

**MASSACHUSETTS  
ACCESS TO JUSTICE COMMISSION  
c/o Hon. Herbert P. Wilkins, Chair  
Boston College School of Law  
885 Centre Street  
Newton MA 02459**

February 12, 2009

Honorable Margaret H. Marshall  
Chief Justice  
Supreme Judicial Court  
John Adams Courthouse  
Boston, Massachusetts 02108

Dear Chief Justice Marshall,

On behalf of the Access to Justice Commission, I submit to the Justices a proposed rule amendment that would permit the addition of an opt-out fee to the lawyers' annual registration statement. The proceeds of the opt-out fee would fund legal services to people of low income and programs designed to improve the administration of justice, especially for needy Massachusetts residents. A copy of the proposed rule change is enclosed, along with (i) a copy of a memorandum providing background information prepared for the bar associations, (ii) a letter from the president of the Massachusetts Bar Association stating the support of that association and (iii) a letter from the president of the Boston Bar Association likewise stating its support.

The proposed rule change would amend S.J.C. Rule 4:03 by inserting a new second paragraph. The annual registration statement for attorneys would set forth an annual fee of \$50 for use in the administration of justice and for the provision of civil legal services for those who cannot afford those services. Any attorney who does not wish to pay that fee may so indicate, thus opting-out of the payment. The amounts collected will be paid by the Board of Bar Overseers to the IOLTA committee and distributed by it as follows: seventy-five percent will be paid over according to the distribution prescribed in S.J.C. Rule 1.15(g)(4) and (5) and twenty-five percent would be paid to the Massachusetts Legal Assistance Corporation to be used for the delivery of legal services to those who cannot afford them or for the administration of justice.

The process by which a lawyer must affirmatively decline to pay the opt-out fee is an essential element of the proposal. Practice elsewhere has shown that an opt-out process produces greater revenue than an add-on option.. Moreover, the opt-out procedure shows the attorney that the Justices are affirmatively urging the payment of the fee. S.J.C. Rule 6.1. states what a lawyer should provide as voluntary pro bono service each year, including the provision of twenty-five hours of service or a contribution of from \$250 to 1% of the attorney's taxable, professional income. The opt-out fee provides a direct means of implementing a portion of the Justices' expressed interest in the provision of assistance by the bar to the access to justice

process. The amount to be collected is not easily measured. If one-half of the attorneys in the Commonwealth pay the fee, over a million dollars will be collected.

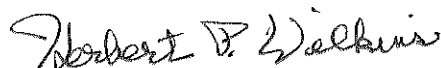
The provision that twenty-five percent of the funds be paid to the Massachusetts Legal Assistance Corporation is an important aspect of this proposal. These funds can be used for special access to justice programs, pilot projects and experiments, and expenses of committees appointed by the Justices to give attention to access-to-justice matters. It is important to note in this regard that the opt-out funds are voluntary payments as to which no valid objection can be made that the Justices are intruding on any legislative prerogative.

During the discussion in the House of Delegates of the Massachusetts Bar Association, a motion was made to convert the opt-out provision into an add-on provision. After several eloquent speeches in opposition to the amendment, the motion was defeated with only the mover and seconder in favor of it. As the attached letter from M.B.A. President McIntyre reports, the House then voted without opposition to approve the proposal.

We urge the Justices to act on the proposal as promptly as possible without seeking public comment. The position of those affected by the rule change is manifest. The attorneys have expressed their approval by the overwhelming votes of their elected representatives. In this time of limited resources and increased need, the position of the legal services community and its clients is clear.

I have written separately to the Rules Committee discussing matters of implementation and possible technical changes in the language of the proposed rule. I and other members of the Commission are available to discuss this proposal.

