principles of the role of the top court, as well as the meaning of Constitutional guarantees.[16]

We cannot believe this is the same Massachusetts Supreme Judicial Court that on June 3, 2020, publicly took the responsibility to… "look afresh at what we are doing, or failing to do, to root out any conscious **and unconscious bias in our courtrooms**; to ensure that the justice provided to African-Americans is the same that

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[16] In this decision, the Court reversed the meaning of ownership of own's home; it referred to the right to Constitutional protections of your home as if this were not a right but a privilege "he or she is continuing to receive the 'benefit' of possession of the property." (Article I, "that of acquiring, possessing, and protecting property" and with Amendment CVI, "Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.") The Court's bias against the indigent litigants — a disparate percentage of whom are people of color — victimized, stripped of their wealth and now seeking before the Courts to stop the further stripping of possession after the illegal ('void') taking of their title, is apparent in the next sentence in its decision; the Court frames the very party whose illegal actions created this situation as the wronged party: "Instead, the cost ... are being imposed on the plaintiff …"

is provided to white Americans; to create in our courtrooms, our corner of the world, a place where all are truly equal." [emphasis added] Further, the justices of this Court called on the wider legal community to join you as you lead by example.

How could you then on June 17th render a decision that does so much harm? We must call it a judicial version of "We Can't Breathe." *Do not finalize this decision asking the judges and legal community to follow this oppressive decision to facilitate and expand structural racism and the erasing of the Constitutional and legal existence of a whole sector of the people of this Commonwealth!*[17]

We must point out that Black and Brown people are singularly harmed by your ruling. We insist you review

[17] Commonwealth V. Jennison (Massachusetts, July 8, 1783, Unreported), a/k/a the 3rd Quock Walker decision, "And upon this ground our Constitution of Government, by which the people of this Commonwealth have solemnly bound themselves, sets out with declaring that all men are born free and equal -- **and that every subject is entitled to liberty, and to have it guarded by the laws, as well as life and *property*** -- and in short is totally repugnant to the idea of being born slaves. This being the case, I think the idea of slavery is inconsistent with our own conduct and Constitution; and there can be no such thing as perpetual servitude of a rational creature, unless his liberty is forfeited by some criminal conduct or given up by personal consent or contract". [emphasis added]

your decision through our viewpoint and the history of racial oppression:

- Why select a Black man[18] with a $1Million mortgage[19] from the queue of six appellants? Is there bias in this?
- Why is the burden on Mr. King to prove he is worthy? Yet no burden on the Securitized Trust[20] to prove they even have a mortgage[21] with Mr. King?

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[18] For an example, "Of home purchase loans made in 2006, roughly one out of every two loans made to African American (53 percent) and Latino (46 percent) borrowers were high-cost, compared to fewer than one out of five loans made to white borrowers (18 percent) (Been, Ellen, and Madar 2009). Similarly, for refinance loans made in 2006, 52 percent of black refinance borrowers and 39 percent of Latino refinance borrowers received high-cost loans compared to only 26 percent of white borrowers (Been, Ellen, and Madar 2009) . Even after controlling for available loan and household characteristics, such as income, black home purchase borrowers were more than twice as likely to receive a subprime loan as white borrowers and **the likelihood of receiving a subprime loan actually increased with household income, calling into question claims that subprime loans were given to riskier borrowers** (Faber 2013)." https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6084476/

[19] Note: the facts actually show this was the first of a pair of mortgages together 150% of the real value of the property; this meant the inflationary bubble created by the Industry trapped King in a mortgage package "doomed to fail" (as held in this Court's Fremont decision) on a property never worth enough for him to sell out from under. The terms made them illegally predatory for that reason as well. Also like most subprime packages, these were a refinance incapable of forming a basis for the prejudicial "bought too much home" stereotype.

[20] Note: the Court misnames the Plaintiff as a "bank" when it claims to be a securitized trust; a cursory review of the "execution copy" of this Securitized

- In your June 3, 2020 letter to the legal community, you quote Reverend Doctor Martin Luther King, Jr.'s "Letter from The Birmingham Jail." Rev. Dr. King said in part, *"Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly."* Did you have this top of mind when making your ruling which for Black people is a return to the Slave Codes, which forced us to be property, never to own property?

You must fully rescind this decision – to rescind the carve out of constitutional rights for those Indigent parties (mostly rendered so by the very opposing parties they are then forced to face pro se in court) fighting an illegal foreclosure during Summary Process.

Trust's founding document at the Securities and Exchange Commission shows it was never even executed. Therefore, as a non-existent legal entity, it is it, not King who has no Constitutional existence.

[21] The so-called 'mortgage' is recorded and available to the world; its terms violate numerous laws and is not a legal contract (see G.L. c. 183C §10). ("If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result." Restatement (Second) of Contracts § 208 (1981))

In our fight against practices steeped in structural racism, you must:

1. reverse your decision that disproportionately denies people of color recognized Constitutional guarantees, and,

2. reverse this Court's guidance to all the lower Courts that non-payment of a mortgage is a basis to deny:

a. all accountability from those who claim to have foreclosed and

b. all justice for those victims of the unconscionable, adhesion, and overwhelmingly void contracts that were intentionally unaffordable and illegal from origination forward.[22]

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[22] As this Court already held but now reverses its obligation to enforce: "When a loan has been made based on the foreclosure value of the collateral, rather than on a determination that the borrower has the capacity to make the scheduled payments under the terms of the loan, .. the lender is effectively counting on its ability to seize the borrower's equity in the collateral to satisfy the obligation and to recover the typically high fees associated with such credit.… the judge appropriately could and did "look to Chapter 183C as an established, statutory expression of public policy that it is unfair for a lender to make a home mortgage loan secured by the borrower's principal residence in circumstances where the lender does not reasonably believe that the borrower will be able to make the scheduled payments and avoid foreclosure." Commonwealth v. Fremont Investment & Loan, 459 Mass. 209 (2011). Like so many others, especially homeowners of color, Alton King's loan is in direct violation of c. 183C, 244 §35B and others, and yet, when

Respectfully, to adapt this own Court's recent statement: "The events of the last ~~few months~~ *several days* have reminded us ~~of what~~ *as* African-Americans [*and other people of color] what we* know all too well: that too often, by too many, black ~~lives,~~ *brown and red homes* are not treated with the dignity and respect accorded to white ~~lives~~ *homes*…. ~~As judges and as lawyers~~, we are both saddened and angry at the confluence of recent events that have revealed how much more ~~we~~ *even this, our highest Court (that until now has mostly upheld our Constitution and long settled law in this fight for justice)* need*s* to do to create a just, fair, and peaceful society." [edits to reframe provided]

You must "look afresh at what" you are "failing to do, to root out any ... unconscious bias in our courtrooms; to ensure that the justice provided to African-Americans" and all targeted by illegal loans and practices as part of the structural racism of this

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the mortgagee Securitized Trust forecloses (as was planned for this loan all along), this Court says: given the length of Alton King's inability to pay, this Court can look away from enforcing our laws unless he still has enough money left for this Court to be obligated to discover what has already been publicly recorded - this loan was predatory, discriminatory and unenforceable; *if this Court or any higher court recognizes its obligation to review this loan, King won't need any more money to pay to stop a new attempt to foreclose.*

industry; "to create in [y]our courtrooms, [y]our corner of the world, a place where all are truly equal."

Further, we call on you as the Justices of the Highest Court to abide by your Constitutional obligation *which was explicitly reversed in this decision*, that, *"As lawyers, we must also look at what we are doing, or failing to do, to provide legal assistance to those who cannot afford it; to diminish the economic ... inequalities arising from rac[ism]."*

On June 3, 2020, you said you must not just "reflect", you must "act".

Follow your own words, reflect on this draft decision and *act*, rescind it.

Respectfully submitted,[23]

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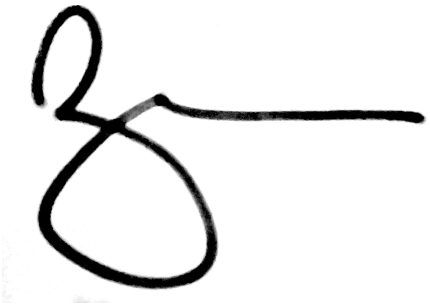
[23] Bring Our Wealth Home is a campaign of the Mass Alliance Against Predatory Lending and may be reached through 508-630-1686 or MAAPLinfo@gmail.com.



Zakiya Alake, Amicus Curiae
16 Downer Court #B
Dorchester, MA 02122

DATE: July 14, 2020

ADDENDUM

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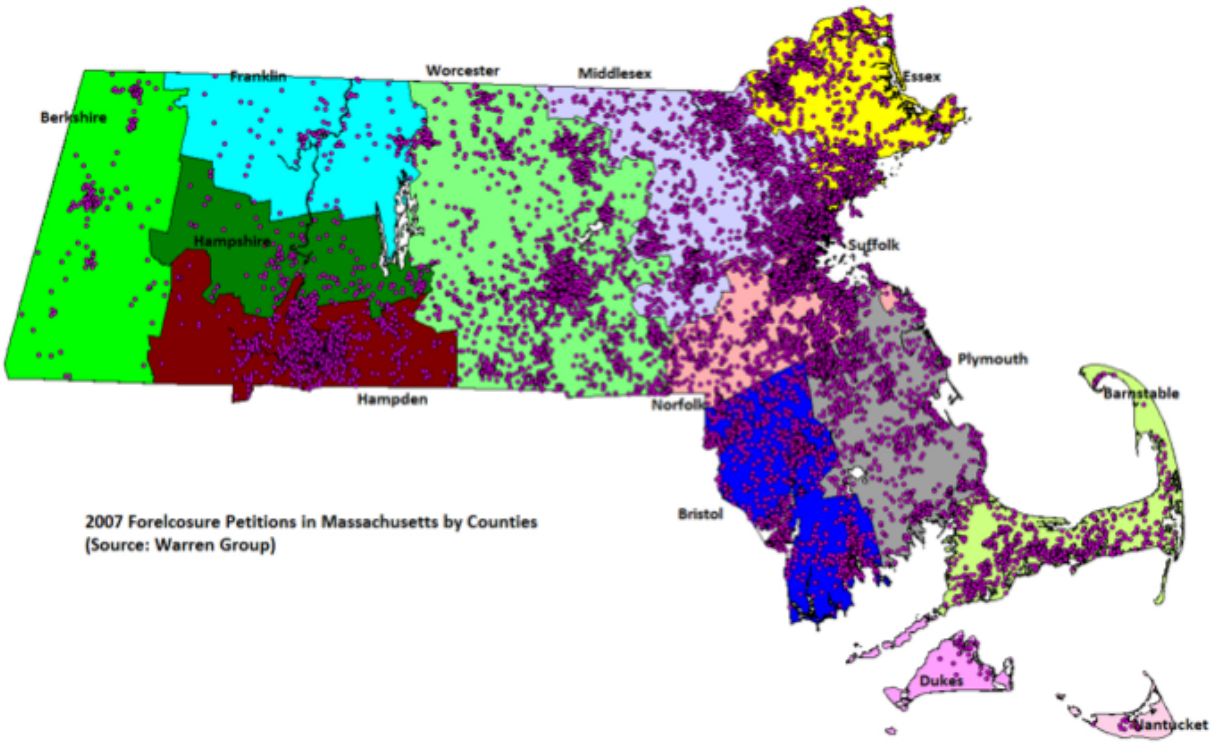
Impacts and Responses to 'Spatial Concentrations' of Foreclosures in Massachusetts Communities of Color

Presentation
William Monroe Trotter Institute University of Massachusetts Boston March 2008

James Jennings

Tufts University



2007 Forelcosure Petitions in Massachusetts by Counties
(Source: Warren Group)

The New York Times

Bank Accused of Pushing Mortgage Deals on Blacks

By Michael Powell

- June 6, 2009

As she describes it, Beth Jacobson and her fellow loan officers at Wells Fargo Bank "rode the stagecoach from hell" for a decade, systematically singling out blacks in Baltimore and suburban Maryland for high-interest subprime mortgages.

These loans, Baltimore officials have claimed in a federal lawsuit against Wells Fargo, tipped hundreds of homeowners into foreclosure and cost the city tens of millions of dollars in taxes and city services.

Wells Fargo, Ms. Jacobson said in an interview, saw the black community as fertile ground for subprime mortgages, as working-class blacks were hungry to be a part of the nation's home-owning mania. Loan officers, she said, pushed customers who could have qualified for prime loans into subprime mortgages. Another loan officer stated in an affidavit filed last week that employees had referred to blacks as "mud people" and to subprime lending as "ghetto loans."

"We just went right after them," said Ms. Jacobson, who is white and said she was once the bank's top-producing subprime loan officer nationally. "Wells Fargo mortgage had an emerging-markets unit that specifically targeted black churches, because it figured church leaders had a lot of influence and could convince congregants to take out subprime loans."

Ms. Jacobson's account and that of the other loan officer who gave an affidavit, Tony Paschal, both of whom have left Wells Fargo, provide the first detailed accusations of deliberate racial steering into subprimes by one of the nation's top banks.

The toll taken by such policies, Baltimore officials argue, is terrible. Data released by the city as part of the suit last week show that more than half the properties subject to foreclosure on a Wells Fargo loan from 2005 to 2008 now stand vacant. And 71 percent of those are in predominantly black neighborhoods.

Judge Benson E. Legg of Federal District Court had asked the city to file the additional paperwork and has not decided whether the lawsuit can go forward.

Wells Fargo officials have declined detailed interviews since Baltimore filed suit in January 2008. In an e-mail statement on Friday, a spokesman said that only 1 percent of the city's 33,000 foreclosures have come on Wells Fargo mortgages.

Image

A foreclosed home on Barclay Street in Baltimore. The city is suing Wells Fargo Bank over its mortgage lending practices in black neighborhoods.Credit...Matt Roth for The New York Times

"We have worked extremely hard to make homeownership possible for more African-American borrowers," wrote Kevin Waetke, a spokesman for Wells Fargo Home Mortgage. "We absolutely do not tolerate team members treating our customers or others disrespectfully or unfairly, or who violate our ethics and lending practices."

City and state officials across the nation have investigated and sometimes sued Wells Fargo over its practices. The Illinois attorney general has investigated whether Wells Fargo Financial violated fair lending and civil rights laws by steering black and Latino homeowners into high-interest loans. New York's attorney general, Andrew M. Cuomo, raised similar

questions about the lending practices of Wells Fargo, JPMorgan Chase and Citigroup, among other banks.

The N.A.A.C.P. has filed a class-action lawsuit charging systematic racial discrimination by more than a dozen banks, including Wells Fargo.

At the heart of such charges is reverse redlining, specifically marketing the most expensive and onerous loan products to black customers.

The New York Times, in a recent analysis of mortgage lending in New York City, found that black households making more than $68,000 a year were nearly five times as likely to hold high-interest subprime mortgages as whites of similar or even lower incomes. (The disparity was greater for Wells Fargo borrowers, as 2 percent of whites in that income group hold subprime loans and 16.1 percent of blacks.)

“We’ve known that African-Americans and Latinos are getting subprime loans while whites of the same credit profile are getting the lower-cost loans,” said Eric Halperin, director of the Washington office of the Center for Responsible Lending. “The question has been why, and the gory details of this complaint may provide an answer.”

The affidavits of the two loan officers seem to bolster Baltimore’s lawsuit. Mr. Paschal, who is black and worked as a loan officer in Wells Fargo’s office in Annandale, Va., from 1997 to 2007, offers a sort of primer on Wells Fargo’s subprime marketing strategy by race.

In 2001, he states in his affidavit, Wells Fargo created a unit in the mid-Atlantic region to push expensive refinancing loans on black customers, particularly those living in Baltimore, southeast Washington and Prince George’s County, Md.

“They referred to subprime loans made in minority communities as ghetto loans and minority customers as ‘those people have bad credit’, ‘those people don’t pay their bills’ and ‘mud people,’ ” Mr. Paschal said in his affidavit.

He said a bank office in Silver Spring, Md., had an “affinity group marketing” section, which hired blacks to call on African-American churches.

Image

Another foreclosed house on Baltimore's North Brice Street, which shares a downed fence with a house still lived in.Credit...Matt Roth for The New York Times

“The company put ‘bounties’ on minority borrowers,” Mr. Paschal said. “By this I mean that loan officers received cash incentives to aggressively market subprime loans in minority communities.”

Both loan officers said the bank had given bonuses to loan officers who referred borrowers who should have qualified for a prime loan to the subprime division. Ms. Jacobson said that she made $700,000 one year and that the company flew her and other subprime officers to resorts across the country.

“I used to joke that ‘I’ll pay for your kids to go to private school if you give me clients,’ ” Ms. Jacobson said in the interview.

Loan officers employed other methods to steer clients into subprime loans, according to the affidavits. Some officers told the underwriting department that their clients, even those with good credit scores, had not wanted to provide income documentation.

“By doing this, the loan flipped from prime to subprime,” Ms. Jacobson said. “But there was no need for that; many of these clients had W2 forms.”

Other times, she said, loan officers cut and pasted credit reports from one applicant onto the application of another customer.

These practices took a great toll on customers. For a homeowner taking out a $165,000 mortgage, a difference of three percentage points in the loan rate — a typical spread between conventional and subprime loans — adds more than $100,000 in interest payments.

The accusations contained in the affidavits, which were given to Relman & Dane, a civil rights law firm working with the City of Baltimore, have not drawn a specific response from Wells Fargo. But city officials say the conclusion is clear.

“They confirm our worst fears: that this is not just a case based on a review of numbers and a statistical analysis,” said the city solicitor, George Nilson. “You don’t have to scratch your head and wonder if maybe this was just an accident. The behavior is pretty explicit.”

Both sides expect to appear in court at a hearing in the case in late June.

Janet Roberts contributed reporting.

JUSTICE NEWS

Department of Justice
Office of Public Affairs

FOR IMMEDIATE RELEASE
Wednesday, December 21, 2011

Justice Department Reaches $335 Million Settlement to Resolve Allegations of Lending Discrimination by Countrywide Financial Corporation

More than 200,000 African-American and Hispanic Borrowers who Qualified for Loans were Charged Higher Fees or Placed into Subprime Loans

The Department of Justice today filed its largest residential fair lending settlement in history to resolve allegations that Countrywide Financial Corporation and its subsidiaries engaged in a widespread pattern or practice of discrimination against qualified African-American and Hispanic borrowers in their mortgage lending from 2004 through 2008.

The settlement provides $335 million in compensation for victims of Countrywide's discrimination during a period when Countrywide originated millions of residential mortgage loans as one of the nation's largest single-family mortgage lenders.

The settlement, which is subject to court approval, was filed today in the U.S. District Court for the Central District of California in conjunction with the department's complaint which alleges that Countrywide discriminated by charging more than 200,000 African-American and Hispanic borrowers higher fees and interest rates than non-Hispanic white borrowers in both its retail and wholesale lending. The complaint alleges that these borrowers were charged higher fees and interest rates because of their race or national origin, and not because of the borrowers' creditworthiness or other objective criteria related to borrower risk.

The United States also alleges that Countrywide discriminated by steering thousands of African-American and Hispanic borrowers into subprime mortgages when non-Hispanic white borrowers with similar credit profiles received prime loans. All the borrowers who were discriminated against were qualified for Countrywide mortgage loans according to Countrywide's own underwriting criteria.

"The department's action against Countrywide makes clear that we will not hesitate to hold financial institutions accountable, including one of the nation's largest, for lending discrimination," said Attorney General Eric Holder. "These institutions should make judgments based on applicants' creditworthiness, not on the color of their skin. With today's settlement, the federal government will ensure that the more than 200,000 African-American and Hispanic borrowers who were discriminated against by Countrywide will be entitled to compensation."

The settlement resolves the United States' pricing and steering claims against Countrywide for its discrimination against African Americans and Hispanics.

