Massachusetts Legal Malpractice Law: An Update
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Case Comments
Criminal Law: In digital evidence cases, police must now establish probable cause to believe evidence will be located in each electronic location they plan to search

Criminal Law: Reasonable suspicion is generally required to search a parolee’s residence

Book Review
Hidden in Plain Sight: What Really Caused the World’s Worst Financial Crisis and Why It Could Happen Again

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Cover: A door knob in the Franklin County Courthouse in Greenfield prior to its demolition and subsequent reconstruction. The knobs did not make it into the renovated courthouse. Photo by Hon. David S. Ross.
I. Introduction

This is the fifth in a series of articles in this journal, the first one published in 1978, in which the authors have charted developments in the law of Massachusetts governing malpractice claims against lawyers.1

The commonwealth’s courts have historically been active in this field. Over the six prior years covered by the article we published in 2000, the state’s appellate courts had published 27 decisions in legal malpractice cases, with 29 more reported cases coming from the superior and federal courts. In the period through 2009 covered by the last article before this one, there had been 29 legal malpractice decisions from the state appellate courts, and 45 from the superior and federal courts.

The trend in the more recent period covered by this article has been rather different. The number of published state appellate decisions in legal malpractice cases fell from an average of 7.6 per year between 1993 and 2009 to 1.6 per year between 2010 and July 2017. The most obvious explanation is a shift by the Massachusetts Appeals Court to deciding legal malpractice cases by “unpublished” summary disposition under its Rule 1:28, which applies to cases deemed to present “no substantial question of law.” As many as 48 cases — nearly half of all reported decisions in the current period — were resolved in this way.2 This may suggest a view among Appeals Court justices that the important rules for legal malpractice cases have by now been clearly established and explained, and may be applied without difficulty to new factual situations.

Yet there remain a number of important unresolved matters which, for various reasons, have yet to reach the Massachusetts appellate courts in a setting conducive to full analysis. In this article we attempt to distinguish between well-trodden ground and territories that remain to be settled. For the latter, we occasionally offer suggestions as to what an appropriate rule might be.

II. Plaintiffs Other Than Clients

While most legal malpractice lawsuits are brought against lawyers by their clients, a recurring area of dispute involves the rights of non-clients, and of plaintiffs who claim the status of clients even in the absence of any conventional engagement agreement.

A. Implied Clients

Under Massachusetts law, an “implied client” is one who asks for a lawyer’s assistance in a particular matter, and, without the lawyer ever expressly consenting to the representation, obtains services under circumstances that are deemed to signal the lawyer’s constructive consent to an attorney-client relationship. A similar analysis applies where an actual client (or former client) alleges that his lawyer negligently provided (or failed to provide) services beyond the scope of the original representation. A successful implied-relationship claim typically involves a putative client who is unsophisticated,
and a lawyer who stood to obtain some unfair advantage from the ambiguity of the relationship.  

In all but two reported cases on this subject since 2009, lawyer defendants successfully defeated, at the very outset of the case, malpractice suits based on supposed implied attorney-client relationships. For example, in Goldberg v. Fredericks & Gerardi Ins. Agency Inc., a one-time client sought to avoid his obligations under a commercial lease with a lawyer-landlord by arguing that the lawyer should have done more to protect the former client in the lease negotiations. But the former client had neither asked for nor received any actual assistance from the lawyer in the negotiations, and this, a panel of the Appeals Court agreed, precluded any such implied-relationship claim. Similarly, in Yeomans v. Stackpole, a trust beneficiary and co-trustee were barred by a superior court judge from suing a lawyer-trustee for malpractice, again because neither plaintiff actually sought or received any assistance from the lawyer. In Bayko v. Evans, the lawyer for a husband in a divorce proceeding admittedly agreed to represent the wife in certain joint dealings with creditors; but this, a superior court judge held, did not mean that the lawyer undertook a broad duty to protect the ex-wife’s interests, which remained fundamentally adverse to his client’s.  

In a series of other cases, beneficiaries of probate estates unsuccessfully sought to circumvent the general rule explained in the 2000 Supreme Judicial Court (SJC) decision Miller v. Mooney that estate beneficiaries are not implied clients of the testator’s lawyer.  

One of the two recent cases in which an implied-relationship claim was successful, Unger v. Lambert, involved the classic pattern of an unsophisticated client and a lawyer’s advantage-taking. The client received a $230,000 inheritance, and his lawyer persuaded him to invest the funds with the lawyer via a loan. When the lawyer failed to repay the loan, the client sued on various theories, including breach of fiduciary duties owed to a client. A jury found that the evidence established an implied attorney-client relationship as to the loan transaction, and a panel of the Appeals Court affirmed the resulting judgment, finding sufficient evidence both of the client’s request for the lawyer’s legal assistance on the matter of the loan, and implicit consent by the lawyer to provide it.  

In the other case bucking the overall trend, Max-Planck-Gesellschaft Zur Foerdern der Wissenschaften E.V. v. Wolf Greenfield & Sacks PC, the trial court rejected the defendant lawyers’ summary judgment argument that they had no implied attorney-client relationship with the plaintiff, though the issue was rendered moot when the court agreed, later in the same decision, that the lawyers were entitled to dismissal of the case based on the statute of limitations (see discussion below). The lawyers had originally been retained by one of two co-assignees of an invention, Client A, to work on prosecution of a patent application. The malpractice case involved a claim by the other co-assignee, Client B, that at some point a conflict had arisen between the co-assignees’ interests, and the law firm had improperly acted to steer the matter in favor of Client A. The lawyers argued that they never had an attorney-client relationship with Client B. But the court disagreed. It pointed to evidence of a series of actions by the lawyers indicating that they had implicitly taken on a joint representation: the law firm provided Client B with its legal opinion on the patentability of the invention; the lawyers submitted papers to the Patent and Trademark Office referring to themselves as both “Applicants’ Attorney”; and the lawyers sent confidential draft documents to Client B, responded to Client B’s requests for legal advice, and sought input from Client B on draft papers and comments on strategy.

B. Non-Clients  

A plaintiff with no express or implied attorney-client relationship with a lawyer-defendant usually may sue the lawyer only for something more egregious than mere legal error. Examples include intentionally (or in some circumstances negligently) making a representation of fact intended to induce the non-client to do something, or aiding and abetting a client’s breach of duty to the non-client.  

In our 2000 article, we commented on what appeared to be some inconsistency between two leading appellate decisions involving misrepresentation claims against lawyers by non-clients. In Kirkland Construction Co. v. James, the Appeals Court upheld a claim by a seller in a business deal that the buyer’s lawyer negligently misrepresented facts about his client’s financial condition. The court found that the obvious conflict between the parties’ interests, which often insulates a lawyer from any claim that he owes a legal duty to an opponent, did not bar the misrepresentation claim in that case. By contrast, five years later in Miller v. Mooney, the Supreme Judicial Court barred a claim by non-clients (the beneficiaries of a testator-client’s will) based on a factual misrepresentation by the lawyer for
the testator about the contents of the will. Without acknowledging or discussing Kirkland Construction, the SJC in Miller cited concerns about the “[c]omplex psychological demands on a client” in preparing a will, the “[c]onsiderable patience and compassion” required of an attorney engaged to perform the service, and the need not to “unduly burden[]” that delicate attorney-client relationship with the threat of outsider claims.

In the current period, the courts have continued to follow Miller v. Mooney not only by rejecting claims of estate beneficiaries that they should be considered implied clients of a testator’s attorney (as discussed above), but also by holding that beneficiary suits against testator’s counsel are impermissible as non-client claims. The non-client plaintiffs in two such cases in 2012 sought, unsuccessfully, to limit Miller to situations in which the beneficiary’s interests were actually in conflict with those of the testator-client, and to permit beneficiary suits against the testator’s counsel where the lawyer clearly failed to carry out the testator’s undisputed intent. A panel of the Appeals Court found no such distinction permissible. Another panel of the Appeals Court likewise rejected a more recent beneficiary claim for the same reason. On the other hand, in a 2014 federal case, Spinato v. Goldman, the judge acknowledged the conflict between Miller and Kirkland Construction, and declined to dismiss at the outset an estate heir’s claim of misrepresentation against the testator’s lawyer.

Further indications that Kirkland Construction may continue to give some non-clients a legal avenue to a claim — but that such claims will be closely scrutinized, especially where they involve core lawyer roles and sophisticated non-clients — are found in four other recent decisions.

The lawyer in Nova Assignments, Inc. v. Kunian conveyed to his client’s opponent in a collection dispute an offer by the client, who was seeking to avoid attachment of its assets, that in the event the assets were ever sold, the client would escrow part of the proceeds to cover the dispute. After the client failed to fulfill this promise, the Appeals Court, citing Kirkland Construction, upheld the opposing litigant’s right to assert a claim against the lawyer for negligently misrepresenting that the funds would be protected.

In Boston Property Exchange Transfer Co. v. Iantosca, the lawyer successfully prosecuted a commercial-litigation claim for his client (Company A) against a defendant (Company B), and obtained by judicial assignment the right to prosecute Company B’s broad rights against a third-party defendant (Company C). While pursuing the assigned claims against Company C, the lawyer made a strategic decision to narrow the scope of the claims in order to increase the chance of recovery. This resulted in a full recovery by his client, Company A, but only a limited recovery by Company B on its original broad third-party claim.

Company B sued the lawyer on the theory that even though he represented Company A, he had a duty not to surrender Company B’s broader rights. The court rejected the claim, holding that the obvious conflict of interests between Company A, which needed only the narrow victory to be made whole, and Company B, with its broader claim, precluded the lawyer’s having any duty to protect non-client Company B. (The case may be anomalous in that the problem for Company B presumably could have been avoided by asking the court, in crafting the original assignment, to ensure that Company B’s interests would be protected, rather than leaving its fate to decisionmaking by Company A and its lawyer.)

In Sgarzi v. Sharkansky LLP, a superior court judge dismissed a claim by former shareholders of a bankrupt lender that the entity’s lawyers aided and abetted a concededly fraudulent series of maneuvers designed to mask the lender’s unauthorized transactions and failing financial health. The court observed that the lawyers had given the lender correct advice about financial statement requirements and a potential sale of promissory notes — correct advice, which the client ignored — and represented the company in an investigation by the Securities and Exchange Commission. An “aiding and abetting” claim against a lawyer requires a showing that the lawyer knew the client was breaching a duty to someone else, and gave the client substantial assistance or encouragement in doing so. Here, however, the lawyers could owe no duty to the shareholders to ensure that the client company followed the lawyers’ advice. And merely continuing to represent a client who has engaged in fraudulent conduct does not constitute “substantial assistance or encouragement” to the client in the fraud itself, even where the representation allows the client to remain in business, “buys time” for the client in an investigation, and delays revelation of the fraud.

Finally, in Baker v. Wilmer Cutler Pickering Hale & Dorr LLP, the Appeals Court reinstated a lawsuit brought by minority shareholders in a closely held medical-technology company against lawyers for the company, holding that even though the shareholders had no contact with the lawyers and never relied on their advice or services, under the particular circumstances of the case — including the allegation of the secrecy of the lawyers’ involvement in helping to bypass a minority-protective operating agreement — the non-client shareholders had sufficiently made out claims of conspiracy and aiding and abetting breaches of shareholder fiduciary duties to survive a motion to dismiss.

16. Id. at 64.
22. Id. at 8, 9.
In some cases, a lawyer’s alleged misrepresentation to a client’s opposing party may be protected by the litigation privilege. In *Loltek-Jick v. O’Toole*, the plaintiffs sued a contractor and sought pre-judgment security. At a hearing, the contractor’s lawyer falsely represented that the contractor had more than $300,000 in two bank accounts. In a subsequent arbitration, the lawyer falsely represented that the contractor had complied with the terms of a preliminary injunction and still had more than $300,000 in the accounts. A superior court judge held that the statements were non-actionable because they were subject to the litigation privilege, applicable to all statements of a party, counsel or witness in the context of a lawsuit.

### III. Duties to Clients

While many of a lawyer’s duties to her actual clients are by now well defined in the cases, there remain areas of interesting uncertainty and ongoing development (see A–E).

#### A. Making Arguments

Can a litigation attorney be charged with malpractice for failing to make a plausible, but improbable, argument to a court? In the 2014 case *Minkina v. Frankl*, the Appeals Court held that employment litigators could not, as a matter of law, be held liable for failing to “advocate for or anticipate a substantial change in law requiring the overruling of a controlling precedent.”

The lawyers represented a doctor as plaintiff in an employment-discrimination claim against her former employer. The employer moved to compel arbitration, citing a provision in the client’s employment agreement that calling for arbitration of disputes “arising out of or relating to this Agreement,” including its “validity, breach or termination.” At the time, two decade-old appellate decisions favored arbitration of employment disputes. In one case, the Appeals Court had held that a discrimination claim similar to the client’s fell within a provision calling for arbitration of “any controversy arising out of the termination of employment.” In the other, the SJC had held that a statutory unfair business practices claim was covered by a provision mandating arbitration of disputes “arising out of or related to this subcontract.”

Finding these prior decisions controlling, a superior court judge sent the client’s discrimination case to arbitration, where the client was represented by successor counsel. She prevailed on her claim, and was awarded $266,000 in damages, fees and costs. Shortly after the award, the SJC ruled for the first time, in a 2009 decision, that an employment discrimination claim would not be subject to arbitration unless the governing employment agreement specifically said so.

The client sued her original lawyers for malpractice. She claimed that in opposing the employer’s motion to compel arbitration, the lawyers should have done more to distinguish the language of her arbitration clause from those at issue in the prior appellate decisions, and to urge a narrow reading of the client’s clause. The malpractice court regarded this as amounting to a contention that the lawyers should have anticipated the 2009 appellate decision effectively overruling the earlier arbitrability cases. The malpractice judge granted summary judgment for the law firm, and the Appeals Court affirmed, agreeing that such a claim was untenable as a matter of law: the lawyer could have no legal duty to make such a precedent-changing argument for his client.

At one level, the rule articulated in *Minkina* is unimpeachable. It cannot be that every time one appellate lawyer succeeds in convincing the courts to make a change in the common law, this means that every other lawyer before him who assumed the courts meant what they said and so decided not to argue otherwise thereby committed malpractice. Or to put the point another way: while the very nature of the common law is that it is constantly changing, lawyers are surely entitled to regard the great majority of clearly articulated common law rules as relatively fixed, and to analyze and argue their cases accordingly.

On the other hand, whether the “settled precedent” rule of *Minkina* actually fits the facts of the case is unclear. The 2009 decision of the SJC limiting the arbitrability of discrimination cases is more accurately characterized as *distinguishing* the court’s earlier precedent than direct overruling it. While the court undoubtedly announced a new rule on the subject, it did not actually need to “overturn” the earlier decisions to do so. And the client’s claim likewise seems to have focused on the possibility of distinguishing the earlier cases. To what extent the *Minkina* “settled precedent” rule leaves room for malpractice claims based on lawyers’ selection and formulation of arguments in the face of unfavorable case law will be worth revisiting in the future.