Sincerely yours,



Herbert P. Wilkins, Chair

Attachments

The Associate Justices  
Mr. Moran  
Ms. Lyons

**Attachment 1:**

**Proposed Amendment to S.J.C. Rule 4:03**

**RULE 4:03**

**PERIODIC ASSESSMENT OF ATTORNEYS**

(1) Every attorney required to register in accordance with Rule 4:02, other than a retired attorney, sitting judge, clerk-magistrate as defined in Canon 1 of Supreme Judicial Court Rule 3:12, Federal clerk of court, chief deputy clerk and deputy clerk, or suspended attorney, shall pay an annual fee as established by the court from time to time, which shall be paid to the Board with the registration statement required under Rule 4:02. The fee so paid subject to any applicable orders of this court shall be used to defray the costs of attorney registration and disciplinary enforcement, to provide funds for the operation of the Clients' Security Board and Fund established under Rule 4:04, to provide funds for the operation of the Massachusetts lawyers assistance programs provided by Lawyers Concerned for Lawyers, Inc. (LCL), and for such other purposes as the Board, with the approval of the court, from time to time shall determine.

**(2) The registration statement required under Rule 4:02 shall provide for an additional annual fee of \$50, or such amount as established by the court from time to time, for use in the administration of justice and provision of civil legal services to those who cannot afford them. The registration statement shall further provide that any attorney who does not wish to pay the additional fee under this subsection shall so indicate and shall not be required to make the payment.**

**The Board shall remit, at least quarterly, to the IOLTA Committee the fees collected under this subsection, which shall disburse 75% of the fees in the same manner as other IOLTA funds are disbursed in accordance with Rule 1.15 (g) (4) and (5). The Committee shall disburse the remaining 25% of the fees to the Massachusetts Legal Assistance Corporation (MLAC) for distribution to organizations and entities involved in the provision of civil legal services and/or the administration of justice. MLAC shall solicit input from the Massachusetts Access to Justice Commission, as well as other public and private entities involved in access to justice issues, to develop a set of criteria to be used by MLAC in determining what programs or projects will be funded with the 25% disbursement it receives hereunder.**

**The Massachusetts Legal Assistance Corporation and other entities which receive the funds hereunder shall submit an annual report to the court describing the distribution of the funds received pursuant to this subsection.**

**(-2-)(3) To any attorney who, without permission from the Board, fails to pay the fee required under subsection (1) above within thirty days, the Board shall mail a letter by first-class mail to the addresses furnished on the last registration statement filed as required by Rule 4:02, notifying the attorney of his or her failure to pay the required fee and that, if within fifteen days from the**

date of the mailing of the letter the attorney shall fail to pay the fee, there shall be added to the fee a late assessment of fifty dollars. If within forty five days from the date of the mailing of the letter, he or she shall fail to pay the fee, the Board shall mails a certified or registered letter to the last known business address and a letter by first-class mail to the last known residential address, notifying the attorney of his or her failure to pay, and shall file a petition for the attorney's suspension with the Clerk of this court for Suffolk County.

~~(-3-)~~(4) Any attorney suspended under the provisions of subsection ~~(-2-)~~(3) above shall become subject to the provisions of Rule 4:01, Section 17(4), upon entry of the suspension order, and if not reinstated within thirty days after entry shall become subject to the other provisions of said Section 17. As a condition precedent to reinstatement, such attorney shall file with the Board an affidavit stating the extent to which he or she has complied with applicable provisions of Rule 4:01, Section 17, and shall pay all arrears due from the date of the last payment to the date of his or her request for reinstatement, including the late assessment of fifty dollars required under subsection (2) above, and shall also pay to the Board a penalty of one hundred dollars.

## Attachment 2:

### Background Information

The Access to Justice Commission requests your support of its proposal to the Supreme Judicial Court that it amend Rule 4:03 by adding to the annual registration fee a contribution of \$50 for the provision of legal services to low-income residents of Massachusetts and for the administration of justice, with the option on the part of the attorney registrant to opt-out of the contribution by simply checking a box on the annual registration form. The contributions will be collected by the Board of Bar Overseers and distributed 75% to the IOLTA Committee and 25% to the Massachusetts Legal Assistance Corporation. The IOLTA Committee will distribute its share to the three charitable entities in the same proportions as IOLTA funds are currently distributed – i.e., two thirds to MLAC, for support of the various legal services programs throughout the state, and one third to the Massachusetts Bar Foundation and the Boston Bar Foundation for grants for delivery of legal services or improvement of the administration of justice. Pursuant to criteria promulgated from time to time by MLAC, upon advice from the Access to Justice Commission among others, MLAC will distribute its 25% share in grants for the purpose of increasing access to legal services and for innovative programs designed to improve the administration of justice for low-income residents of Massachusetts.

Before submitting this proposal to the Court, the Commission wanted to seek your input and approval for this proposal.

### Background

Even in the best of times, the supply of free legal services for low income residents is woefully inadequate. The “justice gap” is large. Only one legal problem in five gets any help from legal aid. Only half of the low-income individuals who actually apply for assistance receive any service; the other half are turned away. Despite significant legislative support and an excellent IOLTA program, a 2003 legal needs study in Massachusetts showed that the justice gap in Massachusetts was just as large.

While the current economic problems which the country faces may well cause problems for the legal community, we must never forget that those same problems are even greater for the Commonwealth’s disadvantaged citizens. Mortgage foreclosure issues, for example, are simply the latest in a string of difficult legal issues which the poorer citizens of the Commonwealth face on a daily basis. While the amount and severity of the legal problems facing the disadvantaged citizens of the Commonwealth are increasing, the funding available for legal services for the poor is not keeping up with the demand for legal services and is, in fact, decreasing. Thus, for example, IOLTA funding decreased by \$15 million in 2008 and is declining more in 2009, which will cause the legal services programs in the state to exhaust their reserves and then to lay off many attorneys and paralegals who would otherwise be able to help the poor deal with their growing problems.

Rule 6.1 of the Massachusetts Rules of Professional Conduct calls on every Massachusetts attorney to donate 25 hours of services pro bono or to contribute at least \$250 to one percent of annual professional income to support organizations that provide free legal assistance to persons of limited means. Other jurisdictions have adopted similar rules to that being proposed by the Access to Justice Commission in recent years. Based on our most recent survey, 16 of the states have some type of special contribution added to their regular registration fee or, in some states with integrated bar associations, the state supreme court has made a contribution to bar dues mandatory. Where the amount of the contribution is specified, it is between \$20 and \$100 per year.

The Access to Justice Commission, an entity appointed by the Supreme Judicial Court to consider the degree to which the legal system was providing meaningful access to the justice system for all citizens of the Commonwealth, believes that the most significant impediment to such access is a simple concept: there are not sufficient lawyers to represent all of the people in the state who need such representation. After holding a series of hearings throughout the state on access issues, the Commission concluded that the concept of an “add-on” to the annual registration fee for lawyers in the state would be one way in which access to justice could be improved. It is in this context that we seek the organized bar’s support of the add-on envisioned by this rule change. The attached proposed amendment to SJC Rule 4.03 contemplates that each attorney will be given an opportunity to opt out of the \$50 proposed add-on, thereby respecting each attorney’s right to make a personal decision about this matter.

#### Uses for the Contributions

The proposal calls for 75% of the funds contributed to go directly to legal aid and public service law firms. The IOLTA Committee is asked to receive the funds and distribute them to MLAC, the MBF and the BBF along with existing IOLTA revenue. The charitable entities are to use these funds to supplement the grants they make for delivery of legal services. The remaining 25% of the revenues generated will be given to MLAC which will have the discretion to provide grants to public and private entities involved in the administration of justice, including the funding of pilot projects and currently unfunded entities which are attempting to address the issues pertaining to access to justice more broadly.

The Access to Justice Commission respectfully requests your support for this proposal.



Attachment 3:

M A S S A C H U S E T T S   B A R   A S S O C I A T I O N

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February 6, 2009

The Honorable Herbert P. Wilkins  
Chairman  
Massachusetts Access to Justice Commission  
c/o Boston College Law School  
885 Centre Street  
Newton, MA 02459

Re: Amendment of Rule 4:03, "Periodic Assessment of Attorneys Fees"

Dear Chairman Wilkins:

On January 15, 2009, the Massachusetts Bar Association's House of Delegates unanimously endorsed the Access to Justice Commission's proposal to amend Rule 4:03, entitled "Periodic Assessment of Attorneys."

The Proposal provides for an assessment of \$50.00 to the annual attorney registration fee of the Board of Bar Overseers, along with, a mechanism for the distribution of these fees, for use in the administration of justice and the provision of civil legal services. As you know first hand, these difficult economic times are having a catastrophic effect on access to justice for the Commonwealth's most vulnerable citizens. Shrinking IOLTA funds and cuts to our legal aid programs coupled with rising unemployment rates, the foreclosure crisis, and statewide cuts in services continues to cause the number of eligible citizens for who are in desperate need of legal services to multiply each day. Amending Rule 4:03 provides attorneys with an opportunity to contribute funds to be disbursed to civil legal aid agencies. Attorneys who do not wish to contribute may opt-out from the additional fee. In addition, the Proposal allows the Court the flexibility of determining the appropriate future amount of the annual assessment.

Despite the critical economic challenges, we cannot forget that access to justice for all citizens is the cornerstone on which this country was founded. Providing an appropriate safety net to our most vulnerable citizens is one of the fundamental obligations of our profession. Thank you for your consideration of our support.

Sincerely,

Edward W. McIntyre  
President



# Boston Bar

ASSOCIATION

16 Beacon Street  
Boston, MA 02108

Phone (617) 742-0615  
Fax (617) 523-0127  
www.bostonbar.org

## Attachment 4:

January 28, 2009

### *Officers*

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John J. Regan  
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*Vice President*  
  
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Honorable Herbert P. Wilkins  
Chief Justice (ret.), Supreme Judicial Court  
Chair, Massachusetts Access to Justice Commission  
Boston College Law School  
885 Centre Street  
Newton, MA 02459

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Maureen A. O'Rourke  
Laura S. Peabody  
Mala M. Rafik  
Rebecca B. Ransom  
Douglas B. Rosner  
Charles E. Walker, Jr.  
Mark J. Warner

**Re: Boston Bar Association Comments on the Proposed  
Amendment to Supreme Judicial Court Rule 4:03**

Dear Chief Justice Wilkins:

On behalf of the Boston Bar Association (the "BBA"), I write to express the Association's support for the Access to Justice Commission's proposal to the Supreme Judicial Court that it amend Rule 4:03 "Periodic Assessment of Attorneys" by adding to the annual registration fee a contribution of \$50 to support civil legal services to low-income residents of Massachusetts and the administration of justice, with the option on the part of the attorney registrant to opt-out of the contribution.

The BBA is very committed to the promise of equal justice for all individuals in the Commonwealth and the concomitant principle of equal access to the legal system. As recognized in the recent report of the BBA's Task Force on Expanding the Civil Right to Counsel, we are fully aware of the enormous gap between the need for legal assistance for those of limited means and its availability, even in the best of economic times. With the current financial situation and the very significant downturn in IOLTA revenues to fund legal services programs, the need to find alternative sources of income for these essential services is even more urgent.

The Access to Justice Commission has been instrumental in working to develop and maintain a comprehensive understanding of issues relating to access to the legal system, including the availability of civil legal services provided to low-income people in the Commonwealth. The BBA is confident that the research and analysis behind this proposal will improve access to justice in this difficult financial climate. Furthermore, the BBA appreciates that this proposal respects

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each attorney's right to make a personal decision about donating to legal services by providing the option of opting out of the contribution.

Thank you for the opportunity to comment. Please do not hesitate to contact me ((617) 371-1004) if the BBA can be of further assistance.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Kathy B. Weinman", with a long horizontal flourish extending to the right.

Kathy B. Weinman  
President

Cc: Anthony Doniger  
Gerry Singsen