COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, SS. NO. SJC-13921

DIANA DIZOGLIO, STATE AUDITOR,
Plaintiff-Appellee,

v.

RONALD MARIANO, SPEAKER OF THE HOUSE; KAREN E. SPILKA, SENATE PRESIDENT; TIMOTHY CARROLL, HOUSE CLERK; MICHAEL D. HURLEY, SENATE CLERK,
Defendants.

ANDREA JOY CAMPBELL, ATTORNEY GENERAL,
Intervenor-Appellant.

ON RESERVATION AND REPORT FROM THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

BRIEF OF THE APPELLEE STATE AUDITOR

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I. INTRODUCTION

On November 5, 2024, 72% of Massachusetts voters—comprising more than 2.3 million individuals—determined that the Office of the State Auditor ("OSA") should be permitted to audit the General Court.[1] In accordance with this overwhelming democratic mandate, on January 6, 2025, the Auditor requested that the Legislature produce four discrete categories of documents pertaining to the Legislature's finances. RA313–34. To date, the Legislature has refused to comply with that request, and has instead taken the position that *any* audit of the General Court conducted by the Auditor violates the Massachusetts Constitution. RA69–73, 103. Clearly, the Auditor and the Legislature are at an impasse, and the only way to give meaning to the People's democratic mandate is for the Judiciary to determine whether the Auditor's request for documents is constitutional.

Regrettably, nearly a year-and-a-half after the ballot initiative was approved, the People have still not received any answers as to the future of the legislative audit. The reason for this significant delay is the Attorney General. For more than a year, the OSA has engaged the Attorney General's Office ("AGO") in good faith to authorize litigation that would break the impasse and permit the Judiciary to

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[1] *See 2024 - Statewide - Question 1*, Sec'y of the Commonwealth of Mass., https://electionstats.state.ma.us/ballot_questions/view/11620/ (last visited Apr. 15, 2026).

determine the constitutionality of the statutorily mandated audit. In response, the AGO has sent the OSA repetitive letters asking essentially the same questions about the scope of the audit, the cause of action to be brought, and the Auditor's position on the audit's constitutionality. The OSA has answered these questions extensively through formal memoranda and letters to the AGO on no fewer than ***six*** occasions throughout the past year (not to mention through countless emails, calls, and meetings). Each time, the AGO has responded by barraging the OSA with the same questions, accusing the OSA of not providing answers, and categorically failing to lend its institutional and legal expertise to assist the Auditor in carrying out her statutory duties.

More than a year of dilatory tactics has forced the Auditor to conclude that enough is enough; the Attorney General's conduct indicates that she has no intention of attempting to enforce the audit—or of appointing a Special Assistant Attorney General so that the People's interests can be represented notwithstanding any disagreements between the Auditor and the Attorney General. By filing a motion to strike, the Attorney General has taken the position that G.L. c. 12, § 3 permits her to decide unilaterally that the Auditor lacks recourse to the courts to enforce her statutory duties backed by an overwhelming democratic mandate. Essentially, the Attorney General claims that she can keep enforcement of the audit

in limbo in perpetuity through an interminable "vetting" process that the AGO has failed to engage in meaningfully or in good faith.

The Attorney General's position is incorrect as a matter of law; this Court has repeatedly acknowledged that the Attorney General may not exercise her authority under G.L. c. 12, § 3 in a manner that is arbitrary, capricious, or unlawful. *See Sec'y of Admin. & Fin. v. Att'y Gen.* (*Sec'y of A&F*), 367 Mass. 154, 159 n.4, 165 (1975); *Feeney v. Commonwealth*, 373 Mass. 359, 368 (1977). The circumstances here present such a case. The Attorney General acted arbitrarily and capriciously in responding to the Auditor's request for judicial enforcement by stalling for more than a year. The Attorney General's argument to the contrary—that the OSA has failed to cooperate and that the Attorney General stands at the ready to support litigation—is blatantly contradicted by the record and is simply not credible.