#### B. Prosecuting a Case

Another recent case raised the question whether a lawyer can commit malpractice merely by failing to move a litigation matter along with sufficient diligence. In *Tuong v. Pageau*, the client was a former criminal defendant who was imprisoned and wrongfully prosecuted for murder. A court ultimately suppressed her confession, and she was released. She brought a civil rights case against the City of Worcester, which in turn impleaded her lawyer as a third-party defendant, claiming that the lawyer’s own 23-month delay in filing the motion to suppress the confession contributed to the length of his client’s incarceration.

A federal district judge granted the lawyer’s motion to dismiss the third-party claim. The court found that such a delay, by itself, could not support a malpractice claim against the public defender. Allowing such a theory, in the court’s view, “would have a chilling effect on the administration of justice and would cause premature filings.” Furthermore, in this case the evidence showed that during the period of “delay” the public defender had in fact worked diligently to prepare the motion to suppress, including applying for funding to hire investigators and experts to support the motion.

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27. *Id.* at 283–84, 289.

28. *Id.* at 283–84.

29. *Id.* at 286–89.


32. *Id.* at *1, *4, *5.
C. Malpractice and Ethics

How do a lawyer’s duties to her client relate to her ethical duties under the rules of professional conduct? It has long been clear that a lawyer’s violation of an ethical rule does not by itself provide a basis for a malpractice claim. As with other statutes and regulations, however, an ethical rule designed to protect someone in the position of the client in a malpractice case may be offered as evidence of what standards of care governed the lawyer’s conduct.33 The ethical rule must be relevant, of course: it cannot be enough, for example, to show that a lawyer was in a technical conflict-of-interest position unless there is a basis for claiming that the conflict itself contributed to his acting negligently or unfaithfully — by favoring one conflicting interest over those of the client — and thereby causing the client harm.34

In Maling v. Finnegan, Henderson, Farabow, Garrett & Dunner LLP, the SJC entered the complex field of “subject-matter conflicts” for patent lawyers — that is, situations in which the ethical rules governing conflicts of interest prohibit simultaneously assisting two clients to obtain patent protection for similar and competing technologies. The law firm in Maling represented two patent clients who were involved in manufacturing “screwless” eyeglasses. One of the clients, Maling, invested heavily in developing his invention, only to learn that the other client’s established patent rights — obtained for the other client by different lawyers in another office of the defendant law firm — greatly limited the value of his invention. Maling sued on the theory that because of the technical conflict of interests (there was no evidence that either set of lawyers knew of or was influenced by the activities of the other), the law firm was somehow to blame for the lost value of his technology.35

A superior court judge dismissed the complaint for failure to state a claim, and the SJC upheld the dismissal. Focusing on the threshold question of whether the firm’s representation of the two clients was an “actionable” conflict of interest, the SJC held that Maling failed to allege a sufficient overlap between the two clients’ inventions such that the law firm should have perceived a conflict. Nor was there any sufficient allegation that the firm’s representation of either client was materially limited by the conflict. The decision leaves open important questions about how a law firm can construct a practical and effective system for identifying and vetting potential “technology” or “subject-matter” conflicts.36

In Holland v. Kwiat, a lawyer used materials from a criminal case he had handled as part of a continuing legal education (CLE) course. In particular, he included the course materials unredacted documents identifying the client and describing his history of drug and alcohol abuse. The client sued for malpractice. A superior court judge granted the lawyer’s motion for summary judgment, holding that whatever the ethical propriety of the lawyer’s conduct (favoring his interest in the CLE program over the client’s privacy interest), the client could not show that it amounted to malpractice resulting in a cognizable harm to the client’s interests. A panel of the Appeals Court affirmed.37

D. Chapter 93A

When may an attorney be held liable for violating Chapter 93A? It is settled that an attorney’s malpractice, standing alone, is not an unfair or deceptive practice that would support a claim under the statute.38 More fundamentally, it has remained unclear whether an attorney-client relationship is in all respects the sort of “business context” that can give rise to a claim under the statute — as opposed to a more private setting “not intended to influence an external marketplace,” of the sort not typically governed by Chapter 93A.39

It is certain that in some areas — for example, matters of fees and billing — the statute applies. In Karatasavas v. Gargano, a superior court judge found an attorney willfully in violation of Chapter 93A, and imposed treble damages, for charging his client an excessive, nonrefundable retainer and threatening to withdraw from the case unless the client paid him additional fees.40 Likewise, in Long Bay Management Co. Inc. v. Haese LLC, a superior court judge found defendant law firm in violation of Chapter 93A, and trebled the damages, for overbilling and fabricating billing entries.41

In a third case, Macpherson v. Marano, a judge held that the lawyer’s negligence in meeting discovery obligations in an underlying personal-injury case was so “blatant” that it constituted a violation of the lawyer’s ethical duty of competence, and therefore also a violation of Chapter 93A.42 In another matter, Emanouil Enterprises LLC v. Alphen, an Appeals Court panel accepted a client’s claim that his attorney violated Chapter 93A by advising him about an acquisition of property while at the same time serving on a town council.43

36. Id. at 336, 340-41, 346, 349.
39. See 2011 ARTICLE, supra n.1, at 325.
42. Macpherson, No. NOCV201001986, 2014 WL 6854502, *5 (Mass. Super. Ct.) (Brady, J.). A jury later awarded $750,000 in malpractice damages against the same lawyer, to which the trial judge added $450,000 in compensatory and punitive damages under Chapter 93A. In Re Marano, 568 B. R. 723, 728 (D. Mass. 2017). The lawyer filed for bankruptcy, and in 2017 a federal bankruptcy judge held that the entire judgment in the malpractice case — including the Chapter 93A award — was dischargeable under bankruptcy law. Id. at 728-31. Although the lawyer had engaged in willful and knowing misconduct, he did not thereby obtain any money or property, nor was he acting in a “fiduciary capacity” within the limited meaning of bankruptcy law. Id. at 729-31.
committee that was recommending purchase of the same property by the town — although, as discussed below, the panel also upheld dismissal of the claim for lack of causation.\footnote{43. {Emanouil Enterprises}, No. 15-P-1600, 2012 WL 2912758, *1-2 (Mass. App. Ct.) (Rule 1:28 order), discussed below for its treatment of a statute of limitations issue, the Appeals Court also rejected the former clients’ claim that they were so-called “Section 11” business plaintiffs and thus were relieved of the obligation to present a demand letter before filing suit. While the lawyer had represented the clients and others in the formation of a business, the specific subject of the malpractice claim was a promissory note and a mortgage the clients had been required to give on their residence, and this they did “as private individuals.” \textit{Id}. at *3.}

In \textit{Baker v. Wilmer Cutler Pickering Hale & Dorr LLP}, discussed above on the subject of potential duties to non-clients, the Appeals Court overturned the outright dismissal of a complaint by minority shareholders charging company lawyers with participating in a scheme to bypass their rights — and in so doing allowed the plaintiffs to proceed on a claim under Chapter 93A. The court acknowledged that the applicability of the statute in the context of an ostensibly private intracompany dispute was a “novel and close question” — but it was one, the court said, that could not be resolved in favor of the lawyers at the pleadings stage.\footnote{44. \textit{Baker}, 91 Mass. App. Ct. at 835, 837, 849, 850.}

\textbf{E. Wrongful Death}

May an attorney be held liable under the Massachusetts wrongful-death statute where his malpractice can be linked to his client’s death? This was the startling question before a superior court judge in the 2014 case \textit{Mietkiewicz v. Galliher}. The lawyers drafted a healthcare proxy that empowered a grandnephew of their elderly client to act as her medical decisionmaker. A back surgery was performed with the grandnephew’s approval. Another relative, who was himself a physician, petitioned the probate court to remove the grandnephew and install the physician-relative as the aunt’s guardian. When she died seven months following the surgery, from what her death record listed as “multisystem failure,” the physician became executor of the estate. He sued the lawyers under Massachusetts’s wrongful-death statute, claiming that the surgery was ill-advised, that it probably shortened the aunt’s life, and that the surgery would not have occurred but for the lawyers’ facilitation of the grandnephew’s appointment as proxy.\footnote{45. \textit{Mietkiewicz}, No. WOCV201100616, 2014 WL 860153, *1-2 (Mass. Super. Ct.) (Kenton-Walker, J.).}

The lawyers’ conduct was negligent, the executor claimed, because they knew or should have known that (as the probate court later found) the aunt was incompetent at the time she gave the proxy, and because the lawyers knew or should have known that once appointed the grandnephew might act other than in the aunt’s best interests. It was revealed that the lawyers had at the same time been representing the grandnephew in a personal bankruptcy proceeding, and had been asked to draft an amendment to the aunt’s will, putting the lawyers in a position to foresee that if appointed the grandnephew might assent to a medical procedure that was not in the aunt’s best interest and would lead to her death.\footnote{46. \textit{Id}. at *4-5.}

After the court’s decision, the case was resolved, and dismissed without appeal. In the authors’ view, it is very doubtful that the theory advanced in \textit{Mietkiewicz} should have any application outside the specific facts of that case.

\textbf{IV. CAUSATION}

Causation is perhaps the most difficult element of a legal malpractice case for a plaintiff to prove. This is at least in part because lawyers operate in a system of rules and institutions that often limit or override the effect of what a lawyer does. As we have discussed in prior articles, Massachusetts has adopted a number of mainstream causation principles applicable to legal malpractice cases.\footnote{47. \textit{See, e.g.}, 2011 ARTICLE, supra n.1, at 326-28.}

\textbf{A. Litigation Matters: The “Trial-Within-A-Trial”}

In a case brought by a client who was a party in an underlying litigation matter, the client may claim that his lawyer’s malpractice cost him a victory — or at least, a probable better result — in the litigation. In such a case, the client must establish his right to such a better result through a “trial-within-a-trial” — that is, a procedure in which the underlying case is retried as part of the malpractice case. The purpose of the trial-within-a-trial is to help assess “but-for” causation — that is, to show the extent to which the result in the original litigation may not have represented the true “value” of the client’s claim or defense, and to show whether, with different lawyering, the claim or defense produced a better outcome. The procedure does not determine proximate cause — that is, whether in a meaningful sense the reason for the difference of outcomes in the two trials was the lawyer’s negligence. This requires expert testimony.\footnote{48. \textit{Id}. at the same time, expert testimony purporting to vouch for the merits of the client’s underlying claim or defense is no substitute for the trial-within-a-trial, and indeed should be inadmissible.\footnote{49. 2011 ARTICLE, supra n.1, at 327.}}

In \textit{Minkina v. Frankel}, discussed above, the trial court and Appeals Court agreed that even aside from the problems with the client’s theory that her lawyer in the underlying employment discrimination suit should have argued against precedent to save her case from arbitration, her causation case was also fatally flawed. The client offered an expert to opine that if she had been able to present her discrimination claim to a jury rather than to an arbitrator, she
would have recovered more in compensatory damages and would have had a better chance of recovering punitive damages. The courts rejected this proposed expert testimony as speculative.\(^{51}\)

When a malpractice court conducts a trial-within-a-trial, all disputed factual issues from the underlying case are resolved anew by the factfinder in the malpractice case. Issues that required (or would have required) expert testimony in the previous case require expert testimony in the trial-within-a-trial. Issues of law, and issues as to how a court would have exercised its discretion in the underlying case, are decided by the court in the malpractice case.\(^{52}\)

Allocation of burdens of proof in the trial-within-a-trial is sometimes, but not always, straightforward. If the client was the plaintiff in the underlying case, and the disputed causation issue is whether he would have obtained a more favorable judgment if the case had been properly handled, then the client bears the same burden in the trial-within-a-trial as he did as the plaintiff in the underlying case. If the client was the defendant in the underlying case, bore no burden of proof on any disputed issue, and suffered an adverse judgment, and if the lawyer contends in the malpractice case that her handling of the matter made no difference because the client had no defense and would have lost no matter what the lawyer did, then the lawyer takes on the role and burdens of the underlying plaintiff. Still further, however, if the attorney for a former defendant contests the malpractice case on a different basis — for example, if he agrees that the client suffered an unjust result, but argues that judicial or jury error was the cause, or if the underlying case resulted in a settlement — then it makes no sense, and is inconsistent with the normal allocation of burdens of proof, to require the attorney to somehow “prove the negative” that the result would have been the same regardless of his actions.

In \textit{Mulcahy v. Sullivan}, the lawyer (Attorney B) advised the client that in order to free up certain trust funds, the client should pay a fee demanded by a prior attorney whom the client had fired, Attorney A, with the understanding that, if necessary, the client could later litigate Attorney A’s entitlement to the fee. But the client’s right to retroactively challenge Attorney A’s fee was not properly preserved, and after his eventual suit against Attorney A was dismissed (on grounds of “accord and satisfaction”), the client sued Attorney B for mishandling the issue and sought to recover the difference between what he paid Attorney A and what he claimed the attorney should have been paid. The Appellate Division of the Massachusetts District Court held that in the malpractice case, Attorney B, not the client, should bear the burden of proving the amount of the fee to which Attorney A was entitled. This allocation of burdens, the court believed, would properly align the parties’ positions with those of the parties to the fee dispute, since if that case had gone forward, Attorney A, not the client, would have borne the burden of proof.\(^{53}\)

### B. Independent Defects in Client’s Position

It remains the rule in Massachusetts that a legal, factual or procedural defect in the client’s underlying legal position, independent of the lawyer’s alleged malpractice, will preclude him as a matter of law from proceeding to a trial-within-a-trial designed to show that the lawyer is to blame for an adverse result.\(^{54}\) In \textit{Foley v. Grosack}, the client sued a lawyer whom he had hired to sue his ex-wife for defamation. The court dismissed the complaint, holding that whatever the lawyer’s lack of zeal in prosecuting the defamation claim, the client failed to identify sufficient admissible evidence to have supported such a claim, without which he could not proceed.\(^{55}\) In \textit{Smith v. Delahun}, the client was a dentist who faced disciplinary action. The lawyers advised her to voluntarily surrender her license pending the outcome of the proceeding, and she did so. The board’s investigation took longer than expected, and the client eventually retained new counsel to seek reinstatement of her license pending the outcome. The board denied the request, and eventually determined that discipline was warranted; the client then agreed to suspension of her license retroactive to the date of voluntary surrender. When she sued the former attorneys who had advised her to surrender her license, the court held that under the circumstances there was no way for the client to show that she would have obtained a better result with different advice about the original voluntary surrender.\(^{56}\)

Similar causation principles apply to malpractice claims arising in transactional settings. In \textit{Scallon v. Dukes}, the client alleged that the lawyers incorrectly advised him about selection of property for a capital gains tax deferral. But the record made clear that the client had not contacted the lawyers until after a deadline for making the selection. Therefore, the court held, there could be no causal connection between the lawyers’ advice and the loss of the deferral opportunity.\(^{57}\) Likewise, in \textit{Shaikh v. Mintz, Levin, Ferris, Cohn, Glovsky & Popeo PC}, the client alleged that his lawyers were negligent in handling his right of first refusal under a realty trust. But the client retained the attorneys too late — over a year after the right of first refusal had expired according to the trust documents. Therefore, the court reasoned, the obstacle to the client’s underlying right was his own delay in seeking advice.\(^{58}\) In \textit{Haag v. Burns & Levinson LLP}, the client sued her tax lawyers for failing to advise her to file

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52. \textit{See, e.g.}, \textit{Vermont Pure Holdings Ltd. v. Berry}, No. 061814-BLS1, 2010 WL 1665258 (Mass. Super. Ct.) (Hinkle, J.) (holding after trial-within-a-trial that reasonable judge would have approved class action settlement and thereby satisfying plaintiff’s burden on causation).