The United States' complaint alleges that African-American and Hispanic borrowers paid more than non-Hispanic white borrowers, not based on borrower risk, but because of their race or national origin. Countrywide's business practice allowed its loan officers and mortgage brokers to vary a loan's interest rate and other fees from the price it set based on the borrower's objective credit-related factors . This subjective and unguided pricing discretion resulted in African American and Hispanic borrowers paying more. The complaint further alleges that Countrywide was aware the fees and interest rates it was charging discriminated against African-American and Hispanic borrowers, but failed to impose meaningful limits or guidelines to stop it.

"Countrywide's actions contributed to the housing crisis, hurt entire communities, and denied families access to the American dream," said Thomas E. Perez, Assistant Attorney General for the Civil Rights Division. "We are using every tool in our law enforcement arsenal, including some that were dormant for years, to go after institutions of all sizes that discriminated against families solely because of their race or national origin."

The United States' complaint also alleges that, as a result of Countrywide's policies and practices, qualified African-American and Hispanic borrowers were placed in subprime loans rather than prime loans even when similarly-qualified non-Hispanic white borrowers were placed in prime loans. The discriminatory placement of borrowers in subprime loans, also known as "steering," occurred because it was Countrywide's business practice to allow mortgage brokers and employees to place a loan applicant in a subprime loan even when the applicant qualified for a prime loan . In addition, Countrywide gave mortgage brokers discretion to request exceptions to the underwriting guidelines, and Countrywide's employees had discretion to grant these exceptions.

This is the first time that the Justice Department has alleged and obtained relief for borrowers who were steered into loans based on race or national origin, a practice that systematically placed borrowers of color into subprime mortgage loan products while placing non-Hispanic white borrowers with similar creditworthiness in prime loans. By steering borrowers into subprime loans from 2004 to 2007, the complaint alleges, Countrywide harmed those qualified African-American and Hispanic borrowers. Subprime loans generally carried higher-cost terms, such as prepayment penalties and exploding adjustable interest rates that increased suddenly after two or three years, making the payments unaffordable and leaving the borrowers at a much higher risk of foreclosure.

The settlement also resolves the department's claim that Countrywide violated the Equal Credit Opportunity Act by discriminating on the basis of marital status against non-applicant spouses of borrowers by encouraging them to sign away their home ownership rights . The law allows married individuals to apply for credit either in their own name or jointly with their spouse, even when the property is owned by both spouses. For applications made by married individuals applying solely in their own name between 2004 and 2008, Countrywide encouraged non-applicant spouses to sign quitclaim deeds or other documents transferring their legal rights and interests in jointly-held property to the borrowing spouse. Non-applicant spouses who execute a quitclaim deed risk substantial uncertainty and financial loss by losing all their rights and interests in the property securing the loan.

In addition, the settlement requires Countrywide to implement policies and practices to prevent discrimination if it returns to the lending business during the next four years. Countrywide currently operates as a subsidiary of Bank of America but does not originate new loans.

The department's investigation into Countrywide's lending practices began after referrals by the Board of Governors of the Federal Reserve and the Office of Thrift Supervision to the Justice Department's Civil Rights Division in 2007 and 2008 for potential patterns or practices of discrimination by Countrywide.

Today's announcement is part of efforts underway by President Obama's Financial Fraud Enforcement Task Force (FFETF). President Obama established the interagency FFETF to wage an aggressive, coordinated and proactive effort to investigate and prosecute financial crimes. The task force includes representatives from a broad range of federal agencies, regulatory authorities, inspectors general and state and local law enforcement who, working together, bring to bear a powerful array of criminal and civil enforcement resources. The task force is working to improve efforts across the federal executive branch, and with state and local partners, to investigate and prosecute significant financial crimes, ensure just and effective punishment for those who perpetrate financial crimes, combat discrimination in the lending and financial markets, and recover proceeds for victims of financial crimes. For more information on the task force, visit www.StopFraud.gov .

A copy of the complaint and proposed settlement order, as well as additional information about fair lending enforcement by the Justice Department, can be obtained from the Justice Department website at www.justice.gov/fairhousing.

Component(s):
Office of the Attorney General

Press Release Number:
11-1694

Updated May 22, 2017

Massachusetts Constitution

PART THE FIRST
A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts

Article CVI.

Article I of Part the First of the Constitution is hereby annulled and the following is adopted:-

All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

Article XI. Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

Part II
Title I Chapter 183 Section 64

REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

TITLE TO REAL PROPERTY

ALIENATION OF LAND

DISCRIMINATION IN RESIDENTIAL MORTGAGE LOANS ON BASIS OF LOCATION OF PROPERTY

Section 64. No mortgagee shall discriminate, on a basis that is arbitrary or unsupported by a reasonable analysis of the lending risks associated with a residential mortgage transaction, in the granting, withholding, extending, modifying or renewing, or in the fixing of the rates, terms, conditions or provisions of any residential mortgage loan or in any written application therefor on residential real property located in the commonwealth of four or fewer separate households occupied or to be occupied in whole or in part by the applicant, that is within the reasonable service area of such mortgagee, on the basis such property is located in a specific neighborhood or geographical area; provided, however, that it shall not be a violation of this section if the residential mortgage loan is made pursuant to a specific public or private program, the purpose of which is to increase the availability of mortgage loans within a specific neighborhood or geographical area. Nor shall any mortgagee use lending or underwriting standards, policies, systems or practices, that discriminate in practice or that discriminate in effect, on a basis that is arbitrary or unsupported by a reasonable analysis of the lending risks associated with a residential mortgage transaction. The preceding sentence shall not preclude a mortgagee from:

(a) requiring reasonable and uniformly applied application fees,

(b) utilizing income standards which are reasonable in relation to the amount of the loan requested and which shall be disclosed to each prospective applicant, or

(c) uniformly refusing to accept applications because of a lack of lendable funds.

Nor shall any mortgagee make any oral or written statement, in advertising or otherwise, to applicants or prospective applicants that would discourage in an arbitrary manner or in a manner that is unsupported by a reasonable analysis of the lending risks associated with a residential mortgage transaction, a reasonable person from making or pursuing an application.

The mortgagee shall inform each applicant in writing of the specific reasons for any adverse action on the application for such mortgage loan or for an extension, modification, or renewal of such loan. If the reason for any adverse action taken by a mortgagee is based in whole or in part on the location or condition of the collateral property, the mortgagee shall inform the applicant in writing of the estimated market value of the subject property on which it relied and the lending standards which it used in taking such adverse action. A mortgagee shall not be liable to any seller or agent of the seller of such property on account of the disclosure of the market value of such property estimated according to a reasonable appraisal rendered to the lender as part of the application process.

For the purposes of this section, adverse action shall mean refusal either to grant financing at the terms and for the amount requested or to make a counter offer acceptable to the applicant.

Nothing contained in this section shall preclude a mortgagee from considering sound underwriting practices and the creditworthiness of the applicant in the contemplation of any such loan. Such practices shall include the following:

(a) the willingness and the financial ability of the borrower to repay the loan;

(b) the market value of any real estate proposed as security for any loan;
(c) diversification of the mortgagee's investment portfolio; and

(d) the exercise of judgement and care under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their affairs.

Any person claiming to have been aggrieved as a result of a violation of this section may bring a civil action in the district court, or housing court where applicable, of the county in which the particular mortgagee involved is located; provided, however, that a person must first exhaust his administrative remedies through the appropriate mortgage review board established pursuant to section fourteen A of chapter one hundred and sixtyseven.

Upon a finding that a mortgagee has committed a violation of this section, the court may award actual damages or punitive damages in the amount of five thousand dollars, whichever is greater, but in no event less than two thousand five hundred dollars, and may, in its discretion, award court costs and attorney's fees.

If the court finds as a fact that any person claiming to have been aggrieved by this section has intentionally misrepresented a material fact in the mortgage application or if the court finds as a fact that the suit is frivolous, the court may award actual damages or punitive damages in the amount of five hundred dollars, whichever is greater, to the mortgagee, and may in its discretion award court costs and attorney's fees.

Chapter 183C

Section 1: **Title**

Section 1. This chapter may be known and cited as the Predatory Home Loan Practices Act.

Section 2: **Definitions**

Section 2. As used in this chapter, the following words shall, unless the context requires otherwise, have the following meanings:—

"Annual percentage rate", the annual percentage rate for a loan calculated according to the Federal Truth In Lending Act (15 U.S.C. 1601 et seq.) and the regulations promulgated thereunder by the federal Bureau of Consumer Financial Protection or chapter 140D and the regulations promulgated thereunder by the commissioner of banks.

"Benchmark rate", the interest rate which the borrower can reduce by paying bona fide discount points; this rate shall not exceed the weekly average yield of United States Treasury securities having a maturity of 5 years, on the fifteenth day of the month immediately preceding the month in which the loan is made, plus 4 percentage points.

"Bona fide loan discount points", loan discount points which are: (1) knowingly paid by the borrower; (2) paid for the express purpose of lowering the benchmark rate; and (3) in fact reducing the interest rate or time-price differential applicable to the loan from an interest rate which does not exceed the benchmark rate.

"Broker", any person who for compensation directly or indirectly solicits, processes, places or negotiates home mortgage loans for others or who closes home mortgage loans which may be in the person's own name with funds provided by others and which loans are thereafter assigned to the person providing the funding of the loans; provided, that broker shall not include a person who is an attorney providing legal services in association with the closing of a home mortgage loan who is not also funding the home loan and is not an affiliate of the lender.

"Commissioner", the commissioner of banks.

"Conventional mortgage rate", the most recently published annual yield on conventional mortgages published by the Board of Governors of the Federal Reserve System, as published in statistical release H.15 or any publication that may supersede it, as of the applicable time set forth in 12 C.F.R. 1026.32(a)(1)(i).

"Conventional prepayment penalty", any prepayment penalty or fee that may be collected or charged in a home loan, and that is authorized by law other than this

chapter, provided the home loan (1) does not have an annual percentage rate that exceeds the conventional mortgage rate by more than 2 percentage points; and (2) does not permit any prepayment fees or penalties that exceed 2 per cent of the amount prepaid.

"High cost home mortgage loan", a consumer credit transaction that is secured by the borrower's principal dwelling, other than a reverse mortgage transaction, a home mortgage loan that meets 1 of the following conditions:—

(i) the annual percentage rate at consummation will exceed by more than 8 percentage points for first-lien loans, or by more than 9 percentage points for subordinate-lien loans, the yield on United

States Treasury securities having comparable periods of maturity to the loan maturity as of the fifteenth day of the month immediately preceding the month in which the application for the extension of credit is received by the lender; and when calculating the annual percentage rate for adjustable rate loans, the lender shall use the interest rate that would be effective once the introductory rate has expired.

(ii) Excluding either a conventional prepayment penalty or up to 2 bona fide discount points, the total points and fees exceed the greater of 5 per cent of the total loan amount or $400; the $400 figure shall be adjusted annually by the commissioner of banks on January 1 by the annual percentage change in the Consumer Price Index that was reported on the preceding June 1.

"Lender", an entity that originated 5 or more home mortgage loans within the past 12 month period or acted as an intermediary between originators and borrowers on 5 or more home mortgage loans within the past 12 month period, provided that lender shall not include a person who is an attorney providing legal services in association with the closing of a home loan who is not also funding the home loan and is not an affiliate of the lender. For the purposes of this chapter, lender shall also mean a broker.

"Obligor", a borrower, co-borrower, cosigner, or guarantor obligated to repay a home mortgage loan.

"Points and fees", (i) items required to be disclosed pursuant to sections 1026.4(a) and 1026.4(b) of Title 12 of the Code of Federal Regulations or 209 CMR 32.04(1) and 209 CMR 32.04(2) of the Code of Massachusetts Regulations, as amended from time to time, except interest or the time-price differential; (ii) charges for items listed under sections 1026.4(c)(7) of Title 12 of the Code of Federal Regulations or 209 CMR 32.04(3)(g) of the Code of Massachusetts Regulations, as amended from time to time, but only if the lender receives direct or indirect compensation in connection with the charge, otherwise, the charges are not included within the meaning of the term "points and fees"; (iii) the maximum prepayment fees and penalties that may be charged or collected under the terms of the loan documents; (iv) all prepayment fees of penalties that are incurred by the borrower if the loan refinances a previous loan made or currently held by the same lender; (v) all

compensation paid directly or indirectly to a mortgage broker, including a broker that originates a home loan in its own name in a table-funded transaction, not otherwise included in clauses (i) or (ii); (vi) the cost of all premiums financed by the creditor, directly or indirectly for any credit life, credit disability, credit unemployment or credit property insurance, or any other life or health insurance, or any payments financed by the creditor directly or indirectly for any debt cancellation or suspension agreement or contract, except that insurance premiums or debt cancellation or suspension fees calculated and paid on a monthly basis shall not be considered financed by the creditor. Points and fees shall not include the following: (1) taxes, filing fees, recording and other charges and fees paid to or to be paid to a public official for determining the existence of or for perfecting, releasing or satisfying a security interest; and, (2) fees paid to a person other than a lender or to the mortgage broker for the following: fees for flood certification; fees for pest infestation; fees for flood determination; appraisal fees; fees for inspections performed before closing; credit reports; surveys; notary fees; escrow charges so long as not otherwise included under clause (i); title insurance premiums; and fire insurance and flood insurance premiums, if the conditions in sections 1026.4(d)(2) of Title 12 of the Code of Federal Regulations or 209 CMR 32.04(4)(b) of the Code of Massachusetts Regulations, as amended from time to time, are met. For open-end loans, the points and fees shall be calculated by adding the total points and fees known at or before closing, including the maximum prepayment penalties that may be charged or collected under the terms of the loan documents, plus the minimum additional fees the borrower would be required to pay to draw down an amount equal to the total credit line.

''Total loan amount'', the total amount the consumer will borrow, as reflected by the face amount of the note.

Section 3: **Certification from counselor with third-party nonprofit organization**

Section 3. A creditor may not make a high-cost home mortgage loan without first receiving certification from a counselor with a third-party nonprofit organization approved by the United States Department of Housing and Urban Development, a housing financing agency of this state, or the regulatory agency which has jurisdiction over the creditor, that the borrower has received counseling on the advisability of the loan transaction. Counseling shall be allowed in whole or in part by telephonic means. The commissioner shall maintain a list of approved counseling programs. A high cost home mortgage loan originated by a lender in violation of this section shall not be enforceable. At or before closing a high cost home mortgage loan, the lender shall obtain evidence that the borrower has completed an approved counseling program. Procedural conscionablity

Section 4: **Obligor's ability to make payments; presumption**

Section 4. A lender shall not make a high-cost home mortgage loan unless the lender reasonably believes at the time the loan is consummated that 1 or more of

the obligors, will be able to make the scheduled payments to repay the home loan based upon a consideration of the obligor's current and expected income, current and expected obligations, employment status, and other financial resources other than the borrower's equity in the dwelling which secures repayment of the loan.

There shall be a presumption that the borrower is able to make the scheduled payments if, at the time the loan is made, and based on the monthly payments as calculated based on the index plus the margin at the time the loan is made, in the case of loans with lower introductory rates: (1) the borrower's scheduled monthly payments on the loan, including principal, interest, taxes, insurance, and assessments, combined with the scheduled payments for all other debt, do not exceed 50 per cent of the borrowers documented and verified monthly gross income, if the borrower has sufficient residual income as defined in the guidelines established in 38 CFR 36.4337(e) and VA form 26– 6393 to pay essential monthly expenses after paying the scheduled monthly payments and any additional debt.

Section 5: **Prepayment fees and penalties**

Section 5. A high-cost home mortgage loan shall not contain any provision for prepayment fees or

penalties.

Section 6: **Limitation on financing of points and fees**

Section 6. A high-cost home mortgage loan shall not include the financing of points and fees greater than 5 per cent of the total loan amount or $800, whichever is greater.

Section 7: **Interest rate increases**

Section 7. A high-cost home mortgage loan shall not contain a provision that increases the interest rate after default. This section shall not apply to interest rate changes in a variable rate loan otherwise consistent with the home loan documents provided that the change in the interest rate is not triggered by the event of default or the acceleration of indebtedness.

Section 8: **Limitation on scheduled payments**

Section 8. A high-cost home mortgage loan shall not contain a scheduled payment that is more than twice as large as the average of earlier scheduled payments. This subsection shall not apply when the payment schedule is adjusted to the seasonal or irregular income of the borrower.

Section 9: **Demand for repayment**

Section 9. A high-cost home mortgage loan shall not contain a demand feature that permits the lender to terminate the loan in advance of the original maturity date and to demand repayment of the entire outstanding balance, except in the following circumstances: No acceleration

(1) there is fraud or material misrepresentation by the consumer in connection with the loan that is not induced by the lender, its employees, or agents;

(2) the consumer fails to meet the repayment terms of the agreement for any outstanding balance and after the consumer has been contacted in writing and afforded a reasonable opportunity to pay the outstanding balance as outlined within the repayment terms of the agreement; or

(3) there is any bona fide action or inaction by the consumer that adversely and materially affects the lender's security for the loan, or any right of the lender in such security as provided in the loan agreement.

Section 10: **Periodic payment schedule**

Section 10. A high-cost home mortgage loan shall not contain a payment schedule with regular

periodic payments such that the result is an increase in the principal amount.

Section 11: **No fee to modify or defer payment**

Section 11. A lender shall not charge a borrower a fee or other charge to modify, renew, extend or amend a high-cost home mortgage loan or to defer a payment due under the terms of a high-cost home mortgage loan.

Section 12: **Consolidation of payments**

Section 12. A high-cost home mortgage loan shall not include terms pursuant to which more than 2 periodic payments required under the loan are consolidated and paid in advance from the loan proceeds provided to the borrower.

Section 13: **Forum for disputes**

Section 13. Without regard to whether a borrower is acting individually or on behalf of others similarly situated, any provision of a high cost home mortgage loan that allows a party to require a borrower to assert any claim or defense in a forum that is less convenient, more costly, or more dilatory for the resolution of a dispute than a judicial forum established in the commonwealth where the borrower may otherwise properly bring a claim or defense or limits in any way any claim or defense the borrower may have is unconscionable and void.

Section 14: **Lender's payment of contractor**

Section 14. A lender shall not pay a contractor under a home improvement contract from the proceeds of a high cost home mortgage loan other than (i) by an instrument payable to the borrower or jointly to the borrower and contractor, or (ii) at the election of the borrower, through a third party escrow agent in accordance with terms established in a written agreement signed by the borrower, the lender and the contractor before the disbursement of funds.

Section 15: **Affirmative claims and defenses available; applicability**

Section 15. (a) Any person who purchases or is otherwise assigned a high-cost home mortgage loan shall be subject to all affirmative claims and any defenses with respect to the loan that the borrower could assert against the original lender or broker of the loan; provided that this subsection shall not apply if the purchaser or assignee demonstrates by a preponderance of the evidence that it:

(1) has in place at the time of the purchase or assignment of the subject loans, policies that expressly prohibit its purchase or acceptance of assignment of any high-cost home mortgage loans;

(2) requires by contract that a seller or assignor of home loans to the purchaser or assignee represents and warrants to the purchaser or assignee that either (i) the seller or assignor will not sell or assign any high-cost home mortgage loans to the purchaser or assignee or (ii) that the seller or assignor is a beneficiary of a representation and warranty from a previous seller or assignor to that effect; and

(3) exercises reasonable due diligence at the time of purchase or assignment of home loans or within a reasonable period of time after the purchase or assignment of the home loans, intended by the purchaser or assignee to prevent the purchaser or assignee from purchasing or taking assignment of any high-cost home mortgage loans; provided, however, that reasonable due diligence shall provide for sampling and shall not require loan by loan review.