The Attorney General's effort to stonewall the Auditor is also unlawful; by refusing to permit litigation to proceed, the Attorney General has acted in dereliction of her duty to act in the public interest and defend the laws of the Commonwealth. Furthermore, the Attorney General's efforts to unilaterally prevent a state official from enforcing her statutory duties in court violate the Auditor's constitutional right of access to courts, especially considering that the Auditor is a fellow elected constitutional officer whose enabling statute provides

her the express right to seek judicial enforcement of her authority to compel records. *See* G.L. c. 11, § 12. The Attorney General has also violated the separation of powers doctrine, since she has effectively prevented the Judiciary from carrying out its core function of deciding the constitutionality of a statute.

The solution is clear: where the Attorney General is unwilling or unable to provide representation to a state official, the courts must step in to appoint counsel so that the People's interests are properly represented. *See Clerk of Super. Ct. v. Treasurer & Receiver Gen.*, 386 Mass. 517, 526 (1982). The necessity of appointing independent counsel is all the more obvious here considering that the Attorney General has already acted on behalf of the named defendants in this litigation, and her conduct clearly indicates that she does not support the Auditor's position. RA372–73.

As retired Justice Robert Cordy explained in a recently published op-ed: "It's one thing for [the Attorney General] to take lawmakers' position in the matter and for her office to represent them; it's another for her to take the extreme view that the auditor cannot hire her own attorney."[2] By taking the position that the Auditor and the public interest cannot be represented in court—by *anyone*—the

[2] Robert Cordy, *DiZoglio's Right to Hire a Lawyer to Push Audit Case Should Be Clear-Cut*, CommonWealth Beacon (Mar. 2, 2026), https://commonwealthbeacon.org/opinion/dizoglios-right-to-hire-a-lawyer-to-push-audit-case-should-be-clear-cut/.

Attorney General has determined unilaterally that the courts cannot provide answers on the audit's constitutionality that the People have been waiting for since November 2024.[3] The law does not compel such an outcome; the Court should find that the Attorney General has failed to exercise her authority properly under G.L. c. 12, § 3, remand with instructions to deny the Attorney General's motion to strike, and permit the Auditor to proceed with this suit represented by independent counsel who will defend the People's interests.

II. STATEMENT OF ISSUE

Whether the Attorney General may unilaterally preclude the Auditor from seeking judicial enforcement of her statutory duties provided by an overwhelming democratic mandate, by failing to defend state law and then blocking the Auditor's representation by a Special Assistant Attorney General.

III. STATEMENT OF CASE

The Attorney General's statement of the case is accurate, though the Auditor makes one clarification—she respectfully disagrees with the Single Justice's

[3] As the *Boston Globe* Editorial Board concluded: "This fight really can't go on indefinitely. That certainly wasn't what nearly 2.3 million Massachusetts voters had in mind in 2024. It's not just DiZoglio who deserves an answer; it's the people who gave her the mandates she is now attempting to exercise." Bos. Globe Ed. Bd., *Voters Deserve a Final Answer on That Legislative Audit*, Bos. Globe (Feb. 18, 2026), https://www.bostonglobe.com/2026/02/18/opinion/auditor-versus-the-legislature/.

observation in her order denying the Auditor's request for the appointment of a Special Assistant Attorney General that "the State Auditor cite[d] no statute, constitutional provision, or other authority that would permit a single justice of the Supreme Judicial Court to appoint a [Special Assistant Attorney General]." RA284. In her motion, the Auditor cited *Secretary of Administration and Finance v. Attorney General*, 367 Mass. At 165, which provides state officials with judicial recourse where the Attorney General has abused her gatekeeping authority under G.L. c. 12, § 3, and *Clerk of Superior Court v. Treasurer and Receiver General*, 386 Mass. at 526, which expressly provides that a Single Justice has the authority to appoint counsel for state officials in the absence of an appointment from the Attorney General. RA261–62.