54. 2000 ARTICLE, supra n.1, at 15.


for “innocent spouse” status under the Internal Revenue Code, after the Internal Revenue Service began investigating her tax returns due to her husband’s use of a shell corporation. The trial court granted the lawyers summary judgment on the basis that the client could not prove but-for causation, because she would not have qualified for “innocent spouse” status even if the lawyers had advised her to claim it.\(^{59}\)

A litigation client’s failure to exhaust available remedies in the original lawsuit matter may similarly prevent him from proving causation in a subsequent malpractice case. In Reed v. Mablowitz, the Appeals Court upheld a trial court’s grant of summary judgment dismissing a claim by a divorce client that the lawyer negligently advised him to negotiate an issue with his ex-wife before filing a complaint for modification. The client alleged that the delay in obtaining modification caused him economic harm, but the court observed that it had been open to the client to ask that the modification be made retroactive, and his failure to pursue this now-foreclosed option precluded him as a matter of law from drawing a causal link between the lawyer’s advice and the alleged harm.\(^{60}\)

Similarly, in the 2017 case Labey v. Aiken & Aiken PC, the Appeals Court affirmed dismissal of a malpractice suit based on the lawyer’s failure to make a timely presentment to preserve a tort claim against a town. The court agreed that the client had subsequently failed to advance a viable alternative argument about the presentment issue, and this precluded as a matter of law any finding that the lawyer’s conduct caused the client’s alleged harm.\(^{61}\)

Just as obvious defects in the client’s underlying claim or right can doom a malpractice claim, it is possible that a client’s claim might be so obviously valid as to warrant judgment for the client as a matter of law in the malpractice case. In Global NAPs Inc. v. Awiszus, the client, a telecommunications company, sued two law firms who represented the company at trial and on appeal in an underlying employment discrimination matter. The client charged that the lawyers failed to timely file a notice of appeal after an adverse verdict. On cross-motions for summary judgment, the malpractice court ruled in favor of the lawyers on causation, reasoning that the client had no reasonable expectation of success in its appeal. The SJC reversed, holding that in fact the client’s interpretation of the relevant statute was correct, and thus it would have prevailed on appeal. Further, the court held, since there was no dispute as to the standard of care or the lawyers’ deviation from it, this necessitated summary judgment for the client on its malpractice claim.\(^{62}\)

C. Judicial Error

An attorney is not his client’s insurer or guarantor; his duty is to perform his work competently, not to assure that the client succeeds in every matter the attorney touches. This limitation is perhaps nowhere more important than in the context of litigation. A lawsuit is inherently fraught with uncertainties, in large part due to the multiple important roles played in the litigation process by human participants. In giving advice about the prospects of success in potential litigation, and in steering a lawsuit toward a desired outcome, the lawyer must at all times be governed by a standard of what is professionally reasonable, and not assigned in hindsight responsibility for delivering a particular result.\(^{63}\)

Cases in Massachusetts and elsewhere have held that a litigation attorney cannot be held liable for malpractice where a client suffers a loss that is fundamentally attributable to “judicial error” — an error by a judicial officer in misunderstanding or misapplying the relevant law, or by a factfinder in rationally assessing the evidence, which for reasons beyond the lawyer’s control, were not corrected through the normal appellate process.\(^{64}\)

The subject of judicial error arose again recently in Kiribati Seafood Co. v. Dechert LLP, and produced a startling decision in which the SJC not only reversed a summary-judgment ruling in favor of the defendant lawyers based on underlying judicial error, but found the lawyers liable for the outcome of the underlying case as a matter of law, and directed that the malpractice case proceed to an assessment of damages.\(^{65}\)

The decision is perhaps best understood as driven by the case’s rather atypical facts. The lawyer defendants were French litigators who represented their client, Kiribati, in a lawsuit brought in Tahiti over damage to a Kiribati fishing boat. Lloyd’s of London insured the vessel, and paid Kiribati benefits under its policy of $1.76 million, after which Lloyd’s joined, as subrogee co-plaintiff, in Kiribati’s lawsuit against the port authority and related parties who were responsible for the damage. Later, as part of a settlement of various collateral disputes between Kiribati and Lloyd’s, the insurer assigned back to Kiribati the subrogated rights deriving from the $1.76 million insurance payment, and Lloyd’s withdrew from the case.\(^{66}\)

Kiribati then proceeded as sole plaintiff in the Tahitian suit, won


63. See, e.g., Coastal Orthopaedic Institute, P.C. v. Bongiorno, 61 Mass. App. Ct. 55, 59 (2004) (“An attorney’s legal opinion as to the prospects of litigation success or the risks of liability must adhere to” general reasonableness standards, “but in the final analysis, any such opinion concerning the merits of the affirmative case, or the defendability of the defense case, is not to be measured by perfection in predictability of outcome, nor by infallibility in opinion determination.”).

64. See Time Terminals, Inc. v. Egan, Flanagan & Cohen, P.C., supra n. 38, 2011 WL 7069275, *1 (Mass. App. Ct.) (Rule 1:28 order) (malpractice claim barred where order temporarily precluding litigant from prosecuting one of its claims was result of judicial error); New Hampshire Ins. Co. v. Madan & Madan, No. 953824, 2000 WL 230350, *4 (Mass. Super. Ct.) (Hinkle, J.) (lawyers’ non-inclusion, in release obtained for trustee clients, of separate language releasing clients in their “individual capacities” could not be basis for malpractice claim; distinction was legally meaningless, and housing court’s refusal to enforce release was judicial error).


66. See id. at 112-13. The authors obtained copies of the briefs and record appendix in the Kiribati Seafood case, and some of the facts recounted here are taken from our reading of the record rather than solely from the SJC’s decision.
the case, and was awarded its full damages, including the $1.76 million initially covered by Lloyd’s. But a reviewing court decided, at the urging of the port authority, that the governing French law’s view of insurance payments (they generally reduce a plaintiff’s potential recovery, by contrast with our “collateral source rule”) and concern over possible “double recovery” required further scrutiny of the settlement agreement between Kiribati and Lloyd’s six years earlier. In a cryptic interim order, the Tahitian court said that while it considered Lloyd’s assignment of its rights back to Kiribati to be valid, it thought the defendant port authority might still be entitled to a “deduction” from damages depending on the amount Kiribati had “paid” to Lloyd’s for re-transfer of the subrogated rights. The court therefore “invited [Kiribati] to disclose the amount” that it had paid to Lloyd’s in the settlement of the insurance dispute.67

This was not a simple matter. The consideration for the settlement had included Kiribati’s waiver of a contention that Lloyd’s was not paying its agreed-upon portion of ongoing fees for shared counsel in the vessel-damage case. The consideration had also included Kiribati’s waiver of potential claims against Lloyd’s for breaching duties assertedly owed under the governing insurance contract. In their response to the Tahitian court’s interim order, Kiribati’s lawyers sought to explain this to the court, and offered in evidence documents stating the amount of underpaid shared-counsel fees that had been at issue, and referring to Kiribati’s waiver of potential claims against Lloyd’s.68

But the defendant port authority argued to the Tahitian court that this proof was insufficient without further evidence of what amount of disputed counsel fees Kiribati had in fact ultimately paid, and evidence that Kiribati had in fact asserted and then given up real claims against Lloyd’s based on its handling of the matter.69

In a brief passage of a lengthy second decision addressing numerous other issues, the Tahitian court agreed with the port authority, held that the amount of consideration actually paid for the re-transfer of Lloyd’s subrogation rights to Kiribati had not been “established,” and concluded that under these circumstances the entire $1.76 million originally received by Kiribati from Lloyd’s should be deducted from the damages awarded against the port authority. Kiribati subsequently decided for various reasons not to appeal this ruling.70

In the ensuing Massachusetts malpractice case, Kiribati claimed that the French lawyers were negligent in omitting from their submission to the Tahitian court, after the interim order, additional documents the lawyers had been given on the subject of the settlement with Lloyd’s. If those documents had been presented, Kiribati claimed, they would have eliminated the court’s concern about double recovery and thus removed any obstacle to Kiribati’s recovering the $1.76 million.71

The lawyers moved for summary judgment. They argued that as a matter of clear French law, once the Tahitian court determined (as it did) that Lloyd’s re-transfer of its subrogation rights to Kiribati was a legally valid transaction, any issue of possible double recovery or unjust enrichment was categorically eliminated from the case, because Kiribati had “purchased back” the rights to the $1.76 million claim, by giving to Lloyd’s what the insurer must have regarded as equivalent in value. Likewise, once the re-transfer of rights to Kiribati was found valid, any exercise in second-guessing the value of the consideration given to Lloyd’s was inappropriate and immaterial. Thus, the lawyers argued, it was erroneous as a matter of law for the Tahitian court to deduct the $1.76 million, and to justify the deduction on a supposed gap in the evidence presented by Kiribati’s lawyers. And this judicial error precluded any malpractice finding against the lawyers.72

A superior court judge agreed, and granted summary judgment for the lawyers. But the SJC reversed. The court framed the central issue as one of causation: whether a putative error by the Tahitian court in accepting the defendant’s argument about double recovery should be regarded as a “superseding cause” of the harm to Kiribati in being denied the $1.76 million recovery, such that the harm could not be tied to any assumed malpractice of the lawyers in failing to submit the additional documents. The SJC held that under the circumstances any error of the Tahitian court was at most a “concurring cause” of the result, and did not insulate the lawyers from liability. Moreover, because the SJC regarded it as clear now, and foreseeable at the time — that the additional documents would have caused the Tahitian court to rule in Kiribati’s favor (but see fn. 71), the court saw no alternative but to conclude, as a matter of law, that failing to submit the documents was indeed negligent and both a but-for and legal cause of the outcome of the case.73

There are a number of steps in the SJC’s analysis in Kiribati that would, if understood as considered statements of broader principle, be subject to criticism as diverging from understood tenets of legal duty and causation in tort law generally, and in the area of legal malpractice. On the issue of “judicial error” in particular, the court goes beyond the reach of the non-Massachusetts decisions on which it relies, and does not attempt to reconcile its analysis with existing Massachusetts doctrine.74

The decision may be better understood as the product of reasoning particular to the factual record of the case before the court — simply put, that: (i) there appears to have been an opportunity for success available to the French lawyers by taking one additional step; (ii) whether or not the additional step should have been necessary (or indeed made any legal sense), the Tahitian court was asking the lawyers to take it, and there was no apparent reason for them not to; and (iii) under such circumstances a lawyer should not be permitted simply to refuse a court’s invitation, without offering any explanation for doing so, and then later avoid malpractice responsibility for the result by arguing that the invitation itself was erroneous.

67. See id. at 111-14.
68. See id. at 112-15.
69. See id.
70. See id.
71. See id. While the way the case was presented to the SJC meant that it was taken as given that the “missing evidence” was responsive to the Tahitian court's inquiry, is not clear from the authors’ examination of the record what exactly the additional evidence was, what additional facts it was legally sufficient to prove, or how exactly those additional facts would have altered the outcome of the case for Kiribati.
72. See id.
73. See id. at 119-21, 124.
74. See id. at 120-21.
D. Lost Settlement/Transactional Opportunities

A client suing a lawyer over a bad result in litigation may avoid the “trial-within-a-trial” requirement if, rather than claiming that the trial outcome of the underlying case would have been better absent the attorney’s malpractice, the client claims that better handling by the attorney would have produced an advantageous (or more advantageous) settlement. In such a “lost settlement opportunity” case, the malpractice damages are measured as the difference between the result — the actual judgment or settlement — obtained by the client and the result — the hypothetical settlement, or better settlement — that he demonstrates he would have obtained with proper lawyering. Similarly, a client who claims that his attorney mishandled a transactional matter may contend that the resulting harm was the loss of an opportunity to close the transaction — or to close it on more favorable terms — and the measure of damages is likewise the difference between the actual result and the hypothetical result that would have been achieved if not for the legal malpractice.

A host of issues arise in such cases. For example, does the client in such a case have to show that he had a substantively good case? Or merely that, as a practical matter, he had (or would have had) a chance at making a settlement “deal”? In a case where the underlying matter resulted in a ruling against the client, it makes sense to preclude the client from claiming that he nonetheless could probably have convinced the other side to settle. And more generally, a client should be required to prove that his claim or defense had objective “settlement value” in the sense of legal and factual merit, not just market opportunity.

In Chang v. Winklevoss, the client was a former business partner of the Winklevoss brothers in their attempts to establish a competitor to Facebook, and was involved as a witness (though not a party) in eventual litigation between Facebook and the Winklevosses. After the latter settled the dispute and received a substantial number of Facebook shares, the client sued both the Winklevosses and his lawyer over the fact that he was excluded from the deal. A superior court judge dismissed the malpractice claim, holding that the client failed to allege sufficient facts to show that he had a plausible basis for participating in the settlement, without which he could show no valid loss of an opportunity to do so.

A lost-settlement-opportunity claim requires (and, notwithstanding the inherently speculative nature of such testimony, permits) testimony by the client that but for the lawyer’s malpractice, he would have been willing to settle the case for a specific alternative amount. If the client concedes he does not know how much or how little he would ultimately have accepted in settlement, this precludes a fact-finder from rationally concluding that a settlement would have occurred for a particular amount. Further, where actual negotiations occurred in the underlying matter, and the client demonstrated intransigence, this should usually bar recovery under a lost-settlement-opportunity theory as a matter of law.

In Krepps v. Wolf, Block, Schorr & Solis-Cohen LLP, the lawyers allegedly guaranteed their client company, which sold educational software, that it would prevail as the plaintiff in a contract case against a French business school and an affiliated company. The client turned down a $500,000 settlement offer, and instead proceeded to trial, where the jury awarded judgment only against one defendant, for half of the damages sought. The owner of the company then sued the lawyers, claiming that they failed to inform him of risks that the claim would not succeed, including the existence of adverse case law. These negligent acts, the owner alleged, caused him to turn down the $500,000 settlement offer. The superior court granted judgment as a matter of law for the lawyers, and the Appeals Court affirmed, citing among other things evidence that the lawyers actually recommended the settlement, as well as the owner’s failure to offer expert testimony tying the loss of the settlement opportunity to the attorney’s advice.