(b) Limited to amounts required to reduce or extinguish the borrower's liability under the high-cost home mortgage loan plus amounts required to recover costs, including reasonable attorneys' fees, a borrower acting only in an individual capacity may assert claims that the borrower could assert against a lender of the home loan against any subsequent holder or assignee of the home loan as follows:

(1) A borrower may bring an original action for a violation of this chapter in connection with the loan within 5 years of the closing of a high-cost home mortgage loan;

(2) A borrower may, at any time during the term of a high-cost home mortgage loan, employ any defense, claim, counterclaim, including a claim for a violation of this chapter, after an action to collect on the home loan or foreclose on the collateral

securing the home loan has been initiated or the debt arising from the home loan has been accelerated or the home loan has become 60 days in default, or in any action to enjoin foreclosure or preserve or obtain possession of the home that secures the loan.

(c) This section shall be effective notwithstanding any other provision of law; provided, that nothing in this section shall be construed to limit the substantive rights, remedies or procedural rights available to a borrower against any lender, assignee or holder under any other law. The rights conferred on borrowers by subsections (a) and (b) are independent of each other and do not limit each other.

Section 16: **Default in connection with refinancing**

Section 16. A lender shall not recommend or encourage default on an existing loan or other debt prior to and in connection with the closing or planned closing of a high-cost home mortgage loan that refinances all or any portion of the existing loan or debt.

Section 17: **Application of chapter; violations**

Section 17. (a) This chapter shall apply to any lender who attempts to avoid its application by

dividing any loan transaction into separate parts for the purpose of evading this chapter.

(b) A lender making a high-cost home mortgage loan who, when acting in good faith, fails to comply with this chapter, shall not be considered to have violated this chapter if the lender establishes that either: (1) Within 30 days of the loan closing and prior to the institution of any action under this chapter, the lender notifies the borrower of the compliance failure and makes appropriate restitution and whatever adjustments are necessary are made to the loan, at the choice of the borrower, to either: (i) make the high-cost home mortgage loan satisfy the requirements of this chapter or (ii) change the terms of the loan in a manner beneficial to the borrower so that the loan will no longer be considered a high-cost home mortgage loan; or, (2) the compliance failure was not intentional and resulted from a bona fide error notwithstanding the maintenance procedures reasonably adapted to avoid the errors, and within 60 days after the discovery of the compliance failure and before the institution of any action under this chapter or the receipt of written notice of the compliance failure, the borrower is notified of the compliance failure, appropriate restitution is made and whatever adjustments are necessary are made to the loan, at the choice of the borrower, to either (i) make the high-cost home mortgage loan satisfy the requirements of this chapter or (ii) change the terms of the loan in a manner beneficial to the borrower so that the loan will no longer be considered a high-cost home mortgage loan. Examples of a bona fide error may include clerical errors, errors in calculation, computer malfunction and programming, and printing errors. An error in legal judgment with respect to a person's obligation under this chapter shall not be considered a bona fide error.

Section 18: **Relief; remedies**

Section 18. (a) A violation of this chapter shall constitute a violation of chapter 93A.

(b) An aggrieved borrower or borrowers may bring a civil action for injunctive relief or damages in a court of competent jurisdiction for any violation of this chapter.

(c) In addition the court shall, as the court may consider appropriate: (1) issue an order or injunction rescinding a home mortgage loan contract which violates this chapter, or barring the lender from collecting under any home mortgage loan which violates this chapter; (2) issue an order or injunction barring any judicial or non judicial foreclosure or other lender action under the mortgage or deed of trust securing any home mortgage loan which violates this chapter; (3) issue an order or injunction reforming the terms of the home mortgage loan to conform to this chapter; (4) issue an order or injunction enjoining a lender from engaging in any prohibited conduct; or (5) impose such other relief, including injunctive relief, as the court may consider just and equitable.

(d) In addition, any lender found to be in violation of this chapter shall be subject to sections 2A and 2D of chapter 167.

(e) Originating or brokering a home loan that violates a provision of this section shall constitute a violation of this chapter.

Section 19: **Regulations**

Section 19. The commissioner shall promulgate regulations necessary to carry out the provisions of this chapter.

Chapter 261, Section 27A: Definitions applicable to Secs. 27A to 27G

Section 27A. As used in sections twenty-seven A to twenty-seven G, inclusive, the following words shall have the following meanings:

"Indigent", (a) a person who receives public assistance under aid to families with dependent children, program of emergency aid for elderly and disabled residents or veterans' benefits programs or who receives assistance under Title XVI of the Social Security Act or the medicaid program, 42 U.S.C.A. 1396, et seq.; (b) a person whose income, after taxes, is 125 per cent or less of the current poverty threshold established annually by the Community Services Administration pursuant to section 625 of the Economic Opportunity Act, as amended; or (c) a person who is unable to pay the fees and costs of the proceeding in which he is involved or is unable to do so without depriving himself or his dependents of the necessities of life, including food, shelter and clothing, but an inmate shall not be adjudged indigent pursuant to section 27C unless the inmate has complied with the procedures set forth in section 29 and the court finds that the inmate is incapable of making payments under the plans set forth in said section 29.

"Fees and costs", fees and costs shall not include attorneys' fees.

"Normal fees and costs", the fees and costs a party normally is required to pay in order to prosecute or defend the particular type of proceeding in which he is involved shall include, but not be limited to, the following: in all civil cases, filing or entry fees, including the surcharges required by section four C of chapter two hundred and sixty-two; fees and related costs for service of process, including publications of a citation when publication is ordered; fees and costs for the issuance or service of a subpoena and witness fees for trial or deposition; jury trial fees; removal fees; costs assessed in a bill of costs; in equity, fees for the issuance of an injunction, restraining order, writ or other process; in the probate and family court department, fees for an amendment of record.

"Extra fees and costs", the fees and costs, in addition to those a party is normally required to pay in order to prosecute or defend his case, which result when a party employs or responds to a procedure not necessarily required in the particular type of proceeding in which he is involved. They shall include, but not necessarily be limited to, the cost of transcribing a deposition, expert assistance and appeal bonds and appeal bond premiums.

"Clerk", the clerk or an assistant clerk or the register or an assistant register.

"Inmate", a person committed to, held by or in the custody of the department of correction or a state, county or federal correctional facility or the treatment center under chapter 123A.

Section 27B: Affidavit of indigency; waiver, substitution or state payment of fees or costs; supplementary affidavits

Section 27B. Upon or after commencing or answering to any civil, criminal or juvenile proceeding or appeal in any court, including but not limited to civil actions, proceedings for divorce or separate support, summary and supplementary processes, and proceedings upon petitions to vacate, for review or, upon appeal in a criminal case, any

party may file with the clerk an affidavit of indigency and request for waiver, substitution or payment by the commonwealth of fees and costs upon a form prescribed by the chief justice of the supreme judicial court and in accordance with the standards set forth in sections twenty-seven C to twenty-seven F, inclusive, and sworn to under oath by the affiant.

An indigent party may subsequently file one or more supplementary affidavits requesting the waiver, substitution or payment by the commonwealth of fees and costs not previously granted at any time while the case is still pending in the original court or elsewhere.

Section 27C: Granting requests for waiver, substitution or state payment

Section 27C. (1) If the affidavit is filed with the complaint or other paper initiating the proceeding, the clerk shall receive the complaint or other paper for filing and proceed as if all regular filing fees had been paid. Such filing shall be conditional until either (a) the affidavit is granted or (b) if the affidavit is denied, the payment of necessary and regular filing fees is made within five days of the denial of the affidavit, or such further time as the court may allow, or within five days of the denial of any appeal relating to the affidavit, whichever is later.

(2) If the affidavit appears regular and complete on its face and indicates that the affiant is indigent, as defined in section twenty-seven A, and requests a waiver, substitution or payment by the commonwealth, of normal fees and costs, the clerk shall grant such request forthwith without hearing and without the necessity of appearance of any party or counsel.

(3) If the affidavit does not appear to satisfy the condition of paragraph (2), the clerk or register shall forthwith bring the affidavit to the attention of the justice or judge, as the case may be. The justice or judge may grant such request forthwith or may have the clerk or register notify the affiant that a hearing will be held on the affidavit within five days. If it appears at the hearing that there is a serious question as to the affiant's indigency, as defined in section twenty-seven A, then before making a finding of indigency, the court shall consider the following facts with respect to the applicant as of the time of hearing, in the immediate past and with respect to the immediate future; his age, education, training, physical and mental ability and number of dependents; gross and net income; regular and extraordinary expense, if any; assets and liabilities; whether or not he is a recipient of public assistance and for what purposes; and any other facts which are relevant to the applicant's ability to pay court costs.

(4) If the court makes a finding of indigency, it shall not deny any request with respect to normal fees and costs, and it shall not deny any request with respect to extra fees and costs if it finds the document, service or object is reasonably necessary to assure the applicant as effective a prosecution, defense or appeal as he would have if he were financially able to pay. The court shall not deny any request without first holding a hearing thereon; and if there is an appeal pursuant to section twenty-seven D following a denial, the court shall, within three days, set forth its written findings and reasons justifying such denial, which document shall be part of the record on appeal.

(5) The clerk of each court shall conspicuously post in the part of his office open to the public a notice informing the public in plain language of the availability of waiver, substitution or payment by the commonwealth of fees and costs for indigent persons.

(6) If the court makes a finding that the applicant could reasonably pay part of the normal fees and costs or extra fees and costs, the court may assess a reasonable partial payment towards said fees or costs and a date by which same is to be paid by the applicant. The court shall not order partial payment without first holding a hearing thereon, and if there is an appeal pursuant to section 27D following such an order, the court shall, within 3 days, set forth its written findings and reasons justifying the order of partial payment, which document shall be part of the record on appeal.

Section 27D: Appeal; notice; record; speedy hearing; stay of proceedings; decision final

Section 27D. In any case where the court denies a request for waiver, substitution or payment by the commonwealth of fees and costs, pursuant to section twenty-seven C or any other provision of law, the applicant may take an appeal as hereafter provided. If the matter arises in the superior, the land, the probate or the housing court departments, the appeal shall be to a single justice of the appeals court at the next sitting thereof. If the matter arises in the juvenile court department, the appeal shall be to the superior court sitting in the nearest county or in Suffolk county. If the matter arises in the district court or Boston municipal court departments, the appeal shall be to the appellate division. Upon being notified of the denial the applicant shall also be advised of his right of appeal, and he shall have seven days thereafter to file a notice of appeal with the clerk or register. Upon receipt of notice of appeal timely filed the clerk or register shall forthwith notify the judge or justice, who shall within three days set forth his written findings and reasons as provided in paragraph (4) of section twenty-seven C. The court denying the request may, with or without motion, stay proceedings pending appeal or issue any other order or process to preserve the rights of the parties pending the appeal. The clerk or register shall then forward the affidavit and request, the court's findings and reasons for denial and any other documents on file relevant to the appeal, to the clerk of the court deciding the appeal, who, upon receipt thereof, shall refer the matter to the court for speedy decision and shall promptly notify the applicant of such decision. The court deciding the appeal may enter a stay or revoke an existing stay or other order, and its decision shall be final with respect to such request."

Section 27E: Repayment; deductions from judgment or settlement; notice; procedure

Section 27E. Any party on whose behalf any fees or costs have been waived or paid by the commonwealth pursuant to sections twenty-seven C or twenty-seven F, or both, shall repay the total amount thereof to the clerk or register of the court if said party shall have recovered, as a result of the proceeding in which said fees or costs were waived or paid, an amount in excess of three times the total amount of said fees and costs. In any case in which any fees or costs have been so waived or paid, the court, upon the waiver or payment of any such fees or costs shall notify all parties of the total amount of said fees and costs to date and that any money judgment or settlement in favor of the party for whom said fees or costs were waived or paid which exceeds three times the total amount thereof shall be deposited with the clerk or register of the court in the following manner. Any party obligated to pay any judgment or settlement exceeding three times the total amount of said fees and costs, or any portion of such a judgment or settlement, shall pay to the clerk or register the total amount of said fees or costs, or if more than one party is so obligated, his proportional share thereof, and deduct the same from such

judgment or settlement. The clerk or register shall notify all parties when the total amount of fees and costs has been so reimbursed. When said notification is received by the party obligated to pay such judgment or settlement or portion thereof, or if no such notification is received after the expiration of thirty days after the payment by said party of such fees or costs or his share thereof, said party shall promptly forward the remainder of the judgment or settlement to the party entitled to it. This procedure shall not be construed to excuse any person on whose behalf any fees or costs have been waived or paid from the obligation to repay the same as provided in this section.

Section 27F: Substitute documents, services or objects at less cost; court order

Section 27F. The court may, upon its own motion or that of any party, order that the document, service or object for which a normal or extra fee or cost would be charged shall be provided by an alternative means at lower or no cost, if the substitute thereby provided is substantially equivalent and the provision thereof does not materially impair the rights of any party. In any such order the court may direct payment by the commonwealth of the cost of any substitute to the same extent that the court would but for this section have ordered payment by the commonwealth for the document, service or object in question.

Section 27G: Payment procedure; public record; report of expenditures

Section 27G. The clerk shall receive from any indigent party or his attorney all bills and vouchers for any document, service or object rendered to said party for which an order for payment by the commonwealth has been issued, and shall transmit said bills and vouchers and an attested copy of said order to the office of the court administrator, who shall make prompt payment thereon.

The office of the court administrator shall keep a record of all payments or waivers made pursuant to this section and of all repayments made pursuant to section twenty-seven E, including therein the name of the party, his attorney if any, the names and addresses of the person or persons to whom payment is made, the dates each was rendered to the party and the charge for each, and the dates payment was made by the office of the court administrator. This record shall be a public record.

The office of the court administrator shall on or before December first of each year make a written report to the general court indicating the amounts and purposes of all expenditures under sections twenty-seven A to twenty-seven G, inclusive, and making such recommendations for change in the law as he deems necessary.

940 CMR: OFFICE OF THE A TTORNEY GENERAL

940 CMR 7.00: DEBT COLLECTION REGULATIONS Section

1. 7.01: Purpose of Regulation

   The purpose of940 CMR 7.00 is to establish standards, by defining unfair or deceptive acts or practices, for the collection of debts from persons within the Commonwealth of Massachusetts.

2. 7.02: Scope

   940 CMR 7.00 applies only to the collection of debts, as defined in 940 CMR 7.00, and no conduct which is not the collection of debts or any part thereof is affected.

3. 7.03: Definitions

   Communication or Communicating means conveying information directly or indirectly to any person through any medium excluding nonidentifying communications.

   Creditor means any person and his or her agents, servants, employees, or attorneys engaged in collecting a debt owed or alleged to be owed to him or her by a debtor and shall also include a buyer of delinquent debt who hires a third party or an attorney to collect such debt provided, however, that a person shall not be deemed to be engaged in collecting a debt, for the purpose of 940 CMR 7.00, if his or her activities are solely for the purpose of serving legal process on another person in connection with the judicial enforcement of a debt.

   Debt means money or its equivalent which is, or is alleged to be, more than 30 days past due and owing, unless a different period is agreed to by the debtor, under a single account as a result of a purchase, lease, or loan of goods, services, or real or personal property, for personal, family or household purposes or as a result of a loan of money which is obtained for personal, family or household purposes whether or not the obligation has been reduced to judgment.

   Debtor means a natural person, or his or her guardian, administrator or executor, present or residing in Massachusetts who is allegedly personally liable for a debt.

Nonidentifying Communication means any communication with any person other than the debtor in which the creditor does not convey any information except the name of the creditor and in which the creditor makes no inquiry other than to determine a convenient time and place to contact the debtor.

Person means any natural person, corporation, trust, partnership, incorporated or unincorporated associationandanyotherlegalentity;provided,however,thatifacreditorcomprisesoremployes more than one natural person, all such individuals shall be deemed to be one and the same "person" with respect to any debt owed or alleged to be owed to such a creditor.

Time-barred Debt means any debt that is not enforceable in a judicial proceeding because the applicable statute of limitations has run.

7.04:

Contact with Debtors

(1) It shall constitute an unfair or deceptive act or practice for a creditor to contact a debtor in any of the following ways:

(a) Threatening to sell or assign to another the obligation of a debtor with an attending representation or implication that the result of such sale or assignment would be that a debtor would lose any defense to the claim or would be subjected to harsh, vindictive or abusive collection attempts;

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Threatening that nonpayment of a debt will result in:

1. Arrest or imprisonment of any debtor; or
2. Seizure, garnishment, attachment, or sale of any property or wages of any person or

the taking of other action requiring judicial order without informing the debtor that there must be in effect a judicial order permitting such action before it can be taken or unless such action is lawful and the creditor intends to take such action; or
3. Any action that cannot legally be taken or that is not intended to be taken.

(c) using profane or obscene language
(d) Communicatingbytelephonewithoutdisclosureofthenameofthebusinessorcompany of the creditor and without disclosure of the first and last name of the individual making such communication or a first name and a personal identifier for such individual such as a code or alias, provided however, that any such individual utilizing a personal identifier shall only use one such personal identifier at all times and provided that a mechanism is established by the

creditor to identify the ,person using such personal identifier;
(e) Causing expense to any debtor in the form of long distance or collect telephone calls, text messaging, download fees, data usage fees, or other similar charges, except the creditor may place non-collect telephone calls to the debtor's place of residence, cellular telephone, or other telephone number provided by the debtor as his or her personal telephone number, subject to the limitations set forth in 940 CMR 7.04(1)(f);
(f) Initiating a communication with any debtor via telephone, either in person or via text messaging or recorded audio message, in excess of two such communications in each seven-day period to either the debtor's residence, cellular telephone, or other telephone number provided by the debtor as his or her personal telephone number and two such communications in each 30-day period other than at a debtor's residence, cellular telephone, or other telephone number provided by the debtor as his or her personal telephone number, for each debt, provided that for purposes of 940 CMR 7.04(l)(f), a creditor may treat any billing address of the debtor as his or her place of residence, and provided further, that a creditor shall not be deemed to have initiated a communication with a debtor if the communication by the creditor is in response to a request made by the debtor for said communication;
(g) Placing telephone calls at times known to be times other than the nonnal waking hours of a debtor, or if normal waking hours are not known, at any time other than between 8:00 A.M. and 9:00 P.M. eastern time;
(h) Placinganytelephonecallstothedebtor'splaceofemploymentifthedebtorhasmade a written or oral request that such telephone calls not be made at the place of employment,

provided, that any oral request shall be valid for only ten days unless the debtor provides written confirmation postmarked or delivered within seven days of such request. A debtor may at any time terminate such a request by written communication to the creditor;
(i) Failing to send the debtor the following notice in writing within 30 days after the first communication to a debtor at his or her place of employment regarding any debt, provided that a copy of the notice shall be sent every six months thereafter so long as collection activity by the creditor on the debt continues and the debtor has not made a \Witten request as described in 940 CMR 7.04(1)(h).

NOTICE OF IMPORTANT RIGHTS
YOU HAVE THE RIGHT TO MAKE A WRITTEN OR ORAL REQUESTTHAT TELEPHONE CALLS REGARDING YOUR DEBT NOT BE MADE TO YOU A T YOUR PLACE OF EMPLOYMENT. ANY SUCH ORAL REQUEST 'WILL BE VALID FOR ONLY TEN DAYS UNLESS YOU PROVIDE WRITTEN CONFIRMATION OF THE REQUEST POSTMARKED OR DELIVERED WITHIN SEVEN DAYS OF SUCH REQUEST. YOU MAY TERMINATE THIS REQUEST BY WRITING TO THE CREDITOR.