IV. STATEMENT OF FACTS

A. Massachusetts Voters Overwhelmingly Approve a Ballot Initiative Authorizing the Auditor to Audit the Legislature

As this Court has recognized, "[t]he public has an interest in knowing whether public servants are carrying out their duties in an efficient and law-abiding manner," and "greater access to information about the actions of public officers and institutions is increasingly . . . an essential ingredient of public confidence in government." *Att'y Gen. v. Dist. Att'y*, 484 Mass. 260, 262–63 (2020) (internal quotations omitted). "Lack of transparency," conversely, "increases suspicion,

inhibits public participation, and undermines confidence in the government." *Kay v. Town of Concord*, 105 Mass. App. Ct. 366, 379 (2025) (Hodgens, J., concurring).

Unfortunately, however, the Legislature has failed to live up to these ideals of governmental transparency. In fact, Massachusetts is widely regarded as one of the worst states in the nation when it comes to legislative transparency.[4] The Commonwealth received an F grade from Open States's 2013 Legislative Data Report Card and a D rating from The Center for Public Integrity in 2015.[5] According to the Pioneer Institute, of the 49 states requiring financial interest disclosure reports, Massachusetts ranks as the least transparent.[6] As these sources have noted, the Legislature's broad claimed exemption from the Massachusetts Public Records Law, the Legislature's refusal to follow open meetings laws, and

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[4] *See* John Hilliard, *'They Don't Even Pretend to Comply': Mass. Agencies, Cities, and Towns Openly Flout Open Record Law*, Bos. Globe (Mar. 4, 2026), https://www.bostonglobe.com/2026/03/04/metro/massachusetts-public-records-law/; *see generally* OSA, *Official Audit Report* (2024), https://www.mass.gov/doc/audit-report-the-massachusetts-general-court-0/download (detailing the General Court's transparency and accountability issues).

[5] *See* Andrew Harding, *From the City on a Hill to a Shrouded Statehouse: Massachusetts' Push for Government Accountability*, Pioneer Inst. (July 30, 2025), https://pioneerinstitute.org/from-the-city-on-a-hill-to-a-shrouded-statehouse-massachusetts-push-for-government-accountability/.

[6] *See id.*; *Ranking the States on Financial Transparency*, Pioneer Inst., https://usdatalabs.org/index.php?cID=404 (last visited Apr. 21, 2026).

chronic underenforcement of existing disclosure requirements all contribute to the Commonwealth's woeful reputation in this area. *See* Harding, *supra*; Hilliard, *supra*.

Exacerbating the Commonwealth's transparency crisis is the Legislature's refusal to take ameliorative measures. Just 12% of state lawmakers responding to a Boston Globe poll stated that the Legislature should be subject to the state's Public Records Law.[7] Moreover, the Legislature has refused to participate in prior audits, including the Auditor's most recent performance audit, asserting that any legislative audit violates the Massachusetts Constitution. RA67–73. The AGO determined that it would be unable to assist the Auditor in carrying out that legislative performance audit in 2023, contending that G.L. c. 11, § 12's prior language (before the voters' approval of the ballot initiative) did not authorize the Auditor to audit the Legislature without its consent. RA74–90.

Faced with a Legislature unwilling to take corrective measures, the People turned to Article 48, which provides "a means by which the people [can] move forward on measures which they deem[] necessary and desirable without the

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[7] *See* Matt Stout & Anjali Huynh, *We Asked Every Mass. Lawmaker Whether They Should Be Subject to the Public Records Law. Only a Handful Responded.*, Bos. Globe (Mar. 17, 2025), https://www.bostonglobe.com/2025/03/17/metro/massachusetts-legislature-public-records-survey-exempt/.

danger of their will being thwarted by legislative action." *Citizens for a Competitive Mass. v. Sec'y of the Commonwealth*, 413 Mass. 25, 30 (1992) (internal quotation omitted). On November 5, 2024, the voters of Massachusetts overwhelmingly approved Question 1 on the statewide ballot, entitled, "A Law Expressly Authorizing the Auditor to Audit the Legislature," with 72% of voters voting in favor of the measure. The approval of this ballot initiative amended the first sentence of G.L. c. 11, § 12, which now mandates that the Auditor shall audit records of "the general court itself."