Since any successful settlement obviously requires willing participation by both parties to a dispute, most courts also sensibly require that a lost-settlement-opportunity plaintiff prove not just that under different circumstances he would have been amenable to settlement, but also that the putative settlement would in fact have occurred. This is often done with one or both of the following: (a) evidence, in the form of testimony by the client’s former opponent or otherwise, that the opponent would in fact have agreed to the terms of the hypothetical settlement on which the lost settlement would have been achieved if not for the legal malpractice.

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75. See 2011 ARTICLE, supra n.1, at 328.
79. See 2011 ARTICLE, supra n.1, at 328.
80. Id.
83. See 2011 ARTICLE, supra n.1, at 328.
opportunity claim is based; and (b) some “objective” evidence — typically through expert testimony — as to the “reasonable settlement value” of the matter. 84

Expert testimony alone is insufficient to establish that in an underlying case where no settlement opportunity ever arose, such an opportunity would have existed but for the lawyer’s negligence. In Lavina v. Satin, a client sued the lawyer who had represented her as plaintiff in an underlying medical malpractice case that was dismissed at summary judgment. The legal malpractice judge accepted as admissible the proposed testimony of the client’s expert as to the applicable standard of care and the lawyer’s deviation from it. But the court found inadmissible — and fatally so for the client’s case — the expert’s testimony that but for the malpractice, the defendant doctor’s “insurance company would likely have settled the case for between $1 million and $3.75 million.” 85

The expert cited as suggestive the fact that, as of the time of the summary judgment hearing in the underlying case, the doctor had identified no expert witness. But “the uncontradicted evidence,” the court observed, was that the doctor’s counsel “had engaged consulting experts,” and intended to “defer disclosure of his testifying experts until the close of discovery,” which had not yet occurred. Further, the proposed expert’s opinion as to the likely settlement value of the case “does not rest upon any analytical foundation disclosed by the expert. She “cites to a selective compilation of jury verdicts and settlements in cases involving below-the-knee amputations,” but that compilation “had been assembled by the plaintiff’s trial counsel on a non-comprehensive basis, and [the expert] herself acknowledged during deposition that she had virtually no personal familiarity with either its substance or the methodology underlying its creation.” Moreover, “the imprecision of [the expert’s] expansive range alone suggests speculativeness.” And finally, “Dr. King’s actual insurance coverage in this case was limited to $1 million per range alone suggests speculativeness.” And finally, “Dr. King’s actual insurance coverage in this case was limited to $1 million per range alone suggests speculativeness.”


88. 2011 ARTICLE, supra n.1, at 328.

89. Global NAP’s Inc. v. Awiszus, 457 Mass. 489 (2010), discussed supra (no expert testimony required to show that failure to appeal breached standard of care, and indeed did so as a matter of law, entitling client to summary judgment in its favor on malpractice claim).


• In Sheffer v. McDonough, the panel held that expert testimony was needed even in a case involving a missed statute of limitations, where computing the statutory period was “not a mechanical exercise” and a jury would have to understand in detail how the computation should have been done.92

• In Breyan v. Shagory, the panel held that expert testimony was required both to show that the breakdown in communications between lawyer and client amounted to breach of a standard of care, and to show a causal connection between the breakdown and the result in the underlying divorce case.93

• In Hadad v. Decristofaro, the panel agreed with the trial judge that expert testimony was required to show that the lawyers’ alleged failure to introduce exhibits at trial fell below the standard of care.94

• In Krepp v. Wolf, Block, Schorr & Solis-Cohen LLP, discussed above, the panel affirmed summary judgment for the defendant lawyer based, inter alia, on the client’s failure to offer expert testimony tying the supposed loss of a settlement opportunity to the lawyer’s advice.95

• In Truran v. Beauregard, the panel rejected the former client’s blunt claim that no expert was needed because the lawyer “failed to do anything at all to defend them” in the underlying case. The record made clear that this was hyperbole — the lawyer took a number of steps to defend the case — and without expert assistance a malpractice jury would have no way to assess whether the lawyer’s handling of the matter fell below the standard of care, or whether the outcome would have been different with proper handling.96

VI. DAMAGES

A. Open Contingencies and Cognizable Harm

Parties to malpractice cases often clash over whether, at the time the malpractice suit is brought, the client has suffered a cognizable harm on which he may base a claim against the lawyer. In circumstances where the client still has remaining available procedural means to avoid harm in the original transaction or litigation, this may render a malpractice claim untenable. In Greenwald v. Burns & Levinson LLP, the court observed that whatever the merits of the plaintiff's divorce client’s claim that his lawyer was responsible for his ex-wife’s failure to properly disclose her inheritance rights under Belgian law, since the couple’s agreement preserved the client’s right to seek recovery from the ex-wife if and when she got the disputed inheritance, the putative malpractice did not result in any cognizable loss.97

By contrast, in Brissette v. Ryan, the Appeals Court rejected the defendant lawyer’s argument that his client suffered no cognizable harm after he advised her to transfer title in her property to her children without retaining a life estate. The lawyer pointed out that the children had formally agreed to allow their mother to live on the property for the rest of her life. But the court found sufficient legal difference between such a license to reside and a life estate to provide a basis for seeking damages against the lawyer.98 Similarly, in Ascher v. Duggan, a federal judge declined to dismiss a malpractice case brought by a client who was himself a suspended attorney against a lawyer who had advised him about how he might earn a living during his suspension. The client alleged that on the lawyer’s advice he had practiced as a paralegal while suspended, and thereby likely harmed his chances of reinstatement. The judge found this a sufficient allegation of cognizable harm on which to base the malpractice claim.99

B. Attorneys’ Fees as a Component of Damages

A client may, in addition or as an alternative to compensatory damages, seek to have the defendant lawyer disgorge a portion of the hourly fees he collected from the client in the underlying matter, if the client can show that with proper lawyering he would not have incurred the fees. In one case discussed in an earlier article, Shimer v. Foley Hoag & Eliot LLP, the SJC held that the client’s claim (based on a lost-settlement-opportunity theory) properly included a claim that the settlement would have resulted in a savings of legal fees paid to the defendant lawyers.100 In another older case, Coastal Orthopaedic Institute PC v. Bongiorno, however, the Appeals Court emphasized that the client must offer sufficient evidence that the need to incur the fees “was proximately caused by the alleged act of malpractice.” The client in Coastal Orthopaedic failed to meet its burden as a matter of law, the court held, to the extent the fees were incurred before the conduct — failure to communicate a settlement offer — from which the malpractice claim arose.101

In the current period, in Emanouil Enterprises LLC v. Alphen, the Appeals Court again rejected a claim for return of fees, where the client failed to differentiate between fees resulting from the malpractice and fees he would have incurred in any event.102 In this sense the applicable rules are the same as those governing a claim for “cost of mitigation” damages — for example, legal fees and expenses incurred with successor counsel in an effort to correct the defendant’s error. The trial judge in Max-Planck-Gesellschaft Zur Foerderung der Wissenschaften E.V. v. Wolf Greenfield & Sacks PC agreed with the defendant lawyers that the plaintiff’s recoverable damages would be limited to such mitigation-cost damages.103

A related issue arises in cases where the defendant lawyer handled the underlying litigation on a contingent fee basis. In the 1987 First Circuit case, Moores v. Greenberg, a client sued his lawyer for loss of

a settlement opportunity in a plaintiff’s personal-injury action. The
malpractice court (applying Maine law) instructed the jury that if it
awarded damages based on the amount of the lost settlement, it
should deduct from the gross settlement amount the amount of the
contingent fee the plaintiff would have had to pay to the defendant
lawyer if the underlying case had settled; that is, the client could
only recover in the malpractice case the net amount he would have
received from the settlement given his fee agreement with the de-
fendant lawyer. The First Circuit agreed that the jury instruction
was proper: the client was only entitled, the court reasoned, to the
damages necessary to put him into the position he would have been
in absent the lawyer’s negligence. The court rejected the argument,
accepted in some jurisdictions, that allowing such offsets in effect
rewards the negligent lawyer by giving him the benefit of a fee for
his negligent work.\footnote{Moores, 834 F.2d 1105, 1106, 1109, 1112-13 (1st Cir. 1987).}

No Massachusetts appellate court has yet addressed this issue,
although the \textit{Moores} rule has been adopted in Massachusetts Con-
tinuing Legal Education’s model jury instructions for legal malprac-
tice cases.\footnote{MCLE, Massachusetts Superior Court Civil Practice Jury Instructions,
Chapter 18 (Professional Malpractice), §18.7.3 (2014) (“The plaintiff in this case
alleges that the defendant attorney was negligent in representing [him/her] as a
plaintiff in the underlying case. In the underlying case, the plaintiff had entered
into a contingent fee agreement with the defendant attorney pursuant to which
[hе/she] would have had to compensate the attorney if the plaintiff were success-
ful in the underlying case. If you find that the plaintiff is entitled to damages in
this malpractice case, that amount must be reduced by the amount the defendant
attorney would have received pursuant to the contingent fee agreement.”).}
But in a 2011 superior court case, the trial judge, asked
to make the deduction after the jury had rendered a verdict, refused
to make such a deduction. In the case, \textit{Cintra v. Law Office of Dane M. Shulman}, the client sued a lawyer who represented him in a per-
sonal injury action and missed the statute of limitations. The client
succeeded via a trial-within-a-trial in showing the value of the lost
claim. The lawyer then requested that the judge, in entering judg-
dent, deduct the amount of the fee required under the parties’ en-
gagement agreement. While the judge mistakenly believed that the
First Circuit in \textit{Moores} had been interpreting Massachusetts law, he
concluded that the case was distinguishable in that the lawyer there
had arguably earned his fee before committing the alleged malprac-
tice by failing to communicate the settlement offer; in \textit{Cintra}, by
contrast, the malpractice was in failing to timely prosecute the case,
and giving the defendant the benefit of the fee-offset seemed less ap-
(Cratsley, J).} Indeed, the \textit{Moores} court itself had acknowledged that
in a case where “a lawyer accepts an engagement and thereafter fails
to show up at the starting gate … it is arguably equitable to fix
damages without regard to a fee entitlement which would only have
come into existence had the lawyer performed the contract.”\footnote{Moores, 834 F.2d at 1112.}

\section*{VII. Defenses}

\subsection*{A. In Pari Delicto}

The defense referred to with the Latin phrase \textit{in pari delicto} (in equal or comparable fault) prevents a client who has himself en-
gaged in illegal or other seriously wrongful activity from using a
malpractice lawsuit to recover from a lawyer or other professional
who allegedly facilitated or failed to stop the client’s wrongdoing.
The underlying principle is that the courts should not be in the busi-
ness of addressing claims for negligence brought by participants in a
wrongful scheme or enterprise, but should leave such parties where
they stand.\footnote{See 2011 ARTICLE, supra n.1, at 338.}

In a case arising from the bankruptcy of the subprime lender
Inofin Inc., a federal district judge in 2016 dismissed, based on the
\textit{in pari delicto} defense, a malpractice claim brought by Inofin’s
bankruptcy trustee against the company’s former outside counsel.
The court found it undisputed that the “primary wrongdoers” in
the unregistered securities scheme at the heart of the case were the
company’s two owners, who also served as its president and chief
executive officer. The scheme was designed to keep Inofin in busi-
ness, and therefore, the principals’ wrongful conduct was properly
imputed to the corporate client. The lawyers had actually given the
principals correct advice on a key securities law issue, which they
ignored. Under these circumstances, the court held, the \textit{in pari delicto}
doctrine barred the trustee’s claim.\footnote{In re Inofin; DiGiacomo v. Holland & Knight LLP, 219 F. Supp. 3d 265, 274 (D. Mass. 2016) (Gorton, J.); see also Merrimack College v. KPMG LLP,
(Salingter, J.) (\textit{in pari delicto} defense barred college’s claim against auditors who
failed to detect and prevent former financial aid director’s fraudulent spending
summary judgment on \textit{in pari delicto} defense in malpractice case brought by
trustee-client. While trustee was bound by (erroneous) finding in underlying
case that she had acted in bad faith, her contention that she acted on advice of
defendant attorneys might make \textit{in pari delicto} defense inapplicable).}

\subsection*{B. Statute of Limitations}

The three-year statute of limitations applicable to a legal mal-
practice claim in Massachusetts begins to run when a client knows,
or reasonably should know, that he or she has sustained appreciable
harm as a result of the lawyer’s conduct. This is the “discovery rule,”
appropriate where the acts providing the basis for a claim against
an attorney are “inherently unknowable” to a lay client at the time
when they first occur, and where it would be unfair to start the limi-
tations period before the client has had an opportunity to discover
the cause of action.\footnote{Van Steiphouts v. McGinnis, the Appeals Court affirmed a
trial judge’s dismissal of a bankruptcy client’s case where her lawyer
had admitted to an error in handling the matter and initially worked
to try to fix it, but later conceded that the proposed fix would not
work, after which the client had retained new counsel. The courts held that at this point the client undisputably had sufficient know-
edge both that she had suffered harm and of a connection between
the harm and the original lawyer’s handling of the bankruptcy mat-
ter. The fact that her successor counsel did not suggest until some
time later that the original lawyer committed malpractice did not
delay the start of the limitations period.}

Even where a lawyer’s representation of the plaintiff client

\footnote{In re Inofin, 834 F.2d at 1112.}
continued after the alleged malpractice began, the limitations period will begin to run if the client knows sufficient facts to indicate that he has been harmed by the lawyer. In *Max-Planck-Gesellschaft Zur Foerderung der Wissenschaften E.V. v. Wolf Greenfield & Sacks PC*, discussed above, the trial court held that the limitations period began running once the plaintiff, Client B, became aware that the defendant lawyers were “deferring to [Client A]’s instructions, which were clearly in conflict with the wishes of [Client B],” and was not tolled until the end of the representation, as Client B argued.112

Similarly, in *Labnston v. Williamson*, the Appeals Court agreed with the defendant lawyer that the limitations period governing a claim over the formation of a charitable trust began to run no later than the date on which the client was sued by the commonwealth’s attorney general for failing to meet certain statutory filing requirements related to the trust. The client retained new counsel for the lawsuit, and while the defendant lawyer at least nominally continued to represent the client on other matters, the new attorneys told the client that the trust had been improperly set up. Under these circumstances, the court held, the client was not entitled to wait until after the conclusion of the attorney general suit or the lawyer’s representation for the limitations period to begin.113

In some cases, exactly what a client must be deemed to have known at the relevant point in time may present issues requiring resolution by a factfinder. In *Chasse v. Day*, the lawyer represented the clients in a commercial lawsuit against the maker of a modular home. The case was lost at trial, and post-verdict motions by the lawyer were denied as well. In the ensuing malpractice case, the lawyer argued that the limitations period began to run no later than the date of the adverse verdict. But the clients, pointing among other things to arguments by the lawyer in the post-verdict motions that errors by the court were to blame for the result, persuaded the court that there was a genuine dispute as to when they became aware that the lawyer was the cause of the bad result.114

In *Kensington v. Johnson*, a lawyer sued a business client to enforce an option agreement. The option had been given to the lawyer himself as an inducement to serve on a company board of directors, and the lawyer included his own comparative negligence — in other words, effectively arguing

The lawyer argued that the malpractice claim was time-barred because years earlier, the client had expressed concerns about the lawyer’s role in drafting his own option agreement. Later, while continuing to rely on the lawyer’s advice on various matters, the client had sought (and incurred fees for) independent legal advice about the option agreement. A trial court judge nonetheless denied the lawyer’s motion for summary judgment based on the statute of limitations, finding a genuine dispute as to when the client discovered the harm of which he now complained and the lawyer’s alleged role in causing it.115

Similarly, in *Young v. Sarah Alger PC*, the client sued the lawyer failing to identify an easement on property he was purchasing. Long after the client learned about the easement from a neighbor, he retained a new lawyer, who confirmed the easement’s existence. The original lawyer, while denying that the easement was valid, attempted — unsuccessfully — to remedy the problem. In the ensuing malpractice suit, the lawyer argued that learning about the easement from the neighbor triggered the start of the limitations period. But a federal trial judge denied summary judgment, finding a genuine dispute as to when the client had sufficient information both as to the existence and validity of the easement and the lawyer’s failure to discover it.116

**C. Assigned Claims and Judicial Estoppel**

Unlike most jurisdictions, Massachusetts permits a client to assign to someone else a potential legal malpractice claim against his lawyer.117 But such assignments are subject to an important limitation: an assignee who was the adversary of the lawyer’s client in the underlying matter cannot, in prosecuting the assigned malpractice claim, violate the principle of judicial estoppel by taking a position in the malpractice case on the merits of the underlying dispute that is contrary to a position the adversary successfully argued in the underlying matter.118 Thus, in *Otis v. Arbeilla Mut. Ins. Co.*, discussed in the 2011 article, a former plaintiff in a highway-accident case was barred from pursuing an assigned malpractice claim against the defendant-client’s lawyer, in which the former plaintiff argued that the lawyer could and should have done more to show the plaintiff’s own comparative negligence — in other words, effectively arguing

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117. 2011 ARTICLE, supra n.1, at 336.

118. *See id.*
that as plaintiff in the underlying case he received more of a recovery than he was justly entitled to.\textsuperscript{119}

The 2011 case \textit{Sandman v. McGrath} raises the question whether a legal malpractice assignee can obviate this judicial estoppel problem by proceeding on a "lost settlement opportunity" theory as discussed above. A plaintiff motorcycleist obtained a $17 million verdict against a motorist in a lawsuit arising from a highway accident that occurred when the motorist was intoxicated. After the judgment, the motorist assigned to the motorcycleist her rights against both her automobile insurer and the defense lawyer it appointed to represent her in the case. The motorcycleist brought the lawsuit, but a superior court judge dismissed it as analogous to \textit{Otis}: the motorcycleist would be arguing in the second case that the verdict was the product not of a meritorious case, but of errors by his former adversary’s lawyer. The Appeals Court accepted this part of the lower court’s reasoning, but observed that it did not apply to a second, separate aspect of the legal malpractice claim: that the lawyer failed to adequately explore opportunities for settlement of the case before trial. For the motorcycleist to say, in support of such a malpractice claim, that he would have been amenable to settling his case before trial — even for less than what he ultimately recovered — would not be inherently inconsistent with any prior position on the merits of his case, and thus would not implicate the judicial-estoppel doctrine.\textsuperscript{120}

\section*{VIII. Other Issues}

\subsection*{A. Declaratory Judgment of No Malpractice}

In \textit{Bingham McCutchen, LLP v. McCourt}, a superior court judge dismissed a pre-emptive suit brought by a Boston-based law firm to establish that it had not committed malpractice in representing the businessman-client in his divorce. The judge held that the statutory vehicle of a declaratory judgment suit was not intended "to permit the reversal of roles in a negligence action and to allow the tortfeasor to sue first." Doing so "would upset the traditional right that our judicial system gives to the injured plaintiff to choose when and where to litigate."\textsuperscript{121}

\subsection*{B. Attorney-Client Privilege}

A lawyer defending himself in a legal malpractice case is to some extent freed from his ethical obligation to keep the confidences of his client: on subjects that the plaintiff-client has put "at issue" by bringing the malpractice case, the lawyer may defend himself by disclosing and using communications with the client that would otherwise have remained confidential and privileged. Further, the lawyer may be able to obtain, under the same "at-issue waiver" principle, discovery of otherwise privileged communications between the client and successor lawyers.\textsuperscript{122} Indeed, in a 2008 decision the Appeals Court suggested that where "a client sues a former attorney for malpractice, the attorney-client privilege is waived as to communications with all attorneys involved in the underlying litigation in which the malpractice allegedly occurred."\textsuperscript{123}

However, in a 2010 decision, \textit{DiPietro v. Erickson}, a single justice of the Appeals Court took a narrowing view of the phrase "involved in the underlying litigation." The lawyer in \textit{DiPietro} represented the client in a divorce, and allegedly failed to advise him that his agreement to pay alimony would not be modifiable. In the ensuing malpractice case, the lawyer sought discovery of the client’s communications with a successor lawyer whom the client had hired to seek a modification notwithstanding the terms of the agreement. A superior court judge ordered that the discovery be allowed, but the single justice reversed, concluding that the subsequent modification proceeding was a separate action that had "far more in common with the current malpractice action... than with the underlying litigation," and that the client had not in any sense put his communications with the successor lawyer at issue in the malpractice case.\textsuperscript{124}

In a 2017 case, \textit{Doe v. American Guar. & Liab. Co.}, the Appeals Court affirmed the dismissal of a suit by a former client who had been a defendant in criminal and civil proceedings charging him with sexual abuse of a foster child. The former client claimed that his lawyer failed to respond to discovery, resulting in a default, and then improperly sought to defend the ensuing malpractice case using sensitive information the former client had disclosed about abuse of another foster child. The Appeals Court agreed that the information was potentially relevant and "at issue" in the malpractice case, and thus the lawyer was entitled to disclose and use it.\textsuperscript{125}

A lawyer defending a malpractice case may also be in the position of seeking to enforce the attorney-client privilege, preventing discovery by the client of communications about the subject of the malpractice suit. For example, can a lawyer concerned about whether a current client may assert a malpractice claim seek legal advice with the assurance that the discussions will be privileged? Or will the lawyer’s (and his firm’s) ongoing fiduciary duty to the client prevent them from engaging in self-protection while still representing the client?

The latter view, sometimes referred to as the "fiduciary exception" to the attorney-client privilege, was adopted by Judge Gorton of the District of Massachusetts in a 2007 ruling in \textit{Burns v. Hale & Dorr LLP},\textsuperscript{126} and by Judge Stearns in a brief 2011 decision in \textit{Cold Spring Harbor Laboratory v. Ropes & Gray LLP}.\textsuperscript{127} In a 2013 case, \textit{RFF Family Partnership, LP v. Burns & Levinson by property owner}).

\begin{footnotesize}
\begin{enumerate}
\item \textit{Otis, 443 Mass. 634 (2005). More recently, in Atlantic Charter Ins. Co. v. Kantrovitz & Associates PC, No. 15-P-1645, 2016 WL 6817452, *1, *3 (Mass. App. Ct.)} (Rule 1:28 order), the Appeals Court upheld the dismissal of a malpractice case brought by a worker’s compensation insurer against an attorney who represented the insured worker in a tort suit arising from the same accident. The lawyer failed to respond to discovery, resulting in dismissal of the tort case. The Appeals Court held that the insurer’s rights as lienholder over any potential recovery in the tort suit did not permit it to step into the client/insured’s shoes and sue the lawyer, the insurer’s former opponent in the worker’s compensation proceeding, for malpractice — particularly where doing so would involve the lawyer reversing its position on the source of the client/insured’s injuries. \textit{Id. at *3}; cf. MIAA Prop. & Cas. Group Inc. v. Seawell Jankowski & Spencer PC, 2011 WL 3672043, at *1, *4 (Mass. Super. Ct.) (Curran, J.) (municipal insurer could sue law firm that represented conservation commission in lawsuit brought
\item \textit{See 2011 ARTICLE, supra n.1, at 341.}
\item \textit{Burns, 242 F.R.D. 170, 173 (D. Mass. 2007) (Gorton, J.).}
\item \textit{Cold Spring, No. CIV.A. 11-10128RGS, 2011 WL 2884893, *1 (D. Mass.) (Stearns, J).}
\end{enumerate}
\end{footnotesize}
LLP, however, the SJC joined what may now be a counter-trend in favor of recognizing a privilege for such in-firm communications about potential malpractice claims, at least under certain conditions. The law firm in the case handled a real estate loan foreclosure that produced a dispute over lienholder priority. The client retained a second lawyer, who sent a malpractice claim letter and draft complaint to the law firm, and demanded indemnification against any loss the client might suffer due to the firm's alleged failure to detect, report and address the competing liens. The letter prompted an internal meeting at the firm between the lawyers involved in the matter and the firm's managing partner.

When a malpractice suit was filed more than a year later, the firm took the position in discovery that the in-firm meeting was for the purpose of seeking the managing partner's legal advice on how to respond to the potential malpractice claim. The plaintiff-client argued that even if this was so, the meeting occurred at a time when the law firm owed the client a fiduciary duty of disclosure as to facts material to the client's interests, and that this fiduciary duty precluded the firm's invocation of the attorney-client privilege.

Rejecting this argument, a superior court judge upheld the firm's position that the communications were privileged, and the SJC, on interlocutory review, agreed. Confidential communications between a law firm's attorneys and its in-house counsel are protected by the attorney-client privilege, the court held, so long as: (1) the firm has designated one or more attorneys within the firm to act as in-house counsel; (2) the in-house counsel has not performed any work on the client matter at issue (or any substantially related matter); (3) the time spent in communications with in-house counsel is not billed to the client; and (4) the communications are made in confidence and kept confidential.

The fiduciary exception to the privilege recognized by some courts did not, the court reasoned, preclude a fiduciary from seeking advice at his own expense and for his own benefit; rather, it merely held that advice sought on behalf of a client could not later be withheld from the client based on privilege. The SJC also agreed with the trial court judge that there was no inherent inconsistency between a lawyer's ongoing duty to disclose facts affecting a client's interests — a duty that exists regardless of the lawyer's decision as to whom, if anyone, to consult — and the reasons for encouraging a lawyer to seek advice on behalf of the client.

C. Vicarious Liability

We have discussed in prior articles the issue of who, aside from the lawyer(s) directly involved, may be a proper defendant in a legal malpractice case. In a 2003 case, Herbert A. Sullivan Inc. v. Utica Mutual Ins. Co., the SJC held that a client with a malpractice claim against an attorney appointed by the client's liability insurance company does not have a claim that the insurer is vicariously liable for the lawyer's conduct. By virtue of the attorney's duty of undivided loyalty to the client, the court reasoned, the insurer does not have the kind of control over the attorney that is required for vicarious liability.

The issue of an insurer's potential vicarious liability arose again in the 2012 case Sandman v. Quincy Mutual Fire Ins. Co., where a divided panel of the Appeals Court rejected a client's claim that her homeowner's insurer should be vicariously liable for the conduct of a lawyer it appointed to handle a subrogation claim. The case arose from an incident in which a heating oil truck spilled fuel into the client's basement. Her homeowner's insurer paid for the clean-up costs, and hired a lawyer to pursue a subrogation action against the delivery company. Because the homeowner's policy did not completely cover the client for the loss, she also had her own separate potential claim against the delivery company. In the malpractice case, she alleged that the appointed lawyer agreed to handle her claim as well, but then prosecuted the insurer's claim while allowing the statute of limitations to lapse as to hers.

The client sued both the lawyer and the insurance company, claiming that the latter should be vicariously liable either for its lawyer's negligence in failing to protect the client's interests or for his “misrepresentation” that he could, and would, do so. Both the superior court and the Appeals Court concluded that neither theory stated a viable claim against the insurer. If an attorney-client relationship with the lawyer existed, the court reasoned, then the case was governed by the Herbert A. Sullivan case discussed above: the insurer would not have had sufficient control over the lawyer's work for the client to make it vicariously responsible. In addition, any misrepresentation about his ability or willingness to represent the client would have fallen outside the scope of his role as attorney for the insurer.

IX. Conclusion

We have concluded in prior articles that, based on our overview of the decisions discussed, there did seem to be an obvious trend of liberalization or restriction of claims against attorneys in Massachusetts courts. The same is true now. The courts generally continue to draw reasonable lines on questions such as which plaintiffs may seek to stand in the position of a client in suing a lawyer, the scope of a lawyer's general duties, and how a client may establish causation and damages in a malpractice case. It is the last of these areas that remains both the most doctrinally complicated and the most challenging for malpractice plaintiffs. But there is no particular reason to suppose it should be otherwise.

129. Id. at 704.
130. Id. at 704-705 (2013).
131. Id.
132. Id. at 703.
133. Id. at 711, 713.
134. See, e.g., 2011 ARTICLE, supra n.1, at 339.
137. Id. at 191, 194-95.
Criminal Law: In digital evidence cases, police must now establish probable cause to believe evidence will be located in each electronic location they plan to search


“Modern cell phones [...] are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.”¹ Not only are modern cell phones pervasive, but they contain so much data that a cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form — unless the phone is.²

As a result, courts are beginning to recognize that law enforcement searches of cellular phones must satisfy a “more narrow and demanding standard” than exists for establishing probable cause to search physical items or places.³

Now that the United States Supreme Court has held that a warrant normally is required to search a cellular phone, courts are beginning to wrestle with the question of how to apply the Fourth Amendment’s probable cause, scope and particularity requirements to seizures and searches of cellular phones supported by warrants.⁴ The Supreme Judicial Court (SJC) addressed some of these issues in Commonwealth v. Dorelas, holding in a rare four-to-three decision that where the police obtained a warrant supported by probable cause allowing them to search a defendant’s iPhone for evidence of threatening communications linking him to a shooting, the subsequent search of the photograph files on his iPhone was reasonable because evidence of threatening communications could be stored in photographic form in the photograph files.⁵ The dissenting justices disagreed and argued that the affidavit supported probable cause only to search a subset of photograph files attached to the defendant’s text and multimedia messages (i.e., those that had been communicated).⁶ The dissenting justices further argued that the warrant was not sufficiently particular and that the photos seized were outside the scope of the warrant.⁷

As will become evident below, reasonable minds may differ on whether the police established probable cause to search the defendant’s photograph file. But Dorelas is significant because it settled a broader issue — law enforcement officials in Massachusetts will now have to establish probable cause in search warrant affidavits for each “data file or other specifically identified electronic location that is to be searched.”⁸ This new standard demonstrates an appreciation that the traditional burden requiring only the establishment that probable cause exists for a particular address, for example, is not sufficient to prevent “general exploratory rummaging” through all the files of a cellular phone to locate a single piece of evidence for which probable cause exists.⁹ As the SJC held in Dorelas, “what might have

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2. Id. at 2491 (emphasis in original). Interestingly, as detailed below, the only evidence the police seized from the search of the defendant’s home was a gun and the defendant’s iPhone. In the context of computer hard drives, see Orin S. Kerr, “Searches and Seizures in a Digital World,” 119 Harv. L. Rev. 531, 569 (2005) (Computers “are postal services, playgrounds, jukeboxes, dating services, movie theaters, daily planners, shopping malls, personal secretaries, virtual diaries, and more.”).
4. See Riley, 134 S. Ct. at 2493. In digital evidence cases, “the normal sequence of ‘search’ and then selective ‘seizure’ is turned on its head; first the government seizes the property, then it searches it.” Preventive Med. Assoc’s v. Commonwealth, 465 Mass. 810, 817 (2013) (internal quotation marks and citations omitted); see also Mansor, 381 P.3d at 943 (“Striking a constitutionally principled but workable balance between protecting against general exploratory rummaging by the police through a person’s belongings.”); see Arizona v. Gant, 556 U.S. 332, 345 (2009) (“The particularity requirement serves as a safeguard against general exploratory rummaging by the police through a person’s belongings.”); see Arizona v. Gant, 556 U.S. 332, 345 (2009) (“[T]he central concern underlying the Fourth Amendment is the concern about giving police officers unbridled discretion to rummage at will among a person’s private effects”); United States v. Galpin, 720 F.3d 436, 447 (2013) (“The potential for privacy violations occasioned by an unbridled, exploratory search of a hard drive is enormous.”); Commonwealth v. Perkins, 478 Mass. 97, 106 (2017) (“The conclusion that the warrant affidavit established a sufficient nexus to search the defendant’s apartment for cellular telephone [...] does not mean, however, that police had unlimited discretion to search every portion of the nine cellular telephones seized from the apartment.”).
6. Id. at 505-13.
7. The majority deemed these issues waived. Id. at 500 n.8.
9. Dorelas, 473 Mass. at 510 n.6 (Lenk, J., dissenting), citing Commonwealth v. Freiberg, 405 Mass. 282, 298, cert. denied, Freiberg v. Massachusetts, 943 U.S. 940 (1989) (“The particularity requirement serves as a safeguard against general exploratory rummaging by the police through a person’s belongings.”); see Arizona v. Gant, 556 U.S. 332, 345 (2009) (“[T]he central concern underlying the Fourth Amendment is the concern about giving police officers unbridled discretion to rummage at will among a person’s private effects”); United States v. Galpin, 720 F.3d 436, 447 (2013) (“The potential for privacy violations occasioned by an unbridled, exploratory search of a hard drive is enormous.”); Commonwealth v. Perkins, 478 Mass. 97, 106 (2017) (“The conclusion that the warrant affidavit established a sufficient nexus to search the defendant’s apartment for cellular telephone [...] does not mean, however, that police had unlimited discretion to search every portion of the nine cellular telephones seized from the apartment.”).
been an appropriate limitation in the physical world becomes a limitation without consequence in the virtual one.\textsuperscript{10}

In \textit{Dorelas}, Boston police responded to the scene of a shooting in the Hyde Park neighborhood of Boston and found a man named Michael Lerouge suffering from gunshot wounds to his back.\textsuperscript{11} Witnesses reported that Lerouge and another man, later identified as the defendant, Denis Dorelas, exchanged gunfire in the street.\textsuperscript{12} Witnesses said that the other shooter wore “a green-colored shirt or jacket with writing on it.”\textsuperscript{13} Witnesses pointed the police in the direction which the other shooter fled and the police soon found Dorelas suffering from gunshot wounds to his leg and wearing a green jacket with emblems on it.\textsuperscript{14}

When police found the defendant he was with Jamal Boucicault.\textsuperscript{15} Police interviewed Boucicault; he explained that earlier in the day he was at the defendant’s apartment when the defendant received a telephone call, argued with the caller, and left the apartment.\textsuperscript{16} A short time later, Boucicault said he heard what sounded like gunshots, went outside and found the defendant suffering from a gunshot wound.\textsuperscript{17}

The defendant’s brother later told police that the defendant said he “was receiving threatening [telephone] calls and threatening text messages on his [telephone].”\textsuperscript{18} The defendant’s brother said he did not know who was threatening the defendant.\textsuperscript{19} The police also spoke to the defendant’s cousin who said that the defendant “had been getting a lot of telephone threats because he owes money to people.”\textsuperscript{20} The cousin also said he did not know who was making the threatening calls.\textsuperscript{21}

Based on those facts, officers of the Boston Police Department executed a search warrant at the defendant’s apartment and seized a gun and an Apple iPhone.\textsuperscript{22} In support of the application for a warrant, a Boston police detective had said that, based on the witness statements, he had “probable cause to believe [the defendant’s] cell phone contain[ed] valuable information that [would] link the victim/suspect ([the defendant]) and suspect/victim (Lerouge) to the crime.”\textsuperscript{23} The detective obtained a search warrant which authorized a search of the defendant’s iPhone for:

- Subscriber’s name and telephone number, contact list, address book, calendar, date book entries, group list, speed dial list, phone configuration information and settings, incoming and outgoing draft sent, deleted text messages, saved, opened, unopened draft sent and deleted electronic mail messages, mobile instant message chat logs and contact information mobile Internet browser and saved and deleted photographs on an Apple iPhone, silver and black, green soft rubber case. Additionally, information from the networks and carriers such as subscribers information, call history information, call history containing use times and numbers dialed, called, received and missed.\textsuperscript{24}

A Boston police forensic examiner used a Universal Forensic Extraction Device (UFED) to search the iPhone.\textsuperscript{25} The UFED was programmed to extract contact lists, text messages and photographs, along with other data.\textsuperscript{26} However, a UFED is capable of being programmed to perform more targeted searches that distinguish between different areas of an iPhone from which to extract data.\textsuperscript{27}

Among other information obtained as a result of the search, police seized from the photograph files on the iPhone a photograph of the defendant wearing a green jacket and a photograph of the defendant holding a gun.\textsuperscript{28} A Suffolk County grand jury subsequently indicted the defendant on multiple firearms-related offenses.\textsuperscript{29}

The defendant’s motion to suppress the photographs obtained as a result of the search of the defendant’s iPhone was denied.\textsuperscript{30} At the motion stage, the defendant argued that the search of the iPhone’s photographic files was not supported by probable cause.\textsuperscript{31} The defendant also argued that “the particularity requirement serves as a safeguard against general exploratory rummaging by the police through a person’s belongings.”\textsuperscript{32}

At the motion to suppress hearing, the defendant presented evidence suggesting that the search of the iPhone’s photograph files was unreasonable because any photographs that had been communicated would be found in the defendant’s text messages. The defendant’s forensic expert testified that “by selecting ‘text messages,’ the search would have yielded both the content of the texts, and any photo attachments to any texts, regardless of whether they had been saved or deleted.”\textsuperscript{33} The only way that a photograph attached to a text message would not be recovered using the text message option, but would be retrieved searching the “pictures” file, is if the original text and attachment had been overwritten, but the user had saved the photograph in the “pictures” file.\textsuperscript{34} The motion judge found that the police acted appropriately in searching the iPhone’s photographic files because the affidavit “furnished probable cause to conduct

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\bibitem{10} \textit{Dorelas,} 473 Mass. at 502; see also Galpin, 720 F.3d at 447 (There is “a serious risk that every warrant for electronic information will become, in effect, a general warrant, rendering the Fourth Amendment irrelevant. This threat demands a heightened sensitivity to the particularity requirement in the context of digital searches.”) (internal citations and quotations omitted).

\bibitem{11} \textit{Dorelas,} 473 Mass. at 497.

\bibitem{12} \textit{Id.}

\bibitem{13} \textit{Id.}

\bibitem{14} \textit{Id.}

\bibitem{15} \textit{Id.} at 498.

\bibitem{16} \textit{Id.}

\bibitem{17} \textit{Commonwealth v. Dorelas,} 473 Mass. 496, 498 (2016).

\bibitem{18} \textit{Id.}

\bibitem{19} \textit{Id.}

\bibitem{20} \textit{Id.}

\bibitem{21} \textit{Id.}

\bibitem{22} \textit{Id.}


\bibitem{24} \textit{Id.} at 499.

\bibitem{25} \textit{Id.} at 497, 504 n.14.

\bibitem{26} \textit{Id.} at 497.

\bibitem{27} \textit{Id.} at 504.

\bibitem{28} \textit{Commonwealth v. Dorelas,} 473 Mass. 496, 499 (2016). The date of the photographs is not clear from the record. The defendant did not claim the photos were taken, stored or received at times remote from the shooting. \textit{Id.}

\bibitem{29} \textit{Id.} The commonwealth determined the defendant acted in self-defense so it did not pursue charges related directly to the shooting. \textit{Id.} at 500 n.5.

\bibitem{30} \textit{Id.} at 500.

\bibitem{31} \textit{Id.}

\bibitem{32} \textit{Id.} at 510 n.6 (Lenk, J., dissenting).


\bibitem{34} \textit{Id.} 12-13.

\end{thebibliography}
an electronic search of [his] cell phone and because threats can be communicated by way of photographs and stored in the iPhone's photograph file."\(^{35}\)

The defendant filed an interlocutory appeal and the SJC took the case.\(^{46}\) On appeal, the defendant argued that the motion judge wrongly denied his motion to suppress the photographs because the police did not have probable cause to search his iPhone's photograph file for evidence linking him to the shooting and that the search warrant failed to satisfy the particularity requirements of the Fourth Amendment to the United States Constitution and Article 14 of the Massachusetts Declaration of Rights.\(^{37}\)

The majority began its discussion by explaining the differences between searches of fixed premises and searches of electronic objects.\(^{38}\) "In the physical world, police need not particularize a warrant application to search a property beyond providing a specific address, in part because it would be unrealistic to expect them to be equipped, beforehand, to identify which specific room, closet, drawer, or container within a home will contain the objects of their search."\(^{39}\) "Rather, "[a] lawful search of fixed premises generally extends to the entire area in which the object of the search may be found."\(^{40}\) The majority noted that unlike a search of fixed premises, "in the virtual world, it is not enough to simply permit a search to extend anywhere the targeted electronic objects possibly could be found, as data possibly could be found anywhere within an electronic device."\(^{41}\) The majority recognized that "what might have been an appropriate limitation in the physical world becomes a limitation without consequence in the virtual one."\(^{42}\)

The majority held that the police had established probable cause to believe that the defendant's iPhone would contain evidence of multiple contentious communications based on numerous witness statements that the defendant had been receiving threatening communications with respect to money he owed to people.\(^{43}\) In addition to text messages and call logs, the warrant authorized the search of the iPhone's photograph files. The majority held that it was reasonable for the police to search the photograph files because "[c]ommunications can come in many forms including photographic."\(^{44}\)

The dissenting justices disagreed and argued that the police made no effort to explain why probable cause existed to search the photographic file (or arguably, the calendar, date book entries, electronic mail messages and mobile internet browser information).\(^{45}\) The affidavit only demonstrated a substantial basis to believe evidence related to threatening telephone calls and text messages would be found in the defendant's iPhone.\(^{46}\)

With regard to the photographs, the dissent agreed that a photograph could convey a threat, but only if it is communicated.\(^{47}\) "A photograph depicting a severed horse’s head, for instance, might well be used to communicate a threat (in the mode of ‘The Godfather’ novel and motion picture)."\(^{48}\) But that rationale would only apply to the subset of photographs that might have been communicated at some point, not to the defendant's entire photographic file.\(^{49}\) In other words, if the photograph is not communicated in some manner, it cannot serve to convey a threat.\(^{50}\)

Moreover, the evidence suggested that the threats had been received by the defendant, not sent by the defendant.\(^{51}\) "Nothing in the affidavit suggest[ed] that the defendant was using photographs of himself to threaten others."\(^{52}\) While the photograph of the defendant holding a gun could be threatening, if communicated, the dissent pointed out that "it strains credulity to assert that photographs of the defendant wearing a green jacket had a similar purpose."\(^{53}\) The dissent concluded that there was only probable cause to search a subset of the defendant's photograph files, those that had been communicated.\(^{54}\)

The dissent disagreed with the majority's conclusion that the defendant waived his particularity argument by not raising it in

36. Id.
37. Id. at 500 n.8. “The Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights both require a magistrate to determine that probable cause exists before issuing a search warrant.” Id. at 501. “Probable cause requires a substantial basis for concluding that the items sought are related to criminal activity under investigation, and that they reasonably may be expected to be located in the place to be searched at the time the search warrant issues.” Id. The Fourth Amendment and Article 14 also require that “a warrant identify with particularity the place to be searched and the items to be seized.” Id. at 510 (Lenk, J., dissenting). When considering the sufficiency of a warrant application, the court's review "begins and ends with the four corners of the affidavit" and "all reasonable inferences . . . may also be considered as to whether probable cause has been established." Id. at 500-01. The validity is to be "assessed solely on the basis of the information that the police disclosed in the [affidavit] at the time the search warrant was issued.” United States v. Winn, 79 F. Supp.3d 904, 920 (2015).
38. See Dorelas, 473 Mass. at 500-03.
39. Id. at 501.
41. Id. at 502; see also United States v. Galpin, 720 F.3d 436, 447 (2013) (limitations of the physical world “are largely absent in the digital realm, where the size or other outwardly visible characteristics of a file may disclose nothing about its content”).
42. Dorelas, 473 Mass. at 502.
43. Id. at 503.
44. Id. The majority ruled that the defendant had waived his argument that the warrant lacked particularity as to the items to be seized and the places to be searched because it held that those arguments were not made in the trial court. Id. at 500 n.8.
45. Commonwealth v. Dorelas, 473 Mass. 496, 498-99 (2016). "If [the detective] wanted to seize every type of data from the cell phone, then it was incumbent upon him to explain in the complaint how and why each type of data was connected to [the defendant's] criminal activity . . . ." United States v. Winn, 79 F. Supp.3d 904, 920 (2015); see also Commonwealth v. White, 475 Mass. 583, 584 (2016) (detectives did not have “any information that a cell phone was used in the crime under investigation, nor did they claim that there existed a particular piece of evidence likely to be found on such a device”); Commonwealth v. Jordan, 91 Mass. App. Ct. 743 (2017) (search warrant failed to establish that any information from defendant's cellular telephone would provide evidence of the murder).
46. Dorelas, 473 Mass. at 507 (Lenk, J., dissenting).
47. Id. at 508.
48. Id.
49. See id. at 507.
50. "The elements of the crime of making a threat have been traditionally stated as an expression of intention to inflict a crime on another and an ability to do so in circumstances that would justify apprehension on the part of the recipient of the threat.” Commonwealth v. Maiden, 61 Mass. App. Ct. 433, 434 (2004) (internal quotation marks omitted).
52. Id.
53. Id.
54. Id. at 507.
the trial court.55 At the motion stage, the defendant argued that “the particularity requirement serves as a safeguard against general exploratory rummaging by the police through a person’s belongings.”56 Because it found error with the majority’s determination that the defendant waived the argument, the dissent analyzed the warrant under the particularity requirement and found that “allowing the police to search a broad variety of categories of files, many of which were at most tangentially related to the communications described in the affidavit was an ‘end run’ around the particularity requirement.”57 “Particularity should mean more than just a general directive to the police to look until they find something.”58

Relying on United States v. Winn, the dissent noted that the warrant “could have limited the search of any image files temporally to include only images stored on the device in the days or weeks leading up to the shooting.”59 In Winn, that court found a warrant lacked particularity where it “was not as particular as the circumstances would allow.”60 That court also noted that “[f]ailure to limit broad descriptive terms by relevant dates, when such dates are available to the police, will render a warrant overbroad.”61 In Dorelas, the police had information that the defendant had recently been receiving threats.62 They could have limited the search to a specific timeframe, which would have allowed them to make the warrant more particular.63

While, as demonstrated above, there is cause to question the majority’s finding of probable cause to search the defendant’s photograph file, the more significant result of Dorelas is that the SJC asked whether there was probable cause to search a particular data file rather than concluding that the police could search the entire iPhone (i.e., every data file) because they had probable cause to believe evidence of threatening communications would be located somewhere in the iPhone.64 In other words, the SJC could have analogized the search of an iPhone to the search of a home and concluded that the police only needed probable cause to believe that evidence of threatening communications could be located somewhere within the files of the iPhone and accordingly permitted a search of every data file within the iPhone.65

Prior to Dorelas the question was whether the police had established probable cause to believe that the object of the search may be found within a fixed premises, such as a home.66 Now, in digital evidence cases, the question is whether the police established probable cause to believe that evidence will be found in a particular electronic location.67

The SJC recently reaffirmed its decision in Dorelas. In Commonwealth v. Broom, the police obtained a warrant to search a murder suspect’s cellular phone.68 The police had already seized cellular site data and call records for the defendant’s phone and knew that he had not exchanged any calls with the victim during the relevant time period.69 The police also knew that the defendant had sent and received text messages, and accessed the internet, during the relevant time period.70 The detective then stated that in his experience cellular phones contain vast amounts of electronic data and described a wide range of data he wanted to search, similar to the affidavit in Dorelas.71

In a unanimous decision, the SJC held that the police lacked the requisite probable cause, because the standard for probable cause in searches of cellular phones requires that the device contains “particularized evidence” relating to the crime.72 The SJC ruled that “it is not enough that the object of the search may be found in the place subject to search.”73 “Rather, the affidavit must demonstrate that there is a reasonable expectation that the items sought will be located in the particular data file or other specifically identified electronic location that is to be searched.”74

Given the pervasive use of cellular phones in modern society, questions regarding the proper scope of searches of cellular phones supported by warrants will continue to be challenging. Undoubtedly, cellular phones offer an excellent source of evidence for police.

55. Id. at 510 n.6.
56. Id.
57. Commonwealth v. Dorelas, 473 Mass. 496, 510-11 (2016); see also Commonwealth v. Perkins, 478 Mass. 97, 106 (2017) (“The police were not authorized to rummage through the entirety of the defendant’s cellular telephones, and were confined by the plain terms of the warrant affidavit to call activity and contact lists.”).
58. Dorelas, 473 Mass. at 511.
59. Id. at 510-11; see also State v. Mansor, 381 P.3d 930, 941 (2016), review allowed, 388 P.3d 721 (Or. 2017) (doubtful that warrant was limited, temporally and substantively, with as much specificity as possible under the circumstances).
61. Winn, 79 F. Supp.3d. at 921 (internal citations omitted).
63. See, e.g., Wheeler, 135 A.3d at 304-05 (to the extent reasonably possible, warrant must contain temporal restraints limiting the search to the relevant timeframe).
65. See id.
66. Id.
68. Id.
69. Id. at 493.
71. Id. at 494.
72. See id. at 495; see also Commonwealth v. White, 475 Mass. 583, 589 (2016) (“Where the location of the search or seizure is a computer-like device, such as a cellular telephone, the opinions of the investigating officers do not, alone, furnish the requisite nexus between the criminal activity and the device to be searched.”) (internal citations and quotation marks omitted); Commonwealth v. Jordan, 91 Mass. App. Ct. 743, 750 (2017) (“It is not enough to rely on the ubiquitous presence of cellular telephones and text messaging in daily life, or generalities that friends and coventurers often use cellular telephones to communicate.”).
73. Broom, 474 Mass. at 495.
74. Id. at 496 (emphasis in original).
75. Id. (emphasis in original).
Yet, permitting police to search the entire contents of a cellular phone is far more invasive than traditional physical searches given the vast amount of information contained within a cellular phone.

The SJC took a step in the right direction by establishing that searches of cellular phones must meet a more demanding standard than searches of physical locations by requiring that police establish particularized evidence for each data file or electronic location to be searched. But more limits are needed to prevent the type of rummaging that the Fourth Amendment and Article 14 are designed to prevent.

Most importantly, courts should require the police to limit searches temporally, as in Winn. Where the police have established probable cause for a particular data file (a suspect’s communications) as required by Dorelas, police should not be able to search the content of that suspect’s entire history of communications. Rather, law enforcement should be required to establish probable cause for a particular data file within a particular time period. Anything less will unnecessarily expose the police to information for which they have not established probable cause.

Where the police know the dates of the criminal activity, that information should be included in the affidavit and used to limit the scope of the search. Where such dates are not available, police should be limited to a reasonable time period given the nature of the criminal offense at issue. For example, in an alleged wide-ranging or long-term conspiracy, a broader time period is appropriate. In the case of a discrete offense, a narrower time frame is appropriate. Courts will need to examine the facts on a case-by-case basis to determine what is reasonable. Failure to limit searches temporally to the relevant time period will result in overbroad warrants that lack particularity.

Moreover, courts should also continue to reject law enforcement’s reliance on training and experience to establish a nexus between criminal conduct and a cellular telephone. As noted above, it will be a rare case where an officer could not argue that a cellular phone is likely to contain relevant evidence, given their pervasiveness in society.

Undoubtedly, requiring law enforcement to obtain warrants authorizing the search of cellular phones, as established in Riley, and further requiring particularized evidence that an item will be located in a specific electronic location, as in Dorelas, will serve to protect the important privacy interests at stake. Courts must further require temporal limits on law enforcement searches to ensure that searches of cellular phones are as narrow as the circumstances will allow, while also permitting law enforcement officials access to important evidence for which they have established probable cause.

— John Brooks
Case Comment

Criminal Law: Reasonable suspicion is generally required to search a parolee’s residence


Introduction

In Commonwealth v. Moore,1 the Supreme Judicial Court (SJC) was called upon to decide whether Article 14 of the Massachusetts Declaration of Rights, absent some quantum of individualized suspicion, bars police from conducting an investigative search of a parolee’s home. The court concluded that while Article 14 offers greater protection to parolees than the Fourth Amendment (which unquestionably permits searches of a parolee’s residence without any individualized suspicion whatsoever), it still affords them only a reduced form of constitutional protection.2 On that basis, the court determined that, while probable cause is not necessary to justify a search of a parolee’s residence, reasonable suspicion is generally required. Specifically, the SJC held in Moore that only where a parole officer (or other state agent) has reasonable suspicion to believe that a parolee’s home contains evidence that the parolee has committed a crime or otherwise violated a condition of his release, may the officer lawfully conduct a warrantless investigative search therein.3 Finding that officers in Moore did, in fact, have the requisite reasonable suspicion, the court approved the warrantless search of the defendant’s residence at issue in that case.4

Notwithstanding the SJC’s ultimate ruling in Moore, the rationale underlying the decision potentially places significant burdens on the ability of the Parole Board effectively to manage parolees. Specifically, it suggests the possibility that parole officers may no longer be able to carry out routine parole home visits for the purpose of ensuring compliance with mutually agreed conditions of parole since such visits, by definition, are not predicated on individualized suspicion of any kind.5 At the very least, it raises the possibility that evidence of either new offenses or technical violations of parole derived from such visits may not be admissible in either criminal prosecutions or at parole revocation hearings.6 However, it seems unlikely that the SJC would impose such a significant and far-reaching change on the parole regime — and one that has such dire public safety implications — without expressly indicating that such was the court’s intent. It is certainly possible to read Moore far more narrowly, applying the decision only to targeted investigative searches aimed at uncovering evidence of specific offenses, rather than routine home visits. Indeed, such a reading would properly reflect the factual context in which the case arose.

Facts

The facts of Moore are straightforward. “In October, 2011, the New Hampshire parole board issued a certificate of parole to the defendant, Lawrence Moore, who was serving a sentence of from two and one-half to ten years for assault with a firearm.”8 “The defendant’s parole was transferred to the Commonwealth in May, 2012.”9 “On November 16, 2012, the defendant’s parole officer and others searched the defendant’s apartment without a warrant and seized 17 ‘twists’ of ‘crack’ cocaine in the defendant’s bedroom drawer, as well as a digital scale and a gun lock.”10 “The defendant was indicted for possession of cocaine with intent to distribute, in violation of G.L. c. 94C, §32A(c).”11 “He filed a motion to suppress the evidence seized from his home, arguing that the search was unconstitutional under the Fourth Amendment to the United States Constitution and Article 14 of the Massachusetts Declaration of Rights.”12

“After a hearing, the motion judge issued a written order allowing the defendant’s motion to suppress, holding that, while the search did not violate the Fourth Amendment, it was barred under Article 14.”13 “The motion judge concluded that Article 14 offers the same protections for parolees as it does for probationers, and, therefore, searches of a parolee’s residence must be supported by both reasonable suspicion and either a search warrant or a traditional exception to the search warrant requirement.”14 “In granting the motion to suppress, the judge ruled that, while the commonwealth had reasonable suspicion to search the defendant’s apartment for evidence of a drug-related parole violation, the search was unconstitutional because there was neither a search warrant nor the presence of a traditional exception to the warrant requirement.”15

4. Id. at 487-88.
5. Id. at 488.
6. Unlike probation, parole is entirely voluntary. Conditions of parole are embodied by an agreement between the parolee and the Parole Board, and a parolee elects to abide by those conditions in exchange for the opportunity to serve some of his sentence in the community.
7. This is not a theoretical concern. Superior Court judges have, in fact, already interpreted Moore in precisely this way when deciding motions to suppress. See, e.g., Commonwealth v. Shane Judge, Bristol Superior Court No. 1573CR00185.
9. Id.
10. Id. at 481-82.
11. Id. at 482.
12. Id.
13. Id.
15. Moore, 473 Mass. at 482.
In Moore, the SJC began its analysis by observing that the defendant was entitled to relief, if at all, only under Article 14. The United States Supreme Court had already determined that any suspicionless search of a parolee’s residence, whether by police or parole officers, and whether for investigative or general supervisory purposes, was permissible under the Fourth Amendment. The SJC then acknowledged that, while Article 14 provides some incremental protection in this area compared to its federal analog, even under state law, parolees have a sharply reduced expectation of privacy due to their unique status as “ward[s] of the Commonwealth.”

A parolee is still serving a sentence under the supervision of the state; he is merely doing so in the community rather than in prison. However, that diminished expectation of privacy notwithstanding, the SJC went on to conclude in Moore that “individualized suspicion is still the appropriate standard [to be met], at least with respect to a search of the parolee’s home.”

Needless to say, were such a rule expanded to encompass routine parole home visits, it would effectively bar the practice altogether; as noted already, such visits are not conducted on the basis of any particularized suspicion. However, there are a number of reasons for inferring a different intention on the part of the SJC.

The notion that Moore was intended, sub silentio, to deprive the Parole Board of its ability to conduct routine home visits to ensure compliance with the most basic conditions of parole defies long-settled law. In the first instance, the SJC has, in previous decisions, expressly drawn a distinction between police investigative searches of the type carried out in Moore and routine parole home visits. For example, in clarifying the role of parole officers under the Community Parole Supervision for Life (CPSL) scheme, the SJC recently stated:

> a parole officer could continue to serve a meaningful role, albeit with one less carrot or stick. CPSL parolees, as all parolees, are subject to constraints and intrusions necessary to ensure oversight and compliance with the conditions of their supervision, including mandatory home visits by parole officers, and searches based on reasonable suspicion (rather than probable cause) that a condition of parole (or CPSL) has been violated.

The conjunctive construction provides strong evidence of the court’s acknowledgement of two discrete categories of intrusion. Consistent with this approach, the Appeals Court has routinely accepted, without comment, the validity of seizures occurring in the context of unannounced parole home visits. The same view has also been adopted in other jurisdictions. Simply put, police investigatory searches and parole home visits are two completely distinct species of government action, and so Moore’s relevance to the first by no means subsumes any presumption of relevance to the latter.

Moreover, excluding routine parole home searches from the purview of Moore is wholly consistent with the SJC’s longstanding views on the significant public safety interest in preserving the Parole Board’s general supervisory authority over parolees. As the SJC noted in Moore, the Parole Board’s “supervisory interests . . . are substantial.” The Parole Board, in carrying out its core supervisory function, “need not ‘ignore the reality of recidivism’” and “may therefore justifiably focus on parolees in a way that it does not on the ordinary citizen.” Indeed, as the SJC concluded in Moore, “the commonwealth’s supervisory interests are more significant than a parolee’s diminished expectation of privacy.

Essential to the Parole Board’s supervisory function is its ability to conduct “[r]egular home visits and employment checks,” at least once a month including “an actual interview of the parolee.” By means of these visits, “[a] parole officer maintains records on each parolee under his direction. These records include a chronological history with current, up to date, factual information.” “On the basis of this information,” the parole officer keeps the Board informed of the . . . progress being made.” The success of the parole system depends entirely on such “enhanced supervision.” As the board’s enabling statute provides, parole permits “shall be granted only if the [parole] board is of the opinion . . . that there is a reasonable probability that, if the prisoner is released with appropriate conditions and community supervision, the prisoner will live and remain at liberty without violating the law.” Routine mandatory home visits are the principal means by which the board assures compliance with these conditions. The SJC in Moore almost certainly would not have eliminated this fundamental — even defining — feature of parole supervision without any consideration or analysis whatsoever of the public safety implications of such a sweeping change.

Treating routine parole home visits differently than police investigatory searches for the purposes of Article 14 also comports with the law in cognate areas. For example, it is well settled that administrative searches, carried out to assure regulatory compliance, and which are in many ways the functional equivalent of parole home visits, may be conducted without any showing of a particularized

17. See Moore, 473 Mass. at 485.
18. Id. at 487 (emphasis added).
27. Id.
28. Id.
31. See Moore, 473 Mass. at 486.
suspicion. However, when such encounters are driven by a specific investigatory purpose, they become subject to Article 14 and Fourth Amendment protections. As the Appeals Court stated in Commonwealth v. Bizzaria, “both Commonwealth v. Eagleton, 402 Mass. 199, 206 n.13 (1988) and Commonwealth v. Frodyma, 386 Mass. 434, 438 (1984), make clear that an administrative search may not be used as a subterfuge to avoid the burden of establishing probable cause to support a criminal investigative search.” Similarly, in Commonwealth v. Tremblay, the court “recognized and respected” a strict “dividing line between administrative procedure and pursuit of evidence of . . . crime.” As noted already, mandatory parole home visits of the sort conducted here are directed solely at ensuring compliance with the conditions of parole and, unlike the situation in Moore, are not aimed at finding evidence of any particular offense. Accordingly, just as administrative searches stand on a different constitutional footing than investigatory searches, so too should routine parole home visits be governed by a different rule than the police conduct in Moore.

Likewise, construing Moore to preclude routine parole home searches would contradict the SJC’s settled approach to the “special needs” exception of Article 14 and the Fourth Amendment. Those constitutional provisions “do not prohibit all searches — only those searches that are unreasonable.” “[N]either a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance.”

A judicial warrant issued upon probable cause is not required under Article 14 or the Fourth Amendment “when special needs, beyond the normal need for law enforcement,” outweigh “the individual’s privacy expectations” and make it “impractical to require a warrant for a public purpose.” Under this approach, qualifying special needs typically involve a significant risk to public safety.

Similarly, under Article 14, Massachusetts courts have created exceptions to the individualized suspicion requirement in cases “where an intrusion is limited and serves a pressing public purpose.” For example, in Commonwealth v. McGeoghegan, the SJC approved the use of suspicionless sobriety checkpoints. As the court noted shortly thereafter in Commonwealth v. Trumble, “there exists a strong public interest in reducing the ‘carnage caused by drunk drivers.’”

Routine parole home inspections meet all of the requirements of the “special needs” exception — whether considered under the state or the various federal standards. As described already, the SJC has repeatedly acknowledged the important public safety function inherent in the close supervision of parolees in view of the potential danger they pose to the communities in which they reside. This is particularly true of sex offenders and others at high risk for reoffending subject to “intensive” parole supervision by the Parole Board. Mandatory home visits are the long-accepted, nationally ubiquitous and least intrusive means of discharging the Parole Board’s responsibility to minimize this risk.

32. Id.
33. Id.
34. Id.
35. Id.
36. Id. at 462; see People v. Pace, 481 N.E.2d 250 (1985) (‘‘once the purpose behind a search shifts from administrative compliance to a quest for evidence to be used in a criminal prosecution, the government may constitutionally enter the premises only upon securing a warrant supported by full probable cause’’).
42. Id. at 50-51.
44. Id. at 455.
45. 520 U.S. 305, 308 (1997).
46. Id. at 313-14 (quoting Skinner v. Railway Labor Executives’ Ass’n, 489 U.S. 602, 619 (1989)).
47. See United States v. Edwards, 498 F.2d 496, 500 (2d Cir. 1974) (significant public safety risk sufficient to justify suspicionless searches).
51. Id. (quoting South Dakota v. Neville, 459 U.S. 553, 558 (1983)).
Specifically, consistent with the analytical factors identified in *Brown, Miller and Article 14*, such visits: (1) address serious public safety concerns around the issue of community supervision, particularly of violent offenders; (2) advance the “public interest” in assuring compliance with the conditions of parole and reducing the risk of recidivism; and (3) do so with minimal interference with what is already a sharply reduced expectation of privacy. “Where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as ‘reasonable’ — for example, searches now routine at airports and at entrances to courts and other official buildings.” 54 Parole home visits, like these other examples of suspicionless searches, are likewise carefully “calibrated to the risk.” The fact that they occur in a context in which there is but a minimal expectation of privacy further militates in favor of their constitutionality.

In short, routine parole home visits fall squarely within the special needs exception. Indeed, this was precisely the basis upon which the United States Supreme Court deemed suspicionless searches in the parole context compatible with the Fourth Amendment. 55 Accordingly, such searches arguably fall squarely outside the rule delineated in *Moore* — at least if *Moore* is construed to apply only to targeted police investigative searches. Indeed, the SJC appears specifically to have contemplated precisely that possibility.

As the court concluded in *Moore*; “in the parole context, although the privacy protections afforded to parolees under Article 14 are incrementally less than those granted to probationers, individualized suspicion is still the appropriate standard, at least with respect to a search of the parolee’s home” 56 “[D]ispensing with individualized suspicion in its entirety would, outside the realm of ‘special needs’ exceptions, establish a precedent we are not inclined to set.” 57 The special needs exception should be construed to permit the Parole Board — like similar bodies across the country and around the world — to continue to conduct home visits for the purpose of assuring compliance with parole conditions. Any other approach would dramatically, and without warning, hobble the Parole Board in carrying out its core public safety function. While future parole decisions could be made mindful of such a change — with the inevitable result that parole would be much more difficult to obtain — many offenders who would never have been paroled into a system that precludes mandatory home visits will suddenly present a grave public safety risk. 58 It is unlikely that the SJC intended that result.

In sum, there is nothing about the holding in *Moore* that suggests that the case was necessarily meant to eliminate routine parole home visits. Indeed, the SJC’s focus in that decision on the kind of individualized suspicion that might justify a search of a parolee’s home simply has no logical relevance to an administrative regime that is, by definition, not predicated upon suspicion that any particular offense has occurred — and, in fact, the vast majority of parole home visits do not disclose any evidence of a crime. To apply *Moore* to parole home visits, therefore, requires a rather tortured reading of that decision. Moreover, such an approach would not only defy the SJC’s own apparent analytical dichotomy between investigative searches and parole home visits, it also would undermine the strong public policy, identified by the SJC, favoring strong supervisory authority for the Parole Board in managing its charges. Finally, a broad interpretation of *Moore* would also be inconsistent with the law in cognate areas that draw a sharp distinction between administrative actions designed to assure compliance with a regulatory regime and police investigatory searches designed to uncover evidence of a crime. It likewise would be sharply at odds with long-settled principles relating the “special needs” exception to the Fourth Amendment and Article 14. For all of these reasons, *Moore* should be limited to police investigatory searches of the kind actually at issue in that case. If the SJC intends otherwise, it should unambiguously say so.

— Roger L. Michel Jr. 59

57. Id. (emphasis added).
58. Indeed, many of the special conditions of parole that are crucial to avoiding recidivism can only be verified during mandatory home visits, including restrictions on computer access for certain sex offenders, residency requirements, GPS monitoring restrictions and associational restrictions, to name just a few.
59. Roger L. Michel Jr. is Deputy Chief of Appeals and Senior Appellate Attorney in the Bristol County District Attorney’s office. Before that, he was a member of the Massachusetts Parole Board. The views expressed herein are his alone.
BOOK REVIEW

Hidden in Plain Sight: What Really Caused the World’s Worst Financial Crisis and Why It Could Happen Again

by Peter J. Wallison (Encounter Books 2015)

It has been almost a decade since the worst financial crisis in recent U.S. history occurred. Four million families lost their homes. Another four and a half million fell behind in payments. Household wealth in the trillions was lost. It was followed by the worst recession in 80 years. Taxpayer bailouts shored up the financial industry in an unprecedented manner. We are still feeling the effects today. So how did the financial crisis happen and could it happen again?

A variety of analyses have been published as to the causes of the financial crisis. Listopia alone identifies over 100 books on the subject. The conventional narrative suggests that the financial crisis was caused by lax government regulations. Some hold the Securities and Exchange Commission (SEC) responsible for its failure, in turn, to hold Wall Street accountable.

Peter Wallison provides a different, in-depth analysis in his book Hidden in Plain Sight: What Really Caused the World’s Worst Financial Crisis and Why It Could Happen Again. Wallison argues that the insolvency of Fannie Mae and Freddie Mac, the government-sponsored enterprises (GSEs) that facilitate the flow of funds for home loans nationwide, caused the crisis.

Wallison previously served as general counsel to the United States Treasury Department during the Reagan administration and currently is a senior fellow at the American Enterprise Institute, a conservative think tank. He is best known as one of the commissioners who dissented from the conclusions of the Financial Crisis Inquiry Commission (FCIC). His book explains many of the points raised in his dissent.

In a series of chapters used as building blocks for his central contention about the causal effect of the housing policies, Wallison lays out the backdrop to how the U.S. government’s affordable housing policies were at the core of the causes of the financial crisis. In 2011, the FCIC concluded that the collapse of the housing bubble, fueled by low interest rates, easy and available credit, scant regulation and toxic mortgages were “the sparks which ignited a string of events which led to a full-blown crisis in the fall of 2008.” Wallison bluntly offers a different view: “it is the thesis of this book that the 2008 financial crisis would not have occurred but for the housing policies of the U.S. government between 1992 and 2008.” Wallison contends that the GSEs, Fannie Mae and Freddie Mac, directed by the Department of Housing and Urban Development (HUD), in order to meet ambitious affordable housing goals established by Congress, ultimately caused the implementation of a set of regulations and policies that required Fannie Mae and Freddie Mac to reduce mortgage underwriting standards. According to Wallison, the GSEs’ mission — to support affordable housing — imposed a mortgage quota system in which a certain percentage of all Fannie Mae and Freddie Mac mortgage purchases had to be loans to low- and moderate-income (LMI) borrowers. HUD subsequently imposed a stricter quota requirement for LMI borrowers. LMI credit under the mortgage quota system would occur only when the loans were used to “purchase a home” as opposed to when a LMI borrower “refinanced.” With this revised quota system, Wallison notes that “it was much more difficult to find high-quality home purchase mortgages than loans that were simply refinancing an existing mortgage.” Wallison argues the government housing policies that reduced mortgage underwriting standards built an unprecedented housing bubble. When combined with mark-to-market accounting and a blundering government response, these policies were the causes of the 2008 financial crisis.

Wallison provides context for his contentions by introducing the reader early on to the relationship between strong mortgage underwriting standards and the avoidance of mortgage defaults. “[G]ood underwriting standards . . . produce a stable housing market during normal (non-stressed) times, while deviations from these standards produce instability and high rates of mortgage default.” Underwriting standards ensure that the borrower has the necessary income to address his debts (“debt to income” or “DTI”), the property

5. See generally Peter J. Wallison, Hidden in Plain Sight (2015).
7. The Fin. Crisis Inquiry Comm’n, supra note 1, at xvi.
8. Wallison, supra note 5, at 43.
10. Wallison, supra note 5, at 132.
12. Wallison, supra note 5, at 27.
to be purchased has a value exceeding its appraised value (“loan to value” or “LTV”), and the borrower has a credit record of meeting his or her financial obligations.\textsuperscript{13}

Mortgage terms are most often conventional (“fixed rate”) “prime” mortgages.\textsuperscript{14} Relying upon data from the Mortgage Bankers Association, Wallison notes that serious delinquencies on conventional loans averaged about 1.1 percent during the period 1982–1991. Wallison contends that non-conventional or non-traditional mortgages (NTMs) have default rates that are multiples times that of the prime loan default rate. From 2007–2009, there were large numbers of NTMs in the financial system that defaulted in record numbers. Using data supplied by Wallison’s colleague at the American Enterprise Institute, Edward Pinto, Wallison notes a harsh reality: by 2008, more than half of all mortgages in the United States were, as Wallison explains, subprime or Alt-A (loans made to people with FICO credit scores lower than 660).\textsuperscript{16} Wallison contends these loans as well as loans with various deficiencies (interest only, no or low down payments, or investment properties) had a much higher rate of default. When the ultimate collapse in real home prices occurred in 2007, borrowers who were having trouble meeting their mortgage obligations were no longer able to refinance or to sell their homes. Surprised by losses on assets believed to be safe, investors pulled back from a wide range of credit opportunities with the failure of the markets. The crisis deepened when the failure or near failures of several major financial firms occurred.\textsuperscript{17}

Prior to the crisis, Fannie Mae and Freddie Mac were buying loans with zero down payments and compromising underwriting standards, such as credit and DTI. This gradual deterioration in loan quality placed mortgages and mortgage-related securities at risk. Toxic mortgages led to a string of events where mortgage-related securities were packaged and sold. Mortgage giants Fannie Mae and Freddie Mac were dramatically affected by the subprime meltdown and eventually subject to government conservatorship.

For Wallison, the affordable housing requirements imposed on Fannie Mae and Freddie Mac forced them to abandon their traditional focus and to begin to accept non-traditional mortgages. This was a major policy error by HUD.\textsuperscript{18} Wallison claims that none of the reports and analyses, including the FCIC’s report, address what he believes is a central fact: “on June 30, 2008, before the financial crisis began in earnest there were at least 31 million nontraditional mortgages (NTMs) — 56% of all mortgages in the U.S. financial system.”\textsuperscript{19} At least three-quarters of these were on the books of Fannie Mae and Freddie Mac.\textsuperscript{20} This weakened the GSEs and made the U.S. financial system extraordinarily vulnerable to the collapse of the housing bubble in 2007. Quoting New York City Mayor Michael Bloomberg, Wallison assigns the blame for the crisis: “[i]t was not the banks that created the mortgage crisis. It was, plain and simple, Congress who forced everybody to go and give mortgages to people who were on the cusp.”\textsuperscript{21}

Wallison takes the FCIC to task for its attempt to assign responsibility among several actors. In July 2009, the 10-member FCIC was appointed to investigate the causes of the crisis, and it noted:

\begin{quote}
The captains of finance and the public stewards of our Financial system ignored warnings and failed to question, understand and manage evolving risks within a system essential to the well-being of the American public. Theirs was a big miss, not a stumble. While the business cycle cannot be repealed, a crisis of this magnitude need not have occurred. To paraphrase Shakespeare, the fault lies not in the stars but in us.\textsuperscript{22}
\end{quote}

Though the FCIC report acknowledged that the Federal Reserve failed to stem the flow of the toxic mortgages and further noted that many financial institutions bought and sold mortgage securities without appropriate examinations, Wallison keeps the focus on government housing policy. Ominously, Wallison suggests that the conventional narrative of lax regulations of private institutions ignores the real cause, and Wallison believes this conventional narrative allows government policies that “will again result in looser underwriting standards and another mortgage based breakdown of the financial system.”\textsuperscript{23}

Wallison’s book brings to mind that nearly a decade after the financial crisis, open issues remain as to whether the causes of the crisis are understood and have been appropriately addressed. With the Dodd-Frank Act\textsuperscript{24} and the regulations that followed, many of the mortgage underwriting standards, as well as the regulatory oversight of mortgage lending, have been strengthened. Indeed, some contend the regulatory pendulum has swung too sharply the other way and that mortgage underwriting standards should be relaxed. Hidden in Plain Sight is a must read for those interested in learning how the crisis occurred and how relaxing underwriting standards is not a long-term solution.

— Robert J. Kerwin

\begin{footnotes}
13. The standard in place since the mid-1990’s has been the credit score developed by the Fair Isaac Corporation (known as the FICO score). See http://www.myfico.com/credit-education/credit-scores/.
14. Term used by Wallison and American Enterprise Institute colleague Edward Pinto to define non-fixed rate conventional mortgages.
15. Wallison, supra note 5, at 31.
18. Wallison, supra note 5, at 218.
19. Wallison, supra note 5, at 41.
20. Wallison, supra note 5, at 265.
21. Wallison, supra note 5, at 42.
22. Fin. Crisis Inquiry Comm’n, supra note 1, at xviii.
23. Wallison, supra note 5, at 342.
\end{footnotes}