(j) Visiting the household of a debtor at times other than the normal waking hours of such debtor, or if normal waking hours are not known, at any time other than between 8:00 A.M. and 9:00 P.M., eastern time provided however that in no event shall such visits, initiated by the creditor, exceed one in any 30-day period for each debt, excluding visits where no person is contacted in the household, unless a debtor consents in writing to more frequent visits, provided, further, that at all times the creditor must remain outside the household unless expressly invited inside by such debtor; and provided further, that visits to the household of a debtor which are solely for the purpose of repossessing any collateral or property of the

creditor (including but not limited to credit cards, drafts, notes or the like), are not limited under 940 CMR 7.04(l)G);

(k) Visitingtheplaceofemploymentofadebtor,unlessrequestedbythedebtor,excluding visits which are solely for the purpose of repossessing any collateral or property of the creditor;
(l) Confrontingorcommunicatinginpersonwithadebtorregardingthecollectionofadebt in a public place, excluding courthouses, the creditor's place of business, other places agreed to by a debtor, offices of an attorney for the creditor, or places where the conversation between the creditor and a debtor cannot be reasonably overheard by any other person not authorized by the debtor;

(m) Stating that the creditor will take any action, including legal action, which in fact is not taken or attempted on such debtor's account, unless an additional payment or a new agreement to pay has occurred within the stated time period. For purposes of 940 CMR 7.04(1)(m), the time period in connection with such statement shall be presumed to expire 14 days from the date the statement is made, unless otherwise indicated by the creditor;

(3) 940 CMR 7.04(l)G) and (l)(m) and (2) shall not apply to telephone, gas and electric utility companies regulated by M.G.L. c. 164 and the Department of Public Utilities, or the Department of Telecommunications and Cable.

Contact with Persons Residing in the Household of a Debtor

(1) Acreditormayassumethatallcontactsdirectedtothedebtor'shouseholdarereceivedeither by the debtor or persons residing in the household of the debtor unless the creditor knows or should know information *to* the contrary.

(2) It shall constitute an unfair or deceptive act or practice for a creditor to imply the fact of a debt, orally or in writing, to persons who reside in the household of a debtor, other than the debtor.

(3) It shall constitute an unfair or deceptive act or practice for a creditor to contact or threaten to contact persons who reside in the household of a debtor, other than the debtor, in any of the following ways:

(a) Using profane or obscene language;
(b) Placing telephone calls, disclosing the name of the business, or company of the creditor, unless the recipient expressly requests disclosure of the business or company name;
(c) Causing expense to any such person in the form of collect or long distance telephone calls, text messaging, download fees, data usage fees or other similar charges;
(d) Engaging any such person in non-identifying communication via telephone with such frequency as to be unreasonable or to constitute harassment to such person under the circumstances, and engaging any person in communications via telephone, initiated by the creditor, in excess of two calls in each seven-day period at a debtor's residence and two calls in each 30-day period other than at a debtor's residence, for each debt;
(e) Placing telephone calls at times known to be times other than the normal waking hours of the person called, or if normal waking hours are not known, at any time other than between 8:00 A.M. and 9:00 P.M. eastern time;

(f) Visiting the place of employment of any such person, unless requested by such person (g) Confronting or communicating in person with any such person regarding the collection of a debt in a public place, excluding courthouses, the creditor's place of business, other places agreed to by the person, offices of the person's attorney or of the attorney for the creditor or debtor, or places where the conversation between the creditor and such person cannot reasonably be overheard by anyone not authorized by such person;

(h) Using language on envelopes or on any other printed or written materials, except materials enclosed in sealed envelopes, indicating or implying that the communication relates to the collection of a debt, which in the normal course of business may be received or examined by any such person residing *in* the household o f a debtor;

(4)
creditor or attorney acting on his or her behalf engaged in collection activities, including notices required prior or subsequent to repossession.

7.06: Contact with Other Persons Regarding a Debt
The following shall apply to contact with persons not covered by 940 CMR 7.04 and 7.05:

(1) It shall constitute an unfair or deceptive act or practice for a creditor to contact or threaten to contact persons in connection with a debt in any of the following ways:

Nothing in 940 CMR 7.05 shall prohibit any contact required by law to be made by a (a) Implying the fact of the debt to any such person;
(b) Using language on envelopes or any other printed or written materials, except materials enclosed in sealed envelopes, indicating or implying that the contact relates to the collection of a debt, which in the normal course of business, may be received or examined by persons other than the debtor;
(c) Causing expense to any person in the form of collect or long distance telephone calls, text messaging, download fees, data usage fees or other similar charges.

The following contacts shall not be deemed unlawful:
(a) Anycontactwithanysuchpersonswhichresultssolelyfromeffortstocontactthedebtor at the debtor's place of residence or at places other than a debtor's residence via telephone pursuant to 940 CMR 7.04(l)(f), provided the creditor limits the contact to disclosing only the first and last name of the individual making such communication on behalf of the creditor or a first name and unique personal identifier established by the creditor to identify the person making such communication, and the telephone number to which the debtor may return the telephone call, unless the recipient expressly requests the disclosure of the business or company name; and provided further, that with respect to contacts made at the debtor's place of employment, the debtor has not made a request pursuant to 940 CMR 7.04(1)(h) that such contact not be made;
(b) Any contact with any such persons made for the purpose of and limited to determining the current location of the debtor, provided the creditor, after making reasonable attempts to locate the debtor, does not have correct information as to the debtor's current residence or location and provided further, that the creditor reasonably believes that the earlier response of such person, if any, is erroneous or incomplete and that such person now has correct or complete locational information, and in no event shall such contacts exceed three per such

person in any 12-month period for each debt. The creditor in making said contacts may reveal only the first and last name of the individual making such communication on behalf of the creditor or a first name and unique personal identifier established by the creditor to identify the person making such communication, unless the recipient expressly requests the disclosure of the business or company name. Any contacts at the debtor's place of employment, made pursuant to 940 CMR 7.06, shall be lawful, unless a request was made by the debtor, pursuant to 940 CMR 7.04(1)(h), that such contacts not be made;

(c) Any contact with respect to such debt to any attorney or other person employing or employed by the creditor, or to any attorney employed by the debtor; to a consumer reporting agency; or, where there are actual negotiations or arrangements for assigning or purchasing or settling of accounts, to potential assignees or purchasers or the like; or to persons who have any interest in property securing all or part of the debt; or to any *bona fide* credit counseling agency not connected to the creditor and designated in writing by the debtor;

(d) Any communication of the fact of such debt by an attorney involved in litigation in connection with such debt, or after a judgment on the debt has been entered by a court of competent jurisdiction; ·
(e) Any contact required by law to be made by a creditor engaged in collection activities, including notices required prior or subsequent to repossession.

General Unfair or Deceptive Acts or Practices

7.07: It shall constitute an unfair or deceptive act or practice to engage in any of the following practices to collect or attempt to collect any debt:

(1) Any false representation that the creditor has information in his or her possession or something of value for the debtor.

(2) Anyknowinglyfalseormisleadingrepresentationinanycommunicationastothecharacter, extent or amount of the debt, or as to its status in any legal proceeding, provided, however, that an incorrect or estimated bill submitted by a gas or electric utility company regulated by M.G.L. c. 164, and the Department of Public Utilities shall not be prohibited by 940 CMR 7.07.

(3) Any false or misleading representation that a creditor is vouched for, bonded by, affiliated with, or is an instrumentality, agency, or official of the state, federal or local government.

(4) Any false or misleading representation that a creditor is an attorney or any other officer of the court.

(5) The use, distribution or sale of any written communication which simulates, or which is falsely represented to be, or which otherwise would reasonably create a false impression that it was, a document authorized, issued or approved by a court, a government official or other governmental authority.

(6) Any representation that an existing obligation of a debtor may be increased by the addition of attorney's fees, investigation fees, service fees, or any other fees or charges, if in fact such fees or charges may not legally be added to the existing obligation.

(7) Any solicitation or obtaining of any written statement or acknowledgement in any form containing an affirmation of any obligation by a debtor who has been adjudicated bankrupt, without clearly and conspicuously disclosing the nature and consequences of such affirmation.

(8) Any false, deceptive, or misleading representation, communication, or means in connection with the collection of any debt or to obtain information concerning a debtor.

(9) Any false or misleading representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the debtor to:

1. (a) lose any claim or defense to payment of the debt; or
2. (b) become subject to any practice prohibited by 940 CMR 7.00.

(10) Any false or misleading representation or implication that the debtor committed any crime or other conduct in order to disgrace the debtor.

(11) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false including, without limitation, the failure to communicate that a disputed debt is disputed.

(12) Any false or misleading representation or implication that documents are legal processes.

(13) Any false or misleading representation or implication that documents are not legal processes or do not require action by the debtor.

(14) Any false or misleading representation or implication that a creditor operates or is employed by a consumer reporting agency.

(15) Using any business, company or organization name other than the true name of the creditor's business, company or organization.·

(16) The collection *of* any amount (including interest, fees, charges or expenses incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

(17) Requesting or demanding from a debtor a postdated check, draft, order for withdrawal or other similar instrument or method in payment for the debt or any portion thereof, or for a creditor to negotiate such instrument before the due date of the instrument.

(18) Takingorthreateningtotakeanynon-judicialaction*to*effectdispossessionordisablement *of* property if:

(a) there is no present right to possession of the property claimed as collateral through a court order or an enforceable security interest;
(b) there is no present intention to take possession of the property;
(c) the creditor knows or has reason to know that demands for payment and/or legal notices were not directed to the debtor's current address; or

(d) the property is exempt from seizure on execution because its value does not exceed the value for exemption set forth in M.G.L. c. 235, *§ 34,* or the property is otherwise exempt by law from such dispossession or disablement; 940 CMR 7.07(18)(d) shall not apply to first mortgage foreclosures properly conducted in accordance with Massachusetts law.

(19) Taking possession of or selling upon execution property that is exempt from seizure on execution because its value does not exceed the value for exemption set forth in M.G.L. c. 23 5, § 34, or the property is otherwise exempt by law from such dispossession or disablement; 940 CMR 7.07(19) shall not apply to first mortgage foreclosures properly conducted in accordance with Massachusetts law.

(20) Communicating with a debtor regarding a debt by postcard.

(21) Reporting to a consumer reporting agency on transactions or experiences with a debtor in a name other than that of the creditor.

(22) Failing to disclose the telephone number and office hours of the creditor or his agents on all written communications to the debtor.

(23) Requesting any information about the debtor or the debtor's accounts or assets other than information the creditor, in good faith, believes will assist in the collection of the debt owed to the creditor.

(24) Collectingorattemptingtocollectfromanypersonpaymentofanydebtthatthecreditor knows, or has reason to know based on a good faith determination, is a time-barred debt, or seeking or obtaining from any person an admission, affirmation, acknowledgement of a new promise to pay, or any waiver of legal rights or defenses with regard to any debt that the creditor knows or has reason to know is a time-barred debt, unless the creditor discloses that the debt may be unenforceable through a lawsuit because the time for filing suit may have expired, and that the debtor is not required by law to sign any admission, affirmation, or acknowledgement of, or new promise to pay the debt, or to make any payment on the debt, or to waive any rights with regard to the effect of the running of the applicable statute of limitations.

(a) A creditor who makes the following disclosure shall be deemed to have complied with the requirements of 940 CMR 7.07(24):

WEAREREQUIREDBYREGULA TIONOFTHEMASSACHUSETTSA TTORNEY GENERAL TO NOTIFY YOU OF THE FOLLOWING INFORMATION. THIS INFORMATION IS NOT LEGAL ADVICE: THIS DEBT MAY BE TOO OLD FOR YOU TO BE SUED ON IT IN COURT. IF IT IS TOO OLD, YOU CANNOT BE REQUIRED TO PAY IT THROUGH A LAWSUIT. TAKE NOTE: YOU CAN RENEW THE DEBT AND THE ST A TUTEOFLIMIT A TIONSFOR THE FILING OF A LAWSUIT AGAINST YOU IF YOU DO ANY OF THE FOLLOWING: MAKE ANY P A YMENT

ON THE DEBT, SIGN A P APER IN WHICH YOU ADMIT THA T YOU OWE THE DEBT OR IN WHICH YOU MAKE A NEW PROMISE TO PAY; SIGN A PAPER IN WHICH YOU GIVE UP OR WAIVE YOUR RIGHT TO STOP THE CREDITOR FROM SUING YOU IN COURT TO COLLECT THE DEBT. WHILE THIS DEBT MAY NOT BE ENFORCEABLE THROUGH A LAWSUIT, IT MAY STILL AFFECT YOUR ABILITY TO OBTAIN CREDIT OR AFFECT YOUR CREDIT SCORE OR RATING.

(b) In the case of written communications, the disclosures required by 940 CMR 7.07(24)(b) shall.be clear and conspicuous by appearing in a type which is a minimum of eight-point type and said disclosure shall be placed on the front page of the communication;
(c) In the case of oral communications, the disclosures required by 940 CMR 7.07(24)(c) shall be made immediately before or immediately after the first statement requesting payment, or, if no request for payment is made, no later than immediately after reference to the debt is first made.

7.08: Validation of Debts

(1) It shall constitute an unfair or deceptive act or practice for a creditor to fail to provide to a debtor or an attorney for a debtor the following within five business days after the initial communication with a debtor in connection with the collection of a debt, unless the following information is contained in the initial communication or the debtor has paid the debt:

1. (a) The amount of the debt;
2. (b) The name of the creditor to whom the debt is owed;
3. (c) A statement that unless the debtor, within 30 days after receipt of the notice, disputes

the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the creditor; and
(d) A statement that if the debtor notifies the creditor in writing within 30 days after receipt of this notice that the debt, or any portion thereof is disputed, the creditor will obtain verification of the debt and provide the debtor, or an attorney for the debtor, additional materials described in 940 CMR 7.08(2).

(2) If the debtor, or any attorney for the debtor, notifies the creditor in writing within the 30-day period described in 940 CMR 7.08(1), that the debt, or any portion thereof, is disputed, the creditor shall cease collection of the debt, or any disputed portion thereof, until the creditor verifies the. Debt and provides the debtor, or any attorney of the debtor, by first class mail, the following materials:

(a) All documents, including electronic records or images, which bear the signature of the debtor and which concern the debt being collected;
(b) A ledger, account card, account statement copy, or similar record, whether paper or electronic, which reflects the date and amount of payments, credits, balances, and charges concerning the debt, including but not limited to interest, fees, charges or expenses incidental to the principal obligation which the creditor is expressly authorized to collect by the agreement creating the debt or permitted to collect by law;

(c) The name and address of the original creditor, if different from the collecting creditor; and
(d) A copy of any judgment against the debtor.
Pursuant to 940 CMR 7.0& (2), the creditor must provide those materials described in

940 CMR 7.08(2)(a) through (d) which are in the possession, custody or control of the creditor. If the creditor does not possess, have custody of, or control the materials described in 940 CMR 7.08(2)(a) through (d), the creditor shall cease collection of the debt until the creditor has made reasonable efforts to obtain the necessary information and provide this information to the debtor.

9. 7.09: Relation to Other Laws

   940 CMR 7.00 does not exempt any person from complying with existing laws or rules of professional conduct with respect to debt collection practices. 940CMR7.00isnotintendedto supersede or in any way limit rights and protections provided to consumers under 114.6 CMR 13.00, the Health Safety Net Eligible Services Regulations, and state and federal foreclosure laws. .To the extent that any provision of 940 CMR 7.00 is specifically inconsistent with the Massachusetts Rules of Professional Conduct, as currently appearing in Supreme Judicial Court Rule 3:07 and then only to the extent of the inconsistency, 940 CMR 7.00 is not applicable. Provisions of940 CMR 7.00 that contain language substantively identical to provisions within 15 U.S.C. § 1692, *et seq.,* the Fair Debt Collection Practices Act, should be interpreted consistently with that Act.

10. 7.10: Preemption by Federal Law

    In the event any conflict exists between the provisions of940 CMR 7.00 and the provisions of Federal statutes or regulations relating to the collection of debts, such Federal law shall control but only to the extent that such Federal law mandates actions or procedures prohibited by 940 CMR 7.00.

REGULA TORY AUTHORITY
940 CMR 7.00: M.G.L. c. 93A, §2(c).

940 CMR 8.00: Section

MORTGAGE BROKERS AND MORTGAGE LENDERS

940 CMR: OFFICE OF THE ATTORNEY GENERAL

8.01: Purpose

940 CMR 8.00 relates to mortgage lenders and mortgage brokers pursuant to the Attorney General's authority in M.G.L. c. 93A, § 2(c). 940 CMR 8.00 is designed to protect Massachusetts consumers seeking residential mortgage loans and to ensure that the mortgage industry is operating fairly and honestly by means of legitimate and responsible business acts and practices that are neither unfair nor deceptive.

940 CMR 8.00 addresses problems experienced by consumers when they seek or obtain mortgage loans for the purchase or initial construction of residential homes, or when consumers refinance an existing loan.

8.02: Scope

940 CMR 8.00 defines unfair or deceptive acts or practices. They are not intended to be all inclusive as to the types of activities prohibited by M.G.L. c. 93A, § 2(a). Acts or practices not specifically prohibited by 940 CMR 8.00 are not necessarily consistent with M.G.L. c. 93A or otherwise deemed legitimate by the absence of regulation here.

940 CMR 8.00 shall cover any mortgage lender or broker advertising or doing business within Massachusetts, regardless of whether or not the lender or broker maintains an office in Massachusetts.

940 CMR 8.00 applies to all residential mortgage loan transactions in the Commonwealth of Massachusetts, as more particularly defined in 940 CMR 8.00, except that it does not apply to either:

(a) reverse mortgages governed by M.G.L. c. 167E, § 7; or
(b) open-end home equity lines of credit. 940 CMR 8.00 also excludes reduced interest rate mortgages originated under the auspices of affordable housing programs which are administered by state, quasi- public, or local government entities.

8.03: Definitions

Advertisement (including the terms "advertise" and "advertising") shall be defined in a manner which is consistent with the definition in 940 CMR 6.00: Retail Advertising, and means any oral, written, graphic, or pictorial statement made by a mortgage broker or lender in any manner in the course of the solicitation of business. Advertisement includes any representation made in a newspaper, magazine, or other publication or on the internet, radio or television or contained in any notice, handbill, sign, billboard, banner, poster, display, circular, pamphlet, catalog, or letter. Advertisement includes any representation disseminated or accessible within Massachusetts if the advertisement is directed to consumers in Massachusetts.

Bait Advertising means an offer to procure, arrange, or otherwise assist a borrower in obtaining a mortgage on terms which the broker or lender cannot, does not intend, or want to provide, or which the broker or lender knows cannot be reasonably provided. Its purpose is to switch borrowers from buying the advertised mortgage loan product to buying a different mortgage loan product, usually at a higher rate or on a basis more advantageous to the broker or lender.

Borrower means any natural person seeking, using, or paying for directly or indirectly, the services of a mortgage lender or broker in connection with a mortgage loan.

Broker Fee means any money, compensation, commission, fee, charge or other valuable consideration directly or indirectly imposed by a mortgage broker for the brokers services in negotiating, placing, finding, or otherwise assisting a borrower in obtaining a mortgage loan. The term broker fee does not include a fee charged by the lender (such as a commitment fee or a lock-in fee), wages or commissions paid to an employee of the mortgage broker or mortgage lender by his or her employer, nor does such term include bona fide and reasonable payments to be remitted to third party service providers, such as appraisal fees or fees for credit reports or payments or remittances to the mortgage lender.

Clear and Conspicuous (including the terms "clearly and conspicuously") shall be defined in a manner which is consistent with the definition in 940 CMR 6.00: Retail Advertising. 940 CMR 6.01: Clear and Conspicuous provides that clear and conspicuous (including the terms "clearly and conspicuously") shall mean that:

the material representation being disclosed is of such size, color, contrast, or audibility and is so presented as to be readily noticed and understood by a reasonable person to whom it is being disclosed.

Further, without limiting the requirements of the preceding sentence, 940 CMR 6.01: Clear and Conspicuous (e) states that a representation in an advertisement is not clear and conspicuous unless:

1. for a printed, written, typed or graphic advertisement, such material representation appears in type which is at least one-third the size of the largest type of information which it modifies and is a minimum of eight point type;
2. for the video portion of a television advertisement, such material representation:

a. is displayed in type not less than 14 scan lines in height;
b. contains letters of a color or shade that noticeably contrast with the background, and the background does not consist of colors and/or images which obscure or detract attention from

the representation or are disparaging to its meaning or importance; and
c. appears on the screen for a duration equal to at least one second for every three words of the material representation but not less than a total of five seconds.

3. for a radio advertisement or the audio portion of a television advertisement, such material representation complies with the requirements of 940 CMR 6.01: Clear and Conspicuous(c).

Commissioner means the Commissioner of Banks.

Commitment for Mortgage Loans (or the word "commitment") means an oral or written agreement to loan or to advance funds for a mortgage loan. A commitment can specify a loan amount, repayment terms, interest rate or conditions necessary to close the loan.

Contractor or Home Improvement Contractor means any person who owns or operates a residential contracting business or who undertakes, offers to undertake, purports to have the capacity to undertake, or submits a bid for, by him or herself or through others, residential contracting work as defined in M.G.L. c. 142A.

Mortgage Broker or Broker means any person, who for compensation or gain, or in the expectation of compensation or gain, directly or indirectly negotiates, places, assists in placement, finds, or offers to negotiate, place, assist in placement or find mortgage loans on residential property for others, or as otherwise defined by M.G.L. c. 255E, § 2 or by the Commissioner. Notwithstanding anything to the contrary in 940 CMR 8.00, the following persons shall not be deemed to be a mortgage broker:

(a) any person who is exempt from the licensing requirements of M.G.L. c. 255E, § 2, provided, however, that individuals who work for or on behalf of brokers that are licensed pursuant to M.G.L. c. 255E, § 2, shall not be exempt from 940 CMR 8.00; and
(b) any financial institution which is regulated by a federal and/or state bank regulatory agency and which, directly or indirectly, negotiates, places, assists in placement, finds, or offers to negotiate, place, assist in placement or find mortgage loans on residential property for a direct or indirect affiliate or subsidiary of such financial institution.

Mortgage Lender or Lender means any person engaged in the business of making mortgage loans or issuing commitments for mortgage loans, including, but not limited to, mortgage lenders licensed or regulated by M.G.L. c. 255E, § 2 or by the Commissioner, and shall include all individuals who work on behalf of such lenders.

Mortgage Loan or Loan means a loan to a natural person primarily for personal, family or household use secured wholly or partially by a mortgage on residential property, or as otherwise defined by M.G.L. c. 255E or by the Commissioner, and shall include loans to refinance a mortgage. "Mortgage loan" or "loan" shall not include either:

(a) reverse mortgages governed by M.G.L. c. 167E, § 7; or (b) open-end home equity lines of credit.

Person means a natural person or organization including a corporation, partnership, association, cooperative or trust or any other legal entity.

No Income Loan Product means a mortgage loan where:

(a) in making its decision whether to underwrite the loan or extend credit, the mortgage lender does not account for or consider, in any manner whatsoever, the prospective borrower's income or employment status; and
(b) that fact is set forth in the lender's written underwriting or loan origination policies governing its No Income Loan Product.

Point means an origination fee, finder's fee, or other fee, premium, service charge, or any other charge calculated as a percentage of the principal amount of the loan or a percentage of the amount financed, however such point may be called, which is charged by a mortgage lender at or before the time the mortgage loan is made as additional compensation for the mortgage loan, or as otherwise defined by M.G.L. c. 183, § 63 or by the Commissioner. A point does not include:

(a) *bona fide* and reasonable fees for actual services performed including, but not limited to, attorney's fees, appraisal fees, credit reporting fees, private mortgage insurance premiums, and title insurance premiums or mortgage broker fees; or
(b) a charge which is credited to closing costs or other costs relating to such loan.

Residential Property means real property located in Massachusetts having thereon a dwelling house with accommodations for four or fewer separate households and occupied, or to be occupied, in whole or in part by the obligor of the mortgage debt, or as otherwise defined in M.G.L. c. 255E.

8.04: Advertising Practices

(1) It is an unfair or deceptive act or practice for a mortgage broker or lender to make any representation or statement of fact in an advertisement if the representation or statement is false or misleading or has the tendency or capacity to be misleading, or if the mortgage broker or lender does not have sufficient information upon which a reasonable belief in the truth of the representation or statement could be based.

(2) It is an unfair or deceptive act or practice for a mortgage broker or lender to advertise without clearly and conspicuously disclosing its business name, and if required to be licensed pursuant to M.G.L. c. 255E, the words broker" or "lender", as applicable, and the license number.

(3) It is an unfair or deceptive act or practice for a mortgage broker to represent in any advertisement that the mortgage broker will fund a mortgage loan.

(4) It is an unfair or deceptive act or practice for a mortgage broker or lender to engage in bait advertising or to misrepresent (directly or by failure to adequately disclose) the terms, conditions or charges incident to the mortgage loan being advertised in any advertisement. Violations of 940 CMR 8.04(4) shall include, but shall not be limited to:

(a) the advertisement of "immediate approval" of a loan application or "immediate closing" of a loan or words of similar import, such as "instant closing";

(b) the advertisement of a "no point" mortgage loan when points are required or accepted by the lender as a condition for commitment or closing;

(c) the advertisement of an incorrect specific number of points required for commitment or closing; (d) the advertisement through terms such as "bad credit no problem" or words of similar import or that an applicant will have unqualified access to credit without clearly and conspicuously disclosing the material limitations on the availability of credit that may exist, such as:

1. requirements for the availability of credit (such as income);
2. that a higher rate or more points may be required for a consumer with bad credit; and 3. that restrictions as to the maximum principal amount of the loan offered may apply.

(e) the use of "avoid foreclosure" or words of similar import in an advertisement unless the advertisement also clearly and conspicuously discloses, that:

1. the borrower must refinance the mortgage in default and/or take a new mortgage loan; 2. the borrower may be required to pay interest rates significantly higher than what other borrowers not facing foreclosures might pay; and
3. the warning that "you may lose your home if you cannot make all the payments or if you miss any of the payments on this loan."

(5) It is an unfair or deceptive act or practice for a mortgage broker or lender who advertises any finance terms to fail to comply with the applicable state and federal advertising Truth-in-lending laws, M.G.L. c. 140D, § 1, et seq. Consumer Credit Cost Disclosure, and 15 U.S.C. § 1601, et seq. Fair Debt Collection Practices Act.

8.05: Mortgage Disclosures

(1) It is an unfair or deceptive act or practice for a mortgage broker or mortgage lender to fail to make any disclosure, or fail to provide any document, to a consumer required by and at the time specified by any applicable state or federal law, regulation or directive.

(2) It is an unfair or deceptive act or practice for a mortgage broker or lender to conceal or to fail to disclose to a borrower any fact relating to the loan transaction, disclosure of which may have influenced the borrower not to enter into the transaction with the broker or lender.

(3) It is an unfair and deceptive act or practice for the mortgage broker or lender to fail to take reasonable steps to communicate the material facts of the transactions in a language that is understood by the borrower. Reasonable steps which shall comply with 940 CMR .8.00 may include but shall not be limited to:

(a) using adult interpreters; and
(b) providing the borrower with a translated copy of the disclosure forms required by any applicable state or federal law, regulation or directive, in a language understood by the borrower.

(4) It is an unfair or deceptive act or practice for a mortgage lender to fail to give to the borrower legible copies of the mortgage deed, promissory note, and the settlement statement when completed or at the time of closing.

8.06: Prohibited Practices

(1) It is an unfair or deceptive act or practice for a mortgage broker or lender to make any representation or statement of fact if the representation or statement is false or misleading or has the tendency or capacity to be misleading, or if the mortgage broker or lender does not have sufficient information upon which a reasonable belief in the truth of the representation or statement could be based. Such claims or representations include, but are not limited to the availability, terms, conditions, or charges, incident to the mortgage transaction and the possibility of refinancing. In addition, other such claims and representations by the broker may include the amount of the brokerage fee, the services which will be provided or performed for the brokerage fee, the borrower's right to cancel any agreement with the mortgage broker, the borrower's right to a refund of the brokerage fee, and the identity of the mortgage lender that will provide the mortgage loan or commitment.

(2) It is an unfair or deceptive act or practice for a broker or lender to charge an application and/or broker fee which significantly deviates from industry-wide standards or is otherwise unconscionable.

(3) It is an unfair or deceptive act or practice for a mortgage broker or lender to accept any broker fee, application fee or other fee, prior to the borrowers receipt of any disclosure forms mandated by 940 CMR 8.05(1). Where the applicable state or federal law specifies that the disclosure form must be provided to a consumer prior to the consummation of the mortgage loan. Notwithstanding the foregoing, an appraisal fee may be accepted if the lender or brokers provides oral or written notice, prior to the receipt of such fee, as to whether the fee is refundable.

(4) It is an unfair or deceptive act or practice for a mortgage broker or lender to engage the services of (another) mortgage broker that will charge the borrower an additional fee without obtaining in advance the written permission of the borrower to charge that fee, the amount of which shall be specified in writing.

(5) It is an unfair or deceptive act or practice for a mortgage broker or lender to directly or indirectly, regardless of the receipt or the expectation of receipt of compensation from the contractor, to:

(a) provide loan application documents to home improvement contractors for use by such contractor in connection with the financing by mortgage loans of home improvement contracts;
(b) use a home improvement contractor as an agent for its business; or
(c) accept mortgage applications from contractors.

940 CMR 8.06(5) shall not prohibit contractors from referring consumers to mortgage brokers or lenders, or lenders from purchasing executed home improvement contracts.

(6) It is an unfair or deceptive act or practice for a mortgage broker or lender to procure or negotiate for a borrower a mortgage loan with rates or other terms which significantly

deviate from industry-wide standards or which are otherwise unconscionable. To determine whether the Annual Percentage Rate (APR), for example, is unconscionable, factors to consider include whether the APR at the time the loan was made is more than, the greater of:

(a) ten percent above the highest domestic "Prime Rate" listed in the Money Rates section of The Wall Street Journal; or
(b) 20% percent; and
whether the APR is consistent with comparable rates for borrowers in similar financial circumstances.

(7) It is an unfair or deceptive act or practice for a mortgage lender to act also as a mortgage broker directly or indirectly in the same mortgage loan transaction, or to violate 209 CMR 42.04(4) or 42.07(4).

(8) It is an unfair or deceptive act or practice for a lender to fail to disburse funds in accordance with any commitment or agreement with the borrower.

(9) It is an unfair or deceptive act or practice for a mortgage broker or lender to conduct business with a person which should be licensed under M.G.L. c. 255E, and which it knows or should know is an unlicensed mortgage broker or lender.

(10) It is an unfair or deceptive act or practice for any mortgage lender to charge a prepayment fee which:

(a) violates M.G.L. c. 183, § 56;
(b) significantly deviates from industry-wide standards; or (c) is otherwise unconscionable.

(11) It is an unfair or deceptive act or practice for a mortgage broker or lender to fail to give to the borrower or his or her attorney the time and reasonable opportunity to review every document signed by the borrower and every document which is required pursuant to 940 CMR 8.00, prior to the disbursement of the mortgage funds.

(12) It is an unfair or deceptive act or practice for a mortgage broker or lender to accept any fees which were not disclosed in accordance with 940 CMR 8.00 or applicable law.

(13) It is an unfair or deceptive act or practice for a mortgage broker or lender to accept any attorneys fees in excess of the fees that have been or will be remitted to its attorneys.

(14) It is an unfair or deceptive act or practice for a mortgage broker or lender to refuse to permit the borrower to be represented by the attorney of his or her choice. Nothing contained herein shall limit the lenders right to choose its own attorney, which may be paid for by the borrower.

(15) It is an unfair or deceptive act or practice for a mortgage broker to arrange or mortgage lender to make a mortgage loan unless the mortgage broker or lender, based on information known at the time the loan is made, reasonably believes at the time the loan is expected to be made that the borrower will be able to repay the loan based upon a consideration of the borrower's income, assets, obligations, employment status, credit history, and financial resources, not limited to the borrower's equity in the dwelling which secures repayment of

the loan (subject, however, to the treatment of No Income Loan Products in 940 CMR 8.06(16)). The determination under 940 CMR 8.06(15) of a borrower's ability to repay a loan shall take into account, without limitation:

(a) the borrower's ability to repay at the fully indexed rate, assuming a fully amortizing repayment schedule, and the resulting scheduled payments that may be charged under the loan accounting for interest rates, financial terms or scheduled payments that may adjust upward; and
(b) the property taxes that are required on the subject property at the time the loan is expected to be made and the reasonably anticipated insurance costs if the loan requires that insurance be maintained on the property, regardless whether the broker or lender will collect an escrow for such taxes or insurance in connection with loan payments.

For purposes of 940 CMR 8.06(15)(a), the "fully indexed rate," with respect to loan rates that may adjust upward, shall mean the index rate prevailing at the date of loan origination plus the margin to be added to it after the expiration of an introductory interest rate. For purposes of illustration, assume that a loan with an initial fixed rate of 7% will reset to the six-month London Interbank Offered Rate (LIBOR) plus a margin of 6%. If the six-month LIBOR rate equals 5.5% at the date of origination, the determination of ability to pay under 940 CMR 8.06(15)(a) shall take into account the borrowers ability to repay at 11.5% (5.5% plus 6%), regardless of any interest rate caps that limit how quickly the fully indexed rate may be reached.

(16) It is an unfair or deceptive act or practice for a mortgage broker or lender to process or make a mortgage loan without documentation to verify the borrower’s income (a so-called "no documentation," "no doc," "stated income" or "limited documentation" loan) unless the broker or lender, as applicable, first provides a written document to the borrower, which must be signed by the borrower in advance of the closing, and which:

(a) identifies the borrower’s income and the source of the income; and
(b) provides detailed information, if true, that by applying for a mortgage loan on a no- or limited documentation basis, the consumer will pay a higher interest rate or increased charges, or have less favorable terms for the mortgage loan (including information concerning the precise increase in interest rate, charges, or the nature of the less favorable terms).

Provided, however, that if a mortgage broker or lender arranges or makes a mortgage loan using a No Income Loan Product, which loans shall remain subject to 940 CMR 8.06(15), the requirement in 940 CMR 8.06(16)(a) shall not apply. It is an unfair or deceptive act or practice for a mortgage lender or broker to process or make a mortgage loan on a no- or limited documentation basis if the stated income provided by the borrower with respect to the no- or limited documentation loan contradicts information previously obtained by the broker or lender with respect to that borrower in connection with the same proposed loan, absent a documented change in circumstances or other documented explanation for the discrepancy between the prior information and latter income representation. Notwithstanding the foregoing, it shall be an unfair or deceptive act or practice for a mortgage lender to underwrite or close a loan without first verifying the employment or income of the borrower when the amount of the income stated is not reasonable for the actual employment status or experience of the borrower known to the lender, or when the borrower's stated employment

or stated income is not reasonable in light of the borrower's circumstances known to the lender.

(17) It is an unfair or deceptive act or practice for a mortgage broker to process, make or arrange a loan that is not in the borrower's interest. Where the financial interest of a mortgage broker conflicts with the interests of the borrower (for example, where the broker's compensation will increase directly or indirectly if the borrower obtains a loan with higher interest rates, increased charges or less favorable terms than those for which a borrower would otherwise qualify), the broker shall disclose the conflict and shall not proceed to process, make or arrange the loan so long as such a conflict exists. It is an unfair or deceptive act or practice for a mortgage broker to disclaim the duty established by 940 CMR 8.06(17) in a written contract or to assert in oral representations that a broker does not have such a duty in communications with the borrower.

(18) It is an unfair or deceptive act or practice for a mortgage lender:

(a) to use a pricing model for its mortgage loans which treats borrowers with similar credit criteria and bona fide qualification criteria differently; or .
(b) to make a mortgage loan when any or all of the cost features of the mortgage loan are based on criteria other than the borrower's credit and other bona fide qualification criteria.

For purposes of 940 CMR 8.06(18), "bona fide qualification criteria" shall mean those account in determining whether to extend a mortgage loan, including by way of example, income, assets, credit history, credit score, income-to-debt ratios or loan-to-value ratios. For purposes of 940 CMR 8.06(18)(b), the term "cost features" shall include, but not be limited to, the interest rate; the index; margin; and other adjustment features if the interest rate is adjustable; points; and prepayment penalties.

If any provision of 940 CMR 8.00 or the application of such provision to any person or circumstances is held to be invalid, the validity of the remainder of 940 CMR 8.00 and the applicability of such provision to other persons or circumstances shall not be affected.

4/4/08 940 CMR – 77

8.08: Effective Date
940 CMR 8.00 is effective on April 4, 2008.

REGULATORY AUTHORITY

940 CMR 8.00: M.G.L. c. 93A, § 2(c).

940 CMR: OFFICE OF THE ATTORNEY GENERAL

Appellate Procedure Rule 8: The record on appeal

(a) Definition

The record on appeal shall consist of the documents and exhibits on file, the transcript of the proceedings, if any, and the docket entries.

(b) Producing the transcript of proceedings

(1) Cases other than child welfare cases

(A) Transcript Orders and Certifications. For those proceedings relevant to the appeal that were recorded by a court reporter, the appellant shall order a transcript of those proceedings within 14 days of filing the notice of appeal in accordance with procedures set by the Chief Justice of the Trial Court, unless the appellant certifies to the clerk (i) that no lower court proceedings are relevant to the appeal or (ii) that the transcript is on file with the court. For those proceedings relevant to the appeal that were electronically recorded, the appellant shall request the transmission of the audio recording of those proceedings and order the transcription of those proceedings within 14 days of filing the notice of appeal in accordance with procedures set by the Chief Justice of the Trial Court, unless the appellant certifies to the clerk (i) that no lower court proceedings are relevant to the appeal or (ii) that the transcript of all proceedings relevant to the appeal is on file with the court. The appellant shall at the same time file a copy of the transcript orders or certifications with the clerk and serve a copy on all other parties. Within 14 days of service of the appellant's transcript orders or certifications, any other party may order a transcript of additional proceedings in accordance with procedures set by the Chief Justice of the Trial Court. Such party shall at the same time file a copy of the transcript order with the clerk and serve a copy on all other parties.

(B) Stipulation that Transcript is Unnecessary. To the extent consistent with the appellant's duty to provide an adequate record to the appellate court, the parties may stipulate that the transcription of some or all of the proceedings relevant to the appeal is unnecessary to the adjudication of the appeal, in which case the appellant need order only the transcript of the proceedings, if any, that the parties agree are necessary to the adjudication of the appeal. The parties shall file the stipulation with the clerk within 14 days of the filing of the notice of appeal.

(C) Costs of Transcription. In any criminal case and in a civil case in which the appellant is entitled to have counsel made available pursuant to **Supreme Judicial Court Rule 3:10**, the Commonwealth shall pay for the cost of providing the transcript of all proceedings relevant to the appeal, including those designated by the appellee, to the lower court clerk. In all other cases, unless ordered otherwise by the lower court, the appellant shall pay for such

costs. If the parties cannot agree on which proceedings are relevant to the appeal, the lower court shall settle the matter upon motion. Payment, if required, for copies of the transcript for the parties shall be governed by procedures set by the Chief Justice of the Trial Court.

(2) Child welfare cases

Upon the filing of a notice of appeal, unless the parties file a stipulation designating the parts of the proceedings which need not be transcribed or a statement of intent to proceed under **Rule 8(d)**, the clerk of the lower court shall order, within 14 days and in accordance with procedures set by the Chief Justice of the Trial Court, a transcript of the proceedings relevant to the appeal and shall serve a copy of the transcript order on the parties.

(3) Delivery of the transcript

Upon completion, the transcriber shall deliver the transcript to the clerk of the lower court in accordance with procedures set by the Chief Justice of the Trial Court. The delivery of transcripts to the parties shall be governed by procedures set by the Chief Justice of the Trial Court. Upon receipt of all of the transcripts ordered by the parties, the clerk shall notify all parties within 14 days that the transcripts have been received.

(c) Statement of the proceedings when no report or transcript is available

If no report of the evidence or proceedings at a hearing or trial was made and a transcript is unavailable, the appellant shall file a motion to reconstruct the record within 14 days of the filing of the notice of appeal. The parties shall confer and reconstruct the record. Within such time as the lower court shall allow, the appellant shall file a proposed statement of the proceedings. Within 14 days of service of the proposed statement, any other party may file objections or proposed amendments or additions. The lower court shall promptly settle any disputes and approve a statement of the proceedings for inclusion in the record on appeal.

(d) Agreed statement as the record on appeal

If the parties intend to submit an agreed statement as the record on appeal in lieu of the procedures set forth in Rule 8(a)-(c), the parties shall notify the clerk in writing within 14 days of the filing of the notice of appeal. Within 28 days of the filing of the notice to the clerk, the parties shall submit to the lower court an agreed statement of the record on appeal containing such information as is necessary for consideration of the appeal. If the statement conforms to the truth, the lower court shall approve the statement, along with any additions the lower court considers useful to the appellate court.

(e) Correction or modification of the record

(1) Omissions

If anything material is omitted from the record, the parties may supply it by stipulation and submit the stipulation for the approval of the lower court. If the parties are unable to agree, the lower court on motion shall settle the dispute and add to the record on appeal. On motion of the parties or on its own motion, the appellate court or a single justice may direct that any omission be rectified.

(2) Corrections

If any part of the record on appeal fails to accord with what occurred in the lower court, the parties may correct the record by stipulation and submit the stipulation for the approval of the lower court. If the parties are unable to agree, the lower court on motion shall settle any disputes and conform the record to the truth. On motion of the parties or on its own motion, the appellate court or a single justice may direct that any part of the record be corrected.

(3) Inaudible recording

If portions of the proceedings cannot be transcribed because they are unintelligible, the parties shall promptly use reasonable efforts to stipulate to their content, and shall submit any such stipulation for the approval of the lower court. If the parties are unable to agree, the lower court shall settle the dispute on motion.

Reporter's notes

(2019)

The 2019 revisions to Rules 8 and **9(a)** were recommended by the Trial Court Committee on Transcript Production, a committee convened by the Chief Justice of the Trial Court in 2016 to address widespread dissatisfaction with the complexity and lack of flexibility afforded by the prior rules. The revisions facilitate assembly of the record on appeal by streamlining the requirements for production of the transcript of the lower court proceedings.

Rule 8(a) was revised to simplify the description of the record on appeal. The requirement that the docket entries be certified was eliminated, consistent with revisions to **Rule 9(e)(2)(D)**. The reference to inclusion in the record of "the report of the trial judge to the appellate division" was deleted because such a report would be part of the documents on file with the lower court.

Rule 8(b)(1) governs all appeals except appeals in child welfare cases. Under **Rule 8(b)(1)(A)**, within 14 days of the filing of a notice of appeal, the

appellant must either order transcripts of "all court proceedings relevant to the appeal," certify that no court proceedings are relevant to the appeal, or certify that the relevant transcripts have already been filed with the lower court. The orders or certifications are filed with the lower court clerk and the appellant is required to give notice to the other parties. If proceedings were electronically recorded, the appellant must order the recording and the transcript at the same time. Prior requirements regarding designation were deleted from this rule. If the appellee believes that other proceedings should be transcribed, the appellee may order the transcript of those proceedings within 14 days of the appellant's order. The procedural mechanics of the parties' orders are to be determined by the Chief Justice of the Trial Court in an Administrative Order, to allow flexibility in the transcript request and production processes as technology advances.

Rule 8(b)(1)(B) retains the right of the parties to stipulate that transcription of some or all of the court proceedings is unnecessary to the appeal. The parties must file the stipulation with the lower court clerk with 14 days of the filing of a notice of appeal.

The requirement in prior **Rule 8(1)(b)(2)** that the clerk of the lower court in a criminal case order the transcript without the prompting of the appellant was deleted. The appellant's trial counsel is better able than the clerk to determine which dates and hearings are potentially relevant to an appeal.

Rule 8(b)(1)(C) governs the cost of producing the transcript. The Commonwealth is responsible for paying for the transcript for the lower court in all criminal cases and in civil cases in which the appellant was entitled to appointed counsel. In other cases, the appellant is required to pay for the transcript for the lower court for all proceedings relevant to the appeal, regardless of whether the appellant or the appellee ordered them. The lower court may settle any dispute over whether transcripts ordered by the appellee are relevant to the appeal and has the authority to shift costs in the interests of justice. Payment of costs for the copies of the transcripts to be provided to the parties is determined by the Chief Justice of the Trial Court in an Administrative Order because it concerns contracts between the Trial Court and transcribers and court reporters, and will be influenced by the expansion of electronic processes.

Rule 8(b)(2) governs child welfare cases, which continues prior **Rule 8(b)(5)**'s recognition of the urgency of child welfare appeals. **Rule 8(b)(2)** requires the lower court clerk to order the transcript of the court proceedings relevant to the appeal, unless the parties stipulate otherwise within 14 days of the filing of a notice of appeal.

Rule 8(b)(3) clarifies that, in all cases, the transcriber must deliver the transcript directly to the lower court clerk, rather than providing it to the

ordering party for delivery to the clerk. This clarification is intended to avoid unnecessary delays. The mechanics of such delivery is governed by an Administrative Order published by the Chief Justice of the Trial Court, which is intended to allow the Trial Court to take immediate advantage of advances in technology regarding electronic delivery. The lower court clerk has the duty of informing all parties when all transcripts have been received. Of course, a clerk may also inform parties when transcripts of some, but not all, proceedings are received.

Rule 8(c) was revised to modify the procedure for reconstructing the record when a transcript is unavailable. Under the modified procedure, the appellant must file a motion to reconstruct the record within 14 days of the filing of the notice of appeal. Unlike prior **Rule 8(c)**, the duty is on the parties to confer prior to the filing of a proposed reconstruction in the lower court. This process is more likely to achieve the objective of reconstructing a record adequate for the appellate court and better reflects the Supreme Judicial Court's admonition that "'[a]ll those with . . . relevant evidence, but particularly the attorneys involved at the trial, are under an affirmative duty to use their best efforts to ensure that a sufficient reconstruction is made if at all possible.'" **Drayton v. Commonwealth, 450 Mass. 1028**, 1030 (2008), quoting **Commonwealth v. Harris, 376 Mass. 74**, 79 (1978). Once the parties have conferred, the appellant shall file a proposed reconstruction within such time as the lower court shall allow, and any other party may file objections, amendments, or additions, and the lower court shall settle the matter. The deadline for filing such objections, amendments, or additions is changed from 10 days to 14 days after the filing of a proposed reconstruction.

Rule 8(d) continues prior **Rule 8(d)**'s provisions authorizing the parties to file an agreed statement of the record on appeal. Unlike the prior rule, however, the parties must notify the lower court clerk of their intention to do so within 14 days of the filing of a notice of appeal. The agreed statement is to be filed within 28 days of the parties' notification to the clerk.

Rule 8(e) was revised to clarify the procedures for correction or modification of the record. The subdivision was separated into three paragraphs, each addressing a different method for modification of the record: omissions, corrections, or an inaudible recording. In each case, the parties may stipulate to a correction and submit the stipulation to the lower court for approval. If the parties cannot agree, they may submit the dispute to the lower court for resolution. The provision of prior **Rule 8(e)** that allowed parties to stipulate to an addition to the transcripts, but not a correction without lower court approval, was deleted. In both instances, the amended rule requires approval of the lower court. The appellate court may benefit from any guidance the lower court judge may be able to provide. The appellate court retains the ability to order a correction or addition to the transcripts, with or without lower court input.

Further organizational and stylistic revisions were made to this rule in 2019 in accordance with a global review and revision of all of the Appellate Rules. These revisions are described in the **2019 Reporter's Notes to Rule 1**.

With regard to the preparation of the 2019 Reporter's Notes to this Rule, see the first paragraph of the **2019 Reporter's Notes to Rule 1**. For an overview of the 2019 amendments to the Rules and a summary of the global amendments to the Rules, see **2019 Reporter's Notes to Rule 1, sections I. and II**.

(2002)

[To Appellate Rule 8(B)(2)] The 2002 amendment to **Appellate Rule 8(b)(2)** requires that upon the filing of a notice of appeal in a criminal case, the clerk of the lower court shall order a transcript from the court reporter within ten days. Prior to this amendment, there was no time period prescribed for ordering the transcript.

This amendment will make the practice in criminal cases consistent with that already in existence in civil cases in Massachusetts. Appellate **Rule 8(b)(1)** requires that in a civil case, the appellant shall order the transcript within ten days after filing of the notice of appeal. It should be noted that Rule 10(b)(1) of the Federal Rules of Appellate Procedure likewise requires that the transcript in civil and criminal cases in federal court be ordered within ten days of the filing of the notice of appeal.

(1999)

The 1999 amendments to **Appellate Rule 8(b)** were part of a comprehensive set of amendments to the Appellate Rules (**Rules 1**, **3**, **4**, **8**, and **10**) that had been proposed by the Supreme Judicial Court Committee on Appeals of Child Welfare Cases. The purpose of the 1999 amendments is described in the **1999 Reporter's Notes to Appellate Rule 1(c)**.

Appellate **Rule 8(b)(1)** (concerning ordering the transcript) and **Rule 8(b)(3)** (concerning electronically-recorded proceedings) have been made inapplicable to child welfare cases. Instead, the ordering of the transcript of the proceeding is now controlled by **Rule 8(b)(5)**. **Rule 8(b)(5)** shifts the duty of ordering the cassettes and transcripts from the appellant to the clerk of the lower court. Modeled in part after the procedures applicable in criminal cases, new **Rule 8(b)(5)** is intended to expedite preparation of the transcript in child welfare cases.

(1998)

The 1998 amendment to **Appellate Rule 8(b)(3)** deals with appeals in proceedings that were electronically-recorded on court-controlled recording equipment and not recorded by an official court reporter.

The existing rule allows the appellant to designate either the entire cassette or only specified portions of the cassette to be transcribed for purposes of preparing the appellate record. The existing rule further provides that where less than the entire cassette is to be designated, the appellant must inform the appellee of those portions of the cassette that are to be transcribed. This allows the appellee to counter-designate additional portions of the cassette for transcription. However, the current rule does not require the appellant to inform the appellee of the issues that the appellant intends to present on the appeal, thus making it difficult for the appellee to make such counter-designation intelligently.

The 1998 amendment resolves this dilemma by requiring the appellant to file and serve on the appellee a statement of the issues together with the appellant's designation of transcript.

(1983)

[To Addition of Rule 8(B)(3)] **Rule 8(b)(3)** has been added to deal with tape-recorded transcripts. It is quite detailed because judges, clerks, and lawyers have complained about a lack of specificity with respect to the utilization of cassettes on appeal.

Rule 8(b)(3)(i) indicates when **Rule 8(b)(3)** applies. The Rule does not apply to court reporters, including voice writers, or to cases where a complete transcript has already been produced for use by the trial court, and is available to the parties. **Rule 8(b)(3)(ii)** gives the duties of appellants and clerks, and provides for appointment of a transcriber. A major purpose is to facilitate a speedy appeal. Consequently, an appellant must order a cassette at the time of appeal and state the date of receipt to insure that the designation is timely. Another major purpose is to reduce the number of steps required of the clerk. This rule permits the parties, if they can agree, to choose the transcriber. The appellant must inform the clerk at the time of transcript designation whether the parties have so agreed. The parties must order their copies directly from the transcriber and make their own payment arrangements; the transcriber delivers transcripts directly to them. **Rule 8(b)(3)(ii)**, unlike **8(b)(1)**, does not specify when an appellant must transcribe all evidence relevant to a finding or conclusion. This is not meant to change the law, but rather leave it to the parties to determine what must be transcribed in order to protect their appeal. The Standing Advisory Committee wants to discourage unnecessary transcription.

Rule 8(b)(3)(iii) gives the duties of the appellee with respect to ordering a cassette or arranging to borrow the appellant's, counter-designation, and ordering copies. **Rule 8(b)(3)(iv)** describes the transcriber's duties, and the certificate which the transcriber must file. **Rule 8(b)(3)(v)** covers the situation where a portion of the cassette is unintelligible; it requires the parties first to attempt to stipulate the contents of such portion, and provides for the trial judge, if possible, to settle differences. **Rule 8(b)(3)(vi)** requires that when the Commonwealth must pay for an original transcript or copy, the designating parties must certify that they have designated only necessary portions. Again, the purpose is to reduce costs.

Rule 8(b)(3) does not have its own provision concerning enlargements of time, but is subject to the general computation and extension of time provisions contained in **Appellate Rule 14**.

Here is a chronology of the major steps and time periods under this rule:

1. Simultaneously with filing the notice of appeal, the appellant, if desirous of a transcript, orders the cassette. Rule 8(b)(3)(ii).

2. The clerk promptly provides the cassette (**Rule 8(b)(3)(ii)**), unless an entire transcript is already available; in such event, the clerk notifies the parties, and the normal designation rules in **Rule 8(b)(1)** or **8(b)(2)** apply. **Rule 8(b)(3)(i)**. In such event, the appellant's time for ordering a transcript is within ten days after the clerk's notification. **Rule 8(b)(3)(i)**. The clerk also notifies the parties if there has been a previous transcription of a portion of the cassette, so that the parties may utilize the prior partial transcription if they wish. **Rule 8(b)(3)(ii)**.

3. Within fifteen days after receipt of the cassette from the clerk, the appellant designates which portions are to be included in the transcript. **Rule 8(b)(3)(ii)**. If the appellant wants the entire cassette transcribed, then appellant also delivers the cassette to the transcriber and places the order within said fifteen day period. **Rule 8(b)(3)(ii)**.

4. When the appellant has not ordered the transcription of the entire transcript, the appellee has fifteen days from service of the appellant's designation to file and serve a counter-designation. **Rule 8(b)(3)(iii)**.

5. When the appellant has not already designated the entire cassette for transcription, the appellant delivers the cassette to the transcriber and places the order promptly after twenty days have expired from service upon the appellee of the appellant's designation. **Rule 8(b)(3)(ii)**. This, in effect, gives the appellant at least five days to deliver the cassette to the transcriber and place the order, for the appellee had to file and serve the counter-designation within fifteen days.

In summary, from the time the appellant receives the cassette from the clerk, the entire designation process takes fifteen days if appellant orders the entire cassette transcribed, and "promptly" after thirty-five days if appellant has designated less than the entire cassette.

(1979)

The second sentence of subdivision (a) of former Rule 8 is amended to clarify that it applies to appeals in civil cases from the Appellate Division of the District Court Department (**G.L. c. 231, § 108**, as amended, St.1978, c. 478, § 264) and not to the Appellate Division of the Superior Court Department for review of sentences in criminal cases (**G.L. c. 278, §§ 28A-28D**).

Subdivision (b) of the former rule has been divided into subdivisions (b)(1), applicable to civil cases, and (b)(2), applicable to criminal cases. Subdivision (b)(1) is identical to former 8(b). Subdivision (b)(2) is wholly new.

Consonant with practice under former **G.L. c. 278, §§ 33A-33H**, a defendant is entitled to a complete transcript on appeal. Charpentier v. Commonwealth, Mass.Adv.Sh. (1978) 2163, 2172. Pursuant to (b)(2), upon the filing of a notice of appeal in a criminal case, the clerk of the lower court automatically orders from the court reporter a transcript of the proceedings out of which the appeal arises. Since counsel is no longer obligated to take this mechanical step, one point of delay under prior practice is thus eliminated. The parties may--and are encouraged by the rule to--file a stipulation as to those parts of the proceedings which are unnecessary to the appeal and which therefore need not be transcribed. The provision for stipulations as to parts of the proceedings which need not be transcribed is not applicable to capital cases under **G.L. c. 278, § 33E**, as amended, because in such cases, the "entire case" is before the Supreme Judicial Court, "including a transcript of the entire proceedings." E.g., *Charpentier,* supra at 2173 n. 9. A "capital case" is a case in which the defendant was convicted of murder in the first degree. **G.L. c. 278, § 33E**, as amended. *See Commonwealth v. O'Brien,* Mass.Adv.Sh. (1976) 2926; **Mass.R.Crim.P. 2(b)(3)**.

When the transcript is completed, the court reporter is to deliver it to the clerk of the lower court who prepares copies thereof for the appellate court, the appellant or appellants, and the appellee or appellees. The parties' copies are delivered to them, while the original and one copy are retained by the clerk for transmission to the appellate court as part of the record (**Rule 9[d]**).

In the district court jury sessions, the General Laws (**G.L. c. 218, § 27A(h)**) provide a procedure for appointment of a court reporter to transcribe the proceedings and in the alternative for an electronic recording of the proceedings. These rules as well as **G.L. c. 218, § 27A(g)** provide that appeals

from the district court jury sessions are to proceed in the same manner as appeals from the superior court.

Because of the unavailability of a court reporter in some cases in the district court jury sessions or where the defendant has not taken advantage of section **27A(h)** it may be necessary for the clerk, who has the responsibility under this rule for the completion of the record, including the transcript, to cause a transcript to be made from an electronic recording.

After this necessary preliminary step has been taken by the district court clerk copies of the transcript are to be made and distributed as provided by this rule and **rule 9(d)**.

The cost of preparation of the original transcript and of the copies required by this rule is borne by the Commonwealth except where the defendant is not indigent. In that case the defendant is to pay the clerk for the cost of producing his copy. The provision requiring production of the whole transcript is intended to provide for more expeditious and just disposition of questions on appeal. In the first place, the Commonwealth could not in all cases determine whether a partial transcript was adequate to serve its needs until such time as the defendant's brief was filed. Secondly, without a full transcript, appellate courts cannot resolve issues of plain error, a miscarriage of justice, or harmless error.

Subdivision (c) has been amended to enlarge the time within which a statement of the evidence or proceedings may be filed from ten to thirty days. Procedure like that provided under this subdivision has been followed by the Supreme Judicial Court in a criminal case when a transcript was unavailable. Commonwealth v. Harris, Mass.Adv.Sh. (1978) 2155.

It should be noted that the appellant may prepare and submit a statement of the evidence or proceeding from the best available means. However, as stated in Ingersoll Grove Nursing Home, Inc. v. Springfield Gas Light Co., Mass.Adv.Sh. (1979) 203, 204 a substitution is available only "if no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable." In a case in which the transcript is "made and available" the plaintiff is not entitled to substitute a statement of the evidence under subdivision (c).

Subdivision (d) however allows the parties to "prepare and sign a statement of the case" in lieu of the record. The term "statement of the evidence or proceeding" of subdivision (c) is not to be used interchangeably with "statement of the case" in subdivision (d) since the rules outline different procedures with respect to these terms.

The agreed statement permitted by subdivision (d) must now be filed within thirty days after the notice of appeal is filed; prior to this amendment no time limit was specified. The parties electing to proceed under the subdivision should notify the clerk that no transcript is to be ordered and, in addition, that the agreed statement shall be substituted for the record as defined in subdivision (a). Filing of the agreed statement as the appendix required by **Rule 18** has been made mandatory.

Subdivision (e), relative to correction or modification of the record, as applied to criminal cases, is similar in operation to prior provisions for settling a bill of exceptions (**G.L. c. 278, § 31**[St.1974, c. 540, § 1]) or for correcting errors in a transcript (**G.L. c. 278, § 33A** [St.1974, c. 540, § 2]), although much broader in the scope of relief available.

(1975)

As originally promulgated, Appellate Rule 8 required the inclusion, in the record on appeal, of a certified copy of the order appealed from and the opinion. Because the record includes all "original papers" anyway, this requirement was superfluous. Accordingly, it has been eliminated.

(1973)

Based on F.R.A.P. 10, Appellate Rule 8 describes the record on appeal, which should be carefully distinguished from the record appendix. The record consists of the original papers and exhibits, plus a transcript of the proceedings and a certified copy of the docket entries, as well as any certified copy of the lower court's final order. The record appendix (see **Appellate Rule 18**) is that distillation of the decision-essential portions of the record which is filed in connection with appellate brief.

The appellant is responsible for attending to the preparation of a transcript; this transcript must be sufficiently extensive to cover all points raised by the appeal. The phrase "description of the parts of the transcript," refers to such a description as "the plaintiff's entire testimony," rather than a designation by page and line, unless a more precise description is necessary.

If no transcript was made, the appellant may prepare a statement of the evidence in the proceedings in the most expeditious manner possible; after inspection by the appellee, this statement will be submitted to the lower court for approval. The statement of issues need be only extensive enough to enable the appellee to determine the need for ordering a transcript of other parts of the testimony.

The parties may, alternatively, prepare and file an agreed statement of facts. This is similar to existing practice, see **G.L. c. 231, § 111**; cf. Paulino v. Concord, 259 Mass. 142, 144, 155 N.E. 870, 871 (1927).

Appellate Procedure Rule 16: Briefs

(a) Brief of the appellant

The brief of the appellant shall be formatted and paginated as provided in Rule 20(a)(4), and contain under appropriate headings and in the order here indicated:

(1) Cover. The cover of the brief shall contain the information identified in Rule 20(a)(6)(B).

(2) Corporate Disclosure Statement. A corporate disclosure statement, if required pursuant to Supreme Judicial Court Rule 1:21, shall be contained within the brief.

(3) Table of Contents. The table of contents shall list each section of the brief, including the headings and subheadings of each section, and the page on which they begin.

(4) Table of Authorities. The table of authorities shall list each case, statute, rule, and other authority cited in the brief, with references to each page on which it is cited. The authorities shall be listed alphabetically or numerically, as applicable.

(5) Statement of Issues. The statement of issues shall concisely and particularly describe each issue presented for review.

(6) Statement of Case. The statement of the case shall briefly describe the nature of the appeal, the procedural history relevant to the issues presented for review, with page references to the record appendix or transcript in accordance with Rule 16(e), and the disposition of these issues by the lower court.

(7) Statement of Facts. The statement of the facts shall describe the facts relevant to the issues presented for review, but need not repeat items otherwise included in the statement of the case, and each statement of fact shall be supported by page references to the record appendix or transcript in accordance with Rule 16(e).

(8) Summary of Argument. In a brief with more than 20 pages of argument, or more than 4,500 words if produced in a proportionally spaced font, there shall be a summary of the argument that contains a succinct, clear, and accurate statement of the arguments made in the body of the brief, which must not merely repeat the argument headings, and is to include page references to where in the body of the brief each argument is made.

(9) Argument. The argument shall contain:

(A) the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities and parts of the record on which the appellant relies. The appellate court need not pass upon questions or issues not argued in the brief; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed
before the discussion of the issues).

(10) Request for Attorney's Fees and Costs. Any request for appellate attorney's fees and costs must be included in the brief, with a citation to the authority therefor.

(11) Conclusion. The brief shall contain a short conclusion stating the precise relief sought.

(12) Signature Block. The signature block shall contain

(A) the printed and signed name(s), Board of Bar Overseers (BBO) number(s), if any, mailing and electronic addresses, and telephone number(s) of the person(s) who prepared the brief, and, if any individual counsel is affiliated with a firm or office, the office name; and

(B) the date of signing.

(13) Addendum. An addendum, contained within the brief, shall consist of the following:

(A) a table of contents listing each item contained therein and the page on which it begins;

(B) any appealed judgment or order (including any written opinion, memorandum of decision, or findings of fact and conclusions thereon relating to an issue raised on appeal, including a typed version of any pertinent handwritten or oral endorsement, notation, findings, or order made by the lower court);

(C) copies of constitutional provisions, statutes, rules, regulations, or relevant parts thereof, as in effect at the relevant time, consideration of which is required for determination of the issues presented;

(D) a copy of any unpublished decision cited in the brief; and

(E) in a case where geographical facts are of importance, unless appropriate plans are reproduced in the printed record or record appendix, an outline plan

(preferably based on exhibits in evidence). This outline plan should be suitable for reproduction on 1 page of the printed law reports.

(14) Certificate of Compliance. The certification required by Rule 16(k) shall be contained within the brief.

(15) Certificate of Service. The certificate of service required by Rule 13(e) shall be contained within the brief.

(b) Brief of the appellee

The brief of the appellee shall conform to the requirements of Rule 16(a), except as follows:

(1) Statements of the Issues, Case, Facts, and Standard(s) of Review. Statements of the issues, of the case, of the facts, and of the applicable standard(s) of review need not be made unless the appellee is dissatisfied with the statements of the appellant.

(2) Argument. The argument shall contain the contentions of the appellee with respect to the issues presented, and the reasons therefor, with citations to the authorities and parts of the record on which the appellee relies.

(3) Addendum. The addendum shall include copies of items required by Rule 16(a)(13) insofar as pertinent to the issues argued by the appellee, even if included in the addendum of the appellant.

(c) Appellant's reply brief

The appellant may file a reply brief responding to the appellee's argument. No new issues shall be raised in the reply brief. No further briefs may be filed except with leave of the appellate court or a single justice. The reply brief shall comply with the requirements of Rule 16(a)(1), (3), (4), (9), and (11)-(15).

(d) References in briefs to parties

Parties will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court, or the actual names of the parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," "the landlord," etc. If the name of a party has been impounded or has been made confidential by statute, rule, or court order, the party shall preserve confidentiality in briefs and oral arguments.

(e) References in briefs to the record

Any factual statement in a brief shall be supported by a citation to the volume number(s) and page number(s) at which it appears in an appendix, and if not contained in an appendix, to the volume number(s) and page number(s) at which it appears in the transcript(s) or exhibits volume(s). Only clear abbreviations may be used, for example RAII/55 (meaning Record Appendix volume II at page 55) or TRIII/231-232 (meaning Transcript volume III at pages 231-232). Any record material cited in a brief must be reproduced in an appendix or transcript or exhibit volume. Any record material cited in a brief that is included in the addendum should also include a citation to the addendum. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.

(f) Reserved

[Reserved}

(g) Massachusetts citations

Citations to Massachusetts decisions, statutes, and regulations shall be made only to the official report of the decision or to the official publication containing the statute or regulation, if any. References to decisions should include, in addition to the page at which the decision begins, a page reference to the particular material therein upon which reliance is placed, and the year of the decision.

(h) Length of briefs in cases other than cross appeals

In any case other than a cross appeal, the length of briefs shall comply with **Rule 20(a)(2)**.

(i) Briefs in cases involving cross appeals

In a cross appeal,

(1) the length of briefs shall comply with **Rule 20(a)(3)**;

(2) the appellee's principal and response brief shall contain the issues and argument involved in the appellee's appeal as well as the answer to the brief of the appellant;

(3) the appellee may file a reply brief responding to the appellant's argument as to the issues presented by the cross appeal; and

(4) except with leave of the appellate court or a single justice, an appellee that has cross-appealed may file only a single brief in reply to the responses of multiple appellants to the issues presented by the cross appeal.

(j) Briefs in cases involving multiple appellants or appellees

In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal per **Rule 10(a)(5)**,

(1) any number of either may join in a single brief or reply brief, provided appropriate notice is given to the clerk and other parties;

(2) any appellant or appellee may adopt by reference any part of the brief of another; and

(3) except with leave of the appellate court or a single justice, an appellee may file only a single brief in response to multiple appellant briefs, and an appellant may file only a single brief in reply to multiple appellee briefs.

(k) Required certification; non-complying briefs

The last page of each brief shall include a certification by the party that the brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: **Rule 16(a)(13)** (addendum); **Rule 16(e)** (references to the record); **Rule 18** (appendix to the briefs); **Rule 20** (form and length of briefs, appendices, and other documents); and **Rule 21** (redaction). The certification shall specify how compliance with the applicable length limit of **Rule 20** was ascertained, by stating either (1) the name, size, and number of characters per inch of the monospaced font used and the number of non-excluded pages, or (2) the name and size of the proportionally spaced font used, the number of non-excluded words, and the name and version of the word-processing program used. A brief not complying with these rules (including a brief that does not contain a certification) may be struck from the files by the appellate court or a single justice.

(l) Citation of supplemental authorities

When pertinent and significant authorities come to the attention of a party after the party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the court, by letter setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made promptly and

shall be similarly limited. Filing and service of any letter pursuant to this paragraph shall comply with **Rule 13**.

(m) References to impounded material

Upon the filing of any brief or other document containing references to matters that are impounded or have been made confidential by statute, rule, or order, the party shall file a written notice with the clerk, with a copy to all parties, so indicating. Wherever possible, the party shall not disclose impounded material. Where it is necessary to include impounded material in a brief, the cover of the brief shall clearly indicate that impounded information is included therein.

(n) Amendment of brief

On motion for good cause, the court may grant leave for a party to file an amended brief. The motion shall describe the nature and reason for the amendment. The party shall file with the motion the amended brief marked as such on the front page or cover. Except as the court otherwise orders, the filing of an amended brief has no effect on any filing deadlines.

Reporter's notes

(2019)

Rule 16(a) was revised and reorganized to detail in sequential order the contents of an appellant's brief. The revised rule is organized as a checklist intended to assist the parties in preparing a brief in compliance with the Rules, and to eliminate any heretofore unreferenced requirements raised by other court rules or decisions. The rule cross-references **Rule 20(a)(4)** for brief formatting and pagination requirements.

Rule 16(a)(1) is a new paragraph that begins the checklist format. It merely cross-references **Rule 20(a)(6)**, which sets forth color and contents of the cover of a brief.

Rule 16(a)(2) is a new paragraph that cross-references **S.J.C. Rule 1:21**, which requires the inclusion of a corporate disclosure statement in specified circumstances. The corporate disclosure statement is to be included immediately after the cover, and before the table of contents in a party's principal brief. See **S.J.C. Rule 1:21**.

Rules 16(a)(3) and **16(a)(4)** are derived from prior **Rule 16(a)(1)** and provide the required format of the table of contents and table of authorities, respectively.

Rule 16(a)(5) continues the requirement from prior **Rule 16(a)(2)** for a statement of the issues presented. The rule was revised to highlight that the statement of issues is to describe each issue concisely and with particularity.

Rule 16(a)(6) continues the requirement from prior **Rule 16(a)(3)** that the brief include a statement of the case. The revised rule requires the statement of the case to include reference to the record appendix or transcript, a requirement that was required in prior **Rule 16(e)**, although not expressly so stated. See also Fed. R. App. P. 28(a)(6).

Rule 16(a)(7) continues the requirement from prior **Rule 16(a)(3)** for a statement of facts relevant to the issues presented for review, with supporting references to the record. New language clarifies that the statement of facts need not repeat items included in the statement of the case. The rule also clarifies that each statement of fact must be supported by specific page references to the record appendix or transcript, similar to the requirements in prior **Rules 16(a)(3)** and **16(e)**.

Rule 16(a)(8) continues prior **Rule 16(a)(4)**'s requirement for a summary of the argument that does not merely repeat argument headings. Under prior **Rule 16(a)(4)**, a summary of the argument was required only when the argument exceeded 24 pages. The page limit was reduced to arguments exceeding 20 pages, or equivalent length under the word count alternative if a proportionally spaced font is used. The paragraph continues to require page references to the pages in the body of the brief where each argument is presented. See also Fed. R. App. P. 28(a)(7).

Rule 16(a)(9) governs the argument portion of the brief and is derived from prior **Rule 16(a)(4)**. The rule was divided into two subparagraphs, the first, **Rule 16(a)(9)(A)**, concerning the argument section generally, and the second, **Rule 16(a)(9)(B)**, concerning presentation of the individual issues. The final sentence of prior **Rule 16(a)(4)** was relocated to **Rule 22**, because it concerns oral argument ("Nothing argued in the brief shall be deemed waived by a failure to argue orally"). **Rule 16(a)(9)(B)** includes a new requirement, derived from Fed. R. App. P. 28(a)(8), that the party include the standard of review for each issue raised. The standard of review is a critical factor in every appeal, constituting the lens through which the court views the issues presented.

Rule 16(a)(10) is a new paragraph added to ensure litigants comply with the requirement derived from case law, that any request for attorney's fees and costs must be included in the brief. See **Yorke Management v. Castro, 406 Mass. 17**, 19 (1989). Such a request must be made even where the request is not based upon a fee-shifting statute. **Beal Bank, SSB v. Eurich, 448 Mass. 9**, 10 (2006). An appellate court may excuse or modify this requirement if the circumstances so warrant. **Lowell v. Massachusetts Comm'n Against**

Discrimination, 65 Mass. App. Ct. 356, 358 (2006). This new rule also requires that a request for fees and costs identify the specific source (e.g., statute, court rule, or case law) which authorizes the request.

Rule 16(a)(11) continues the requirement of prior **Rule 16(a)(5)** for a conclusion to the brief that states the precise relief requested from the appellate court.

Rule 16(a)(12) delineates the requirements of the brief's signature block and expands upon prior **Rule 16(a)(8)**. The signature block must include both the mailing and electronic addresses of the person who prepared the brief, whether by counsel or a self-represented party. This is consistent with amendments to **Rules 13(e)**, **20(a)(6)(B)**, and **20(b)(2)(B)**.

Rule 16(a)(13) specifies the contents of the addendum to a principal brief. It contains substantially revised text relocated from prior **Rules 16(a)(6)** and **16(a)(7)**. The amendment was intended to consolidate into a single provision the various items required to be included in an addendum. **Rule 16(a)(13)(A)** requires the addendum to include a table of contents listing each item contained in the addendum and the page number on which the document begins. **Rule 16(a)(13)(B)** continues the requirement of prior **Rule 16(a)(6)** that a copy of any memorandum of decision or findings of the lower court be included in the addendum. The provision was expanded to require that when the addendum includes a document bearing a handwritten endorsement by the lower court, the addendum also include a typed copy of that endorsement. A lower court judge will often endorse a motion or other paper with a handwritten notation that is difficult to decipher. Requiring both a copy of the original endorsement and a typed version facilitates review in the appellate court. If the lower court clerk provides a typed notice of docket entry containing the full text of the judge's order, a copy of the notice would suffice for purposes of this rule.

Rule 16(a)(13)(D) is a new subparagraph requiring that when a brief cites to an unpublished decision, a copy of the entire decision is to be included in the addendum. The Appeals Court already requires that any party citing to a Memorandum of Decision and Order pursuant to **Appeals Court Rule 1:28** decision is to include the full text of that decision in the addendum to a brief. See **Chace v. Curran, 71 Mass. App. Ct. 258 (2008)**; **Appeals Court Rule 1:28**, as amended in 2008. The amendment codifies this requirement in the Rules, and expands the requirement to apply to any unpublished decision cited in a brief to either appellate court.

Rule 16(a)(13)(E) is nearly identical to prior **Rule 16(a)(7)**, omitting "or chalk" as superfluous.

Rules 16(a)(14) and **16(a)(15)** are new paragraphs which specify that the brief is to conclude with the **Rule 16(k)** certificate of compliance and the **Rule 13(e)** certificate of service. Adding these paragraphs to the "checklist" portion of **Rule 16(a)** highlights that the certifications are necessary parts of a brief and identify the proper location of the certifications in the brief.

Rule 16(b) was revised and separated into three paragraphs. The rule specifies, in greater detail than prior **Rule 16(b)**, the contents of the appellee's brief. The rule requires the appellee's brief to conform to the requirements of **Rule 16(a)** except as provided in paragraphs (1)-(3) of the rule, and including that the statements of the issues, case, facts, and applicable standard(s) of review need not be made unless the appellee is dissatisfied with the statements of the appellant. A new provision, **Rule 16(b)(3)**, requires the appellee to include an addendum that contains the same materials required in the appellant's addendum in **Rule 16(a)(13)**, insofar as the items are pertinent to the appellee's arguments, even if the items were included in the appellant's addendum.

Prior **Rule 16(c)** was revised to specify the format of a reply brief, and expressly state that the reply brief may not raise new issues different from those raised in the principal briefs. Accord **Krapf v. Krapf, 439 Mass. 97**, 110 (2003) (where Supreme Judicial Court, citing prior **Rules 16(a)(4)** and **(c)**, declined to consider issues raised for the first time in a reply brief). The words "or a single justice" are added to the prior requirement that "leave of the appellate court" be obtained before an appellee may file a reply brief, otherwise known as a sur-reply brief. The sentence in prior **Rule 16(c)** authorizing an appellee who has cross-appealed to file a reply brief responding to the appellant's argument as to the issues presented in the cross appeal was relocated to **Rule 16(i)**, the rule addressing brief requirements in a cross appeal.

Rule 16(e) continues to require that parties support factual statements in a brief with citation to the record. This subdivision was amended to specify that the citation references shall be to both the supporting volume number(s), if applicable, and page number(s) in the appendix, transcript, exhibits, or addendum. All citations must be clear and may follow the examples found in the text of the rule. References to **Rules 18(c)** and **18(f)** were deleted consistent with revisions to those subdivisions as described in the **Reporter's Note to Rule 18**.

Prior **Rule 16(f)** (reproduction of statutes, rules, regulations, etc., in the addendum) was deleted entirely because its substance was relocated to **Rule 16(a)(13)**. The subdivision was kept as "reserved" instead of renumbering the subdivisions that follow because subsequent subdivisions **16(k)** and **16(l)** are commonly referred to by their respective numbers and maintaining the lettering will avoid confusion for filers in the appellate courts.

Rule 16(g), regarding Massachusetts citations, was amended to remove language referencing old volumes of the Massachusetts Reports, since those are not as commonly cited today. The language was revised to state more simply that citations to Massachusetts authorities need to be to the official reporter of the decision or the official publication containing the statute or regulation, if an official report or publication exists. Language related to quotations of statutory material and citation examples were also relocated to these Reporter's Notes. Examples of citations to Massachusetts authorities are as follows:

Supreme Judicial Court:	**Commonwealth v. Dorelas, 473 Mass. 496**, 502-503 (2016);
Appeals Court:	**Amaral v. Seekonk Grand Prix Corp., 89 Mass. App. Ct. 1**, 3-5 (2016);
Unpublished decision:	Parks vs. Petraglia, Boston Hous. Ct., No. 93-CV-00155 (Jan. 20, 1995);
General Laws:	**G. L. c. 261, § 27D**.

Citations to these and other authorities should be made consistent with the **Supreme Judicial Court Style Manual**, available at http://www.mass.gov/courts/docs/sjc/docs/reporter-of-decisions-style-guide.pdf.

Rule 16(h) was renamed "Length of Briefs in Cases Other Than Cross Appeals," to be consistent with **Rule 16(i)**, which governs the length of briefs in cross appeals. The current contents of the Rule are deleted entirely, and replaced with a cross-reference to **Rule 20(a)(2)**, which establishes the brief length requirements.

Rule 16(i) continues to govern briefs in cases involving cross appeals. The rule was revised and separated into four paragraphs. The first sentence of this provision was deleted and relocated to **Rule 10(a)(6)**, docketing of a joint appeal. **Rule 10(a)(6)** is a more appropriate location for a provision designating the parties for purposes of a cross appeal, rather than in the rule concerning the briefs. The parties' designation for purposes of the appeal applies to all aspects of the appeal, starting at the docketing stage, and is not simply for purposes of briefing. **Rule 16(i)(1)** cross-references **Rule 20(a)(3)** regarding requirements for the length of briefs in a cross appeal. In addition, **Rule 16(i)(2)** updates the rule to align it with Federal language concerning cross appeals (e.g., principal brief and response brief). See Fed. R. App. P. 28.1(c).The sentence in prior **Rule 16(c)** authorizing an appellee that has cross-appealed to file a reply brief responding to the appellant's argument as to the issues presented in the cross appeal was relocated to **Rule 16(i)(3)**. Finally, **Rule 16(i)(4)** clarifies that, except with leave of the appellate court or a single justice, an appellee who has cross-appealed may file only a single reply brief in response to the issues presented by the cross appeal regardless if

multiple appellants have filed responses to the issues presented by the cross appeal.

Rule 16(j) was amended to cross-reference **Rule 10(a)(5)** concerning consolidated appeals. The specific reference to **Rule 10(a)(5)** clarifies the phrase "cases consolidated for purposes of the appeal." The rule was revised and separated into three paragraphs. The rule continues to authorize parties to join in another party's brief in the same case. The rule was revised to clarify that reply briefs can be joined in the same manner as principal briefs. In addition, a clause requiring notice to the clerk and other parties was added. The notice informs the clerk to designate that party as having joined another party's brief and alerts the other parties that a separate brief will not be filed. Finally, a new provision, encompassed in **Rule 16(j)(3)**, codifies existing practice that, except with leave of the appellate court or a single justice, in cases involving more than one appellant or appellee, an appellee may file only a single brief regardless of the number of appellant briefs that are filed, and an appellant may file only a single reply brief regardless of the number of appellee briefs that are filed.

Rule 16(k) continues to require a certification of compliance with the formatting requirements of these Rules. **Rule 16(k)** was amended to add language that the certification is to specify how compliance with the applicable length limit of **Rule 20** was ascertained. This requirement will also assist the appellate court clerks' offices in verifying the brief's compliance with applicable rules. This requirement is similar to the certification required by Fed. R. App. P. 32(g)(1).

Rule 16(l) was amended to remove the phrase "with a copy to all counsel" and add the sentence, "Filing and service of any letter pursuant to this paragraph shall comply with **Rule 13**." Parties often neglect to adhere to the service requirements of **Rule 13** when filing letters submitted pursuant to **Rule 16(l)**. An express reference to that rule will increase compliance with these requirements and clarify that service requirements apply to such letters.

Rule 16(n) is a new subdivision that codifies existing appellate court practice regarding the filing of an amended brief. The amended document is to be submitted to the court contemporaneous with a motion seeking leave to file the amended document. An "amended" (which sometimes is titled "revised" or "corrected") brief typically contains typographical corrections or required redactions.

Further organizational and stylistic revisions were made to this rule in 2019 in accordance with a global review and revision of all of the Appellate Rules. These revisions are described in the **2019 Reporter's Notes to Rule 1**.

With regard to the preparation of the 2019 Reporter's Notes to this Rule, see the first paragraph of the **2019 Reporter's Notes to Rule 1**. For an overview of the 2019 amendments to the Rules and a summary of the global amendments to the Rules, see **2019 Reporter's Notes to Rule 1, sections I. and II**.

(2005)

In order to reduce the number of non-complying briefs, **Appellate Rule 16(k)** was amended in 2005 to require a certification that the brief complies with all of the rules of court that govern briefs. Counsel should be aware that a brief that does not contain the required certification may be struck by the court for non-compliance with the rule.

(2003)

By virtue of the 2003 amendment to **Appellate Rule 16(h)**, a party seeking leave to file a brief with additional pages must specify the issues involved and why they require additional pages. The rule also sets forth a standard of "extraordinary reasons" for the allowance of such a motion.

(1999)

The 1999 amendments to **Appellate Rule 16(h)** were made together with the updating of **Appellate Rule 20**, the latter governing the form of briefs and appendices. The 1999 amendments to **Appellate Rule 20** deleted references to standard typographic printing in recognition of the practice that briefs today are produced through computer wordprocessing and no longer through a typesetting and printing process. Accordingly, the page limitation for briefs produced by "standard typographic printing" of forty pages (and fifteen pages for reply briefs) has been deleted from the rule.

The existing page limitation on principal briefs produced by computer wordprocessing remains fifty pages, with reply briefs twenty pages.

(1999)

New paragraph (6), added to **Appellate Rule 16(a)** effective in 1999, requires that any findings (written or oral) or memorandum of decision by the trial court pertinent to an appellate issue be included in an addendum to the appellant's brief. Although findings or a memorandum of decision are already required to be included in the appendix to the brief (**Mass.R.A.P. 18(a)**), incorporating such matters in an addendum to the brief will enable a judge on appeal to locate quickly the trial court's rationale for its decision, especially where there is a multi-volume appendix.

The reference to oral findings is intended to cover the situation where the trial judge has dictated findings into the record that have been transcribed or otherwise recorded. These findings must now also be included in an addendum to the brief.

This additional requirement will not serve to reduce the maximum number of pages for a principal brief. The page limitations contained in **Mass.R.A.P. 16(h)** are inapplicable to an addendum to a brief.

(1997)

The amendment to **Appellate Rule 16(a)(1)**, effective January 1, 1997, eliminates the provision that a table of contents and a table of cases, statutes, and other authorities be included only in briefs of twenty pages or more. All briefs must include these items.

The 1997 amendments to **Appellate Rule 16(d)** and **(m)** serve as a reminder to counsel to maintain confidentiality in briefs and oral argument of any information that has been impounded or designated as confidential. For example, where the name of a person is not subject to disclosure, counsel may use a generic term such as "child" or "juvenile" or may use a pseudonym or initials.

Illustrative statutes requiring confidentiality include **G.L. c. 112, § 12S** (petitions by minors seeking judicial determination of maturity in connection with abortion; see also **Superior Court Standing Order No. 5-81**, as amended, requiring that papers "shall be designated anonymously" such as with the titles "Mary Moe" or "Mary Doe"); **G.L. c. 119, § 38** (names in care and protection proceedings); **G.L. c. 119, § 65** (juvenile proceedings); **G.L. c. 209A, § 8** (in abuse prevention proceedings, plaintiff's address and case records involving a minor); **G.L. c. 209C, § 13** (papers in paternity proceedings and a party's address); and **G.L. c. 210, § 5C** (adoption proceedings).

Illustrative rules providing for confidentiality include **Mass.R.Civ.P. 26(c)** (trade secrets and other matters in connection with discovery) and **Probate Court Supplemental Rule 401**(financial statements in connection with requests for support or alimony). The **Uniform Rules on Impoundment Procedure** also provide a mechanism to preserve confidentiality of matters contained in case papers.

Illustrative cases using pseudonyms include **Care and Protection of Stephen, 401 Mass. 144**, 514 N.E.2d 1087 (1987); **C.C. v. A.B., 406 Mass. 679**, 550 N.E.2d 365 (1990); **Oscar F. v. County of Worcester, 412 Mass. 38**, 587 N.E.2d 208 (1992); **Adoption of Carla, 416 Mass. 510**, 623 N.E.2d 1118 (1993); **Doe v. Superintendent of Schools of Worcester, 421 Mass. 117**, 653

N.E.2d 1088 (1995); **Doe v. Purity Supreme, Inc., 422 Mass. 563**, 664 N.E.2d 815 (1996); and **Commonwealth v. Wotan, 422 Mass. 740**, 665 N.E.2d 976 (1996).

There may be instances, however, where counsel will find it necessary to include confidential information in a brief in order to allow for full appellate review of the issue. In such instances, **Rule 16(m)** provides that counsel must alert the clerk's office that confidential information is contained in a filing. In this way, the rule shifts the burden to counsel to alert the clerk's office to the presence of impounded material so that the latter can take appropriate steps to safeguard the material in accordance with **Supreme Judicial Court Rule 1:15, Impoundment Procedure**.

These amendments, together with amendments to **Appellate Rule 18**, serve to preserve confidentiality of material in briefs, appendices, and oral argument.

(1991)

Mass.R.A.P. 16(a)(7) and **20(a)**, final sentence, clause (5):

These amendments require individual counsel who are affiliated with a firm to include the firm name on filed briefs. Appellate judges need to know the firm names in order to determine correctly whether it is necessary to withdraw from a case.

(1986)

This amendment is to clarify that reply briefs of more than twenty pages shall contain the tables and references required of other appellate briefs of that length. Such tables and references aid opposing parties and the court. This amendment corresponds, in part, to the 1986 amendment to Fed.R.A.P. 28(c).

(1982)

Appellate Rule 16(l) is the same as F.R.A.P. 28(j), which became effective in 1979. Its purpose is to allow a concise letter to inform the court in a non-argumentative manner of a "pertinent and significant" authority discovered after the filing of a brief or oral argument. The amendment does not authorize reargument in the disguise of a supplementary citation.

(1979)

Rule 16 was previously incorporated into criminal appellate procedure by Appeals Court Rule 1:15 (1975: 3 Mass.App.Ct. 803) and **Supreme Judicial Court Rule 1:15** (1975: 366 Mass. 861). The rule is unchanged beyond amendment of subdivision (e) to reflect the fact that there may be more than

one appendix in a criminal case. (**Mass.R.App.P. 19[a]**).

The last two sentences of subdivision (a)(4) which provide that questions or issues not argued in the brief need not be decided, but that a failure to orally argue an issue does not waive it if argued in the brief, supersede the last two sentences of former Appeals Court and **Supreme Judicial Court Rules 1:13** (1972: 1 Mass.App.Ct. 889, amended 1975: 3 Mass.App.Ct. 801. 1967: 351 Mass. 738, amended, 1975: 366 Mass. 801).

(1975)

As originally promulgated, **Appellate Rule 16(a)(4)** made optional the use of a summary of argument. The new rule makes such a summary mandatory, if the brief contains more than 24 pages of argument (i.e. not including table of contents, table of cases, statutes, and authorities, statement of issues, and statement of the case). By explicit language, the summary must be something more than a mere recital of the argument headings.

Amended **Appellate Rule 16(a)(4)** makes explicit the long-standing principle that failure to discuss an issue in the brief may, at the discretion of the court, preclude reliance upon that point in oral argument. On the other hand, if the brief does include the question, failure to argue it orally does not waive the point.

Although earlier Massachusetts appellate citation form omitted the year of decision, the amendment to **Appellate Rule 16(g)** ensures that the year will be included in any citation.

(1973)

Appellate Rule 16 establishes the form of the briefs: table of contents; statement of the issues; statement of the case; arguments; and conclusion. **Appellate Rule 16(f)** also requires the reproduction of relevant statutes and the like. None of the requirements will substantially change existing practice. **Appellate Rule 16(e)**, stating the requirements in briefs for references to the record, likewise follows existing practice. See **S.J.C. Rule 1:15**; Appeals Court Rule 1:15.

Appellate Procedure Rule 17: Brief of an amicus curiae (a) General

A brief of an amicus curiae may be filed only (1) by leave of the appellate court or a single justice granted on motion or (2) when solicited by the appellate court, except that leave shall not be required when the brief is presented by the Commonwealth or its officer or agency. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable.

(b) Timing

In all cases, an amicus curiae shall file its brief no later than 21 days before the date of oral argument for that case unless the appellate court or a single justice for cause shown shall grant leave for later filing. Any party may request leave from the appellate court or a single justice to file a response to a brief filed by an amicus curiae.

(c) Cover, length, and content

An amicus brief must comply with **Rule 20**. In addition to the requirements of **Rule 20**, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal or neither. An amicus brief need not comply with all the requirements of **Rule 16**, but must include the following:

(1) if the amicus curiae is a corporation, a disclosure statement like that required of parties by **Supreme Judicial Court Rule 1:21**;

(2) a table of contents with page references, in accord with **Rule 16(a)(3)**;

(3) a table of authorities, in accord with **Rule 16(a)(4)**;

(4) a concise statement of the identity of the amicus curiae and its interest in the case;

(5) unless the brief is presented by the Commonwealth or its officer or agency, a declaration that indicates whether

(A) a party or a party's counsel authored the brief in whole or in part;
(B) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief;
(C) a person or entity—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifying each such person or entity; and

(D) the amicus curiae or its counsel represents or has represented one of the parties to the

present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal, and, if so, identifying the proceeding or transaction, its relevance to the present appeal, and the parties involved;

(6) a summary of argument, in accord with **Rule 16(a)(8)**, if the argument is more than 20 pages in length or more than 4,500 words if produced in a proportionally spaced font;

(7) an argument, which need not include a statement of the applicable standard of review; **(8)** a signature block, in accord with **Rule 16(a)(12)**;

(9) a certificate stating that the brief complies with the requirements of this rule and **Rule 20** and specifying how compliance with the length limit of **Rule 20(a)(3)(E)** was ascertained, by stating either (A) the name, size, and number of characters per inch of the monospaced font used and the number of non-excluded pages, or (B) the name and size of the proportionally spaced font used, the number of non-excluded words, and the name and version of the word-processing program used; and

(10) a certificate of service, in accord with **Rule 13(e)**.
A brief not complying with these rules (including a brief that does not contain a certification)

may be struck from the files by the appellate court or a single justice.

(d) Filing

The same number of copies of the brief of an amicus curiae shall be filed with the clerk and served on each party as required by **Rule 19(d)**.

(e) Oral argument

A motion of an amicus curiae to participate in the oral argument will be granted only for good cause.

Reporter's notes (2019)

Rule 17 was divided into separate subdivisions for clarity and substantively revised as described below.

Rule 17(a) contains the first three sentences of prior Rule 17. The words "or its officer or agency" were added at the end of the second sentence to make it clear that an officer or agency of the Commonwealth may also file an amicus brief as of right. This language was adopted from a similar provision in Fed. R. App. P. 29(a)(2). The phrase "at the request of

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the appellate court" was amended to "when solicited by the appellate court" to clarify when an amicus brief may be filed without leave of court. In accordance with **Rule 17(a)(2)**, an amicus curiae need not move for leave to file a brief in a case where an appellate court has issued an announcement requesting submission of amicus briefs. The words "consent or" were struck because they were redundant of "leave" of court to file an amicus brief.

Rule 17(b) revises the fourth sentence of prior Rule 17 to allow an amicus curiae to file an amicus brief no later than 21 days before the date of oral argument for that case, unless leave is granted for later filing. This is intended to establish an ascertainable date for the filing of an amicus brief on behalf of any party, provide all parties with sufficient time to prepare a response to an amicus brief, and allow the appellate court sufficient time to review any amicus brief or response. **Rule 17(b)** was also amended to explicitly allow any party to seek leave from the appellate court or single justice to respond to any amicus brief.

Rule 17(c) is a new subdivision that governs the cover, length, and content of an amicus brief. An amicus brief must comply with the formatting and length requirements of **Rule 20**. However, an amicus brief does not need to comply with all of the content requirements applicable to a party's brief under **Rule 16**. Instead, **Rule 17(c)** explicitly references certain provisions of **Rule 16** that are applicable to an amicus brief. Text was also added to clarify an amicus brief may be struck by an appellate court or single justice if it does not comply with **Rule 17(c)**.

Rules 17(c)(4) and **(c)(5)** require the amicus curiae to identify its interest in the case in an amicus brief, so that it will be readily apparent to the appellate court when considering the brief. These paragraphs were modelled on Fed. R. App. P. 29(a)(4)(D)-(E), with a few changes. As with the analogous Federal rule, these paragraphs are not intended to require the amicus to disclose mere coordination of arguments or sharing of drafts with a party. The paragraphs are, however, intended to discourage the use of amicus briefs as an instrument to reiterate arguments made by a party to the appeal.

Rule 17(c)(5)(D) requires disclosure concerning whether "the amicus curiae or its counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal," in accord with **Aspinall v. Philip Morris Co., Inc., 442 Mass. 381**, 385 n.8 (2004), and **Champa**

v. Weston Public Schools, 473 Mass. 86, 87 n.2 (2015). In determining whether another proceeding involves similar issues, the amicus and its counsel need only consider issues that have been explicitly raised in, and that are directly relevant to, the other proceeding and the present appeal. Likewise, in determining whether another proceeding or transaction is at issue in the present appeal, the amicus and its counsel need only consider whether that proceeding or transaction has been explicitly put at issue in the appeal. Similar to Fed. R. App. P. 29(a)(4)(E), the Commonwealth and its officer or agency are exempted from the requirements in **Rule 17(c)(5)**.

Rule 17(d) contains the last sentence of prior Rule 17 as a stand-alone subdivision. The text "counsel for each party separately represented" was replaced with "each party," consistent with the with the new definition of "party" in **Rule 1(c)**. The cross-reference to **Rule 19(b)** was changed to **Rule 19(d)** to conform to changes in **Rule 19**.

Rule 17(e) contains the fifth sentence of prior Rule 17 as a stand-alone subdivision. The standard for allowing a motion of an amicus curiae to participate in oral argument was changed from "extraordinary reasons" to "good cause" to reflect that an amicus curiae's participation at oral argument may be desirable for a variety of reasons, even if those reasons might not be fairly described as "extraordinary."

Further organizational and stylistic revisions were made to this rule in 2019 in accordance with a global review and revision of all of the Appellate Rules. These revisions are described in the **2019 Reporter's Notes to Rule 1**.

With regard to the preparation of the 2019 Reporter's Notes to this Rule, see the first paragraph of the **2019 Reporter's Notes to Rule 1**. For an overview of the 2019 amendments to the Rules and a summary of the global amendments to the Rules, see **2019 Reporter's Notes to Rule 1, sections I. and II**.

(1997)

The 1997 amendment to Appellate Rule 17 added a new last sentence requiring that the number of copies of an amicus brief to be filed with the appellate court and served on counsel be the same as set forth in **Appellate Rule 19(b)**.

(1979)

Rule 17 is unchanged, its provisions having been incorporated into criminal appellate procedure by former Appeals Court and **Supreme Judicial Court Rules 1:15** (1975: 3 Mass.App.Ct. 803, 366 Mass. 861).

(1973)

No existing rule governs briefs of an amicus curiae. Appellate Rule 17, limiting the right to file such a brief to an amicus who has obtained leave of the full appellate court or a single justice on motion, follows existing practice. It should be noted that the Commonwealth need never obtain leave to file an amicus brief.

CERTIFICATE OF COMPLIANCE WITH RULE 16(k) and 17

We hereby certify that the foregoing Amici Brief complies, to the best of our knowledge and belief, with the rules of Court pertaining to filing of appellate briefs, including those specified in MRAP 16(k). It is overlength by 7 pages possibly but it is for two Amicae and of sufficient historical importance, they pray acceptance. It is formatted in compliance with monospaced font, 12-point Courier, requirements.

We also certify that no party or party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; no person or entity — other than the amicus curiae — contributed money that was intended to fund preparing or submitting the brief; and nor does Amicus Curiae represent nor has Amicus represented one of the parties to the present appeal in another proceeding involving similar issues, nor was a party or represented a party in a proceeding or legal transaction that is at issue in this appeal.

Respectfully submitted,

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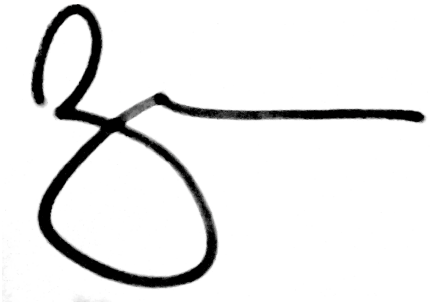

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DATE: July 14, 202

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished on July 14, 2020 by E-Service and US Mail upon the following:

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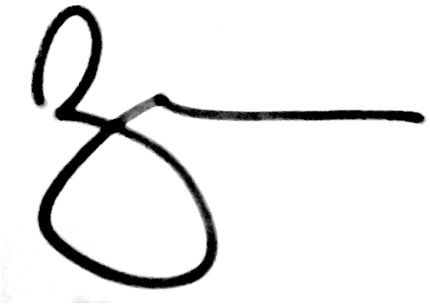

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