B. The Auditor Attempts to Compel Financial Documents from the Legislature Pursuant to Her Statutory Authority

Following the passage of the initiative, the Auditor informed House Speaker Ronald Mariano and Senate President Karen E. Spilka of her intent to begin carrying out the democratically mandated legislative audit via an engagement letter dated January 3, 2025. RA310–11. This letter explained that the audit would review "state contracting and procurement procedures, the use of taxpayer-funded nondisclosure agreements, and a review of [each House's] balance forward line item – including a review of all relevant financial receipts and information." RA310.

On January 6, 2025, the OSA requested from the House and Senate categories of financial documents directly related to those topics:

1. The official budgets for the [Senate/House of Representatives] for Fiscal Years 2021, 2022, 2023 and 2024.
2. Copies of official audits of the [Senate/House of Representatives] for Fiscal Years 2021, 2022, 2023 and 2024.
3. A listing of all transactions related to the [Senate's/House of Representatives'] balance forward line item for Fiscal Years 2021, 2022, 2023 and 2024.
4. A listing of all monetary settlement agreements[] entered into by the [Senate/House of Representatives] with any current or former employees or members of the [Senate/House of Representatives] during Fiscal Years 2021, 2022, 2023 and 2024.

RA313–14. To date, the Legislature has yet to respond to these requests, maintaining its position that "[a]ny audit of the General Court conducted by the Auditor" is unconstitutional. RA103.

C. The Attorney General Stonewalls the Auditor's Efforts to Enforce the Audit for More Than a Year

On January 9, 2025, the OSA first requested via memorandum that the AGO initiate affirmative litigation against the General Court to compel the General Court to produce records and comply with the OSA's audit under G.L. c. 11, § 12. RA316–18. Over the course of the next year, as the record indicates, a clear pattern emerged: the OSA thoroughly—and repeatedly—answered the AGO's questions regarding the proposed litigation, and the AGO continued to repeat essentially the same questions, obstinately refusing to acknowledge that these questions had already been addressed.

In her opening brief, the Attorney General continues to insist that the OSA has been uncooperative and that the AGO is unable to ascertain the Auditor's legal positions. In outlining the OSA's responses to the AGO's questions, the Attorney General obfuscates the OSA's clearly articulated positions by taking fragments out of context, rearranging the chronology, and drawing irrational conclusions that are plainly belied by a review of the full record. The Auditor's positions have been clear and consistent, and the Attorney General's purported failure to recognize these positions and instead claim the existence of remaining ambiguities is indicative of bad faith. Moreover, it is not even clear why all these questions need to be answered prior to the AGO seeking to enforce Massachusetts law and obtaining the General Court's compliance with the OSA's document requests. To ensure that this Court has a comprehensive overview of the facts, the Auditor provides below a thorough chronology of communication between the OSA and the AGO.

Letter from the OSA to the AGO dated January 9, 2025. The OSA initially requested the AGO's assistance to initiate affirmative litigation against the General Court and compel compliance with G.L. c. 11 § 12. RA316–18. This initial letter explained that the Legislature had failed to respond to the Auditor's request for documents, even though the information requested is readily available and can be produced without significant administrative burden. RA317. This letter also noted

that G.L. c. 11 § 12 contains an enforcement method providing that the courts can order the production of records. *Id.*

Letter from the AGO to the OSA dated January 23, 2025. After employees of the OSA and the AGO met on January 16, 2025, to discuss enforcement of the audit, the AGO provided an official response letter. RA320–323. In this letter, the AGO provided three "core questions" for the OSA to address before litigation could be initiated:

1. What is the scope of the audit that the OSA intends to perform?
2. What legal claim do you propose to bring against the Legislature and what relief do you propose to ask of the court?
3. Does the OSA believe all functions of the Legislature are subject to audit or, instead, are certain core functions constitutionally protected?

Id. Notably, the AGO in this letter raised an important issue that the Auditor reiterated several times in the subsequent correspondence: "A court will not—indeed, cannot—answer the theoretical question of the Auditor's authority; it must examine the question in the context of particular information sought."[8] RA321.

Letter from the OSA to the AGO dated February 5, 2025. The OSA's letter provided thorough responses to each of the AGO's three "core questions." RA325–

[8] This conclusion is supported by the well-established principle of constitutional avoidance, *see SCVNGR, Inc. v. Punchh, Inc.*, 478 Mass. 324, 330 (2017), as well as this Court's reticence to issue advisory opinions, *see Answer of Justs. to the Acting Governor*, 426 Mass. 1201, 1204–05 (1997).

30. Addressing the first question, the OSA responded that the scope of the audit that would be the subject of litigation was the documents actually requested by the Auditor on January 6, 2025. As the OSA explained, "the scope of our audit is focused on the General Court's contracting and procurement procedures, use of taxpayer-funded nondisclosure agreements, and a review of the General Court's forward line item – including a review of all relevant financial documentation." RA326–27. The OSA also expressed agreement with the AGO's assertion that a court could not answer theoretical questions about the Auditor's authority or hypothetical future audits, and accordingly the OSA found it inappropriate and infeasible to provide an exhaustive position on the Auditor's authority to conduct any hypothetical audit. *Id.*

Addressing the second question, the OSA provided an extensive response that acknowledged existing obstacles to bringing suit against the Legislature, while providing theories as to how those obstacles may be overcome.[9] RA327–29. The

[9] Considering the OSA's extensive response on this issue (which was reiterated time and time again through subsequent correspondence), the Attorney General's claim that "[t]he OSA has not yet articulated its view regarding a suitable cause of action" is staggering. *See* Brief of the Appellant Attorney General ("Opening Br.") at 34, Dkt. No. 15. Plus, in any event, the AGO explicitly informed the OSA that questions about the availability of mandamus relief "need not prevent authorization of litigation," RA342, a sensible conclusion considering that the availability of mandamus relief in this instance raises a constitutional issue of first impression.

OSA proposed that a mandamus action under G.L. c. 249, § 5 may be appropriate. And, acknowledging this Court's holding in *LIMITS v. President of the Senate*, 414 Mass. 31, 35 (1992), that mandamus actions generally may not be brought against the Legislature, the OSA noted that *LIMITS* may be distinguished because the audit at issue would not compel the Legislature to take any *legislative action* or carry out any of its *constitutional duties*.[10] RA327–28. The OSA also noted that the proposed action would be unique in that it would seek to enforce a statute enacted by the People themselves, who resorted to the "ballot box" to express frustration with the Legislature, *see LIMITS*, 414 Mass. at 35, and who have constitutional authority to act as "legislators," *see Bates v. Dir. of Off. of Campaign & Pol. Fin.*, 436 Mass. 144, 165 (2002). RA327–28.

The OSA also detailed in this letter a similar case in which mandamus was deemed appropriate in addressing the legality of the Legislature's actions, *see Lamson v. Sec'y of the Commonwealth*, 341 Mass. 264, 267 (1960), as well as several Supreme Judicial Court authorities representing the flexibility of the

[10] Since the Attorney General is charged with "tak[ing] cognizance of all violations of law" and initiating proceedings that are "deem[ed] to be for the public interest," G.L. c. 12, § 10, the Auditor had hoped that the AGO would engage cooperatively with the Auditor and assist with litigation strategy. Instead, the AGO has undertaken no effort to lend its expertise to the OSA in addressing complex and novel issues of legislative privilege and the availability of mandamus relief against the Legislature.

separation of powers doctrine, including *Attorney General v. Brissenden*, 271 Mass. 172, 180 (1930), in which this Court held that "[t]he ascertainment of facts in its essence is not a legislative function." RA328–29.

Addressing the AGO's third "core question," the OSA acknowledged that there may be "core functions of the Legislature that are constitutionally protected," but again clarified that the Auditor's requests for the limited categories of financial documents did not "touch upon any constitutionally protected core functions of the Legislature." RA329–30.

Letter from the AGO to the OSA dated February 18, 2025. The AGO's response to the OSA's detailed answers provided perhaps the first indication that the AGO was not engaging in good-faith communication. The AGO restated the three "core questions" verbatim, and asked follow-up questions that had already been addressed. RA332–34. For instance, in restating its first question, the AGO asked the OSA to confirm if the audit described in detail by the OSA was, "in fact, the intended scope of your audit as it would be described to a court in prospective litigation." RA333. In restating its second question, the AGO asked the OSA to "confirm" that it would seek a mandamus claim, identify the defendants, and "identify the precise scope of the relief you propose to seek." *Id.* To reiterate, the AGO made clear in its prior letter that the scope of the audit was not hypothetical; the Auditor had already requested four discrete categories of documents from the

Legislature, and she was seeking to enforce the compulsion of *those documents*. RA326–28.

Finally, in restating its third question, the AGO asked the OSA to define "legislative action" and describe the extent to which "legislative action" is subject to audit, RA333–34, essentially asking the Auditor to detail the precise contours of "legislative privilege," a doctrine that this Court recently addressed for the first time in over 200 years in *Tran v. Commonwealth*, 496 Mass. 518, 528–36 (2025), and which is more properly developed through actual disputes on a case-by-case basis rather than through the discussion of hypothetical acts.

Letter from the OSA to the AGO dated February 27, 2025. Though the AGO's follow-up questions either had been explicitly addressed or asked the OSA to address hypothetical issues extending well beyond the scope of the limited audit at issue, the OSA answered the AGO's letter in good faith. Addressing the first restated "core question," the OSA reiterated that it was intending to enforce in court the limited document requests that were currently pending before the Legislature. RA336–37. Addressing the second restated question, the OSA reiterated that it was proposing bringing a mandamus action to compel the production of the requested records, and it clarified that the proposed defendants would be the House Clerk, the Senate Clerk, the Speaker, and the Senate President. RA337. Addressing the third question, the OSA acknowledged that "[c]ertainly,

not all functions of the Legislature are subject to audit, particularly those core legislative functions that are constitutionally protected."[11] RA337–38. The OSA further acknowledged that there may be "uncertainty regarding the definition of core legislative functions" (particularly when addressed in the abstract), but reiterated that "there is no uncertainty with regard to our audit and we would welcome a court's consideration and determination in that regard." RA338.

Finally, the OSA stated that it expected that the AGO "would in fact assist" the Auditor in working through these questions—rather than simply interrogate the OSA—and expressed hope that the Attorney General would provide "assistance in not only identifying, but using [her] legal expertise and resources, working with

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[11] Contrary to the Attorney General's assertion, the Auditor has never "abandoned" this position. Opening Br. at 33. Rather, the Auditor has made clear that the audit *at issue* would not infringe on core legislative functions and that the OSA would not engage in the abstract exercise of precisely delineating the constitutional limits of the Auditor's authority through endless hypotheticals. *See, e.g.*, RA174–79.

The Auditor also notes that the Attorney General misinterprets the OSA's claim that legislative privilege was being raised "for the first time" despite the parties' prior discussions of constitutional issues. Opening Br. at 33 (citing RA252). Although the OSA had addressed the AGO's questions about "core legislative functions" from the beginning of their correspondence, the AGO did not comprehensively frame this issue using the term of art "legislative privilege" until September 2025, RA241–42, likely because this Court had just recently issued the *Tran* decision that discussed "legislative privilege" at length.

The Attorney General's effort to manufacture contradictions where none exist is just one example of her taking statements out of context and distorting the record to portray the Auditor's positions as inconsistent.

the OSA to overcome any potential legal obstacles related to [the OSA's] proposed litigation against the General Court."[12] RA338.

Letter from the AGO to the OSA dated March 13, 2025. The AGO's response accused the OSA of not demonstrating "serious engagement with these issues." RA340. Rather than offer its legal expertise to assist the OSA, the AGO instead blatantly mischaracterized the Auditor's positions. For instance, the AGO accused the Auditor of providing "shifting descriptions" of the audit at issue, RA341, based on a letter to the Subcommittee of the Temporary Senate Committee on Rules stating that the OSA *would* seek to cover "all of the topics [the OSA was] unable to fully review in [the OSA's] previous audit."[13] However, that same letter made clear that the OSA had only *actually* sought disclosure of the four categories of documents covering "high-risk areas,"[14] and the OSA had made abundantly clear to the AGO that it was only seeking to compel the production of these documents *actually requested*—not materials that might be sought later. This

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[12] The OSA also expressly noted that, alternatively, the Attorney General could authorize the appointment of a Special Assistant Attorney General to provide this type of assistance. RA338.

[13] *See* Letter from Diana DiZoglio, Auditor of the Commonwealth, to Subcomm. of the Temp. Senate Comm. on Rules (Feb. 28, 2025), https://www.bostonherald.com/wp-content/uploads/2025/04/Senate-Subcommittee-Letter-2.28.25.pdf.

[14] *See id.*

distinction is straightforward, and the Attorney General's continued insistence that "some ambiguity remains" regarding the scope of this litigation strains credulity. *See* Opening Br. at 31.

Furthermore, instead of helping the Auditor develop a mandamus theory—and while acknowledging that questions regarding the availability of mandamus as a remedy "need not prevent the authorization of litigation"—the AGO asked that the OSA provide case law on issues that, to the Auditor's knowledge, have not been substantively developed in the Commonwealth, including whether protection for "legislative action" differs when actions are taken under statutory rather than constitutional authority, and to what extent that protection applies to "administrative activities." RA342.

Finally, the AGO disingenuously accused the OSA of seeking to bring "unspecified claims against the Secretary of the Commonwealth," changing its requested relief to a declaratory judgment, and taking the position that the OSA could bypass the AGO entirely by invoking G.L. c. 12, § 26. RA341–42.

Letter from the OSA to the AGO dated March 28, 2025. At this juncture, after nearly three months of the AGO restating repeatedly answered questions and moving the goalposts each time its questions were answered, the OSA finally

expressed concern that the AGO was not engaging in good-faith correspondence.[15] RA344–45.

These concerns notwithstanding, the OSA answered the questions from the AGO's previous letter. The OSA reiterated—again—that the prospective litigation would seek to compel production of the four categories of documents requested from the Legislature. RA345–46. The OSA also maintained that the production of financial documents would be an administrative act and would not violate separation of powers, acknowledged that the case law in this area is limited, and requested feedback on whether the AGO would support this position. RA346–47. The OSA further clarified that litigation would be brought against the four previously identified defendants and that a comment made by the OSA's prospective outside counsel regarding declaratory relief did not contradict the OSA's repeated communications that it sought mandamus relief. *Id.* Finally, the OSA reiterated that it was attempting in good faith to engage the AGO to enforce

[15] The Attorney General cites out of context the OSA's expressed concern with the AGO's lack of good-faith engagement in support of its claim that the OSA "disclaimed the need to engage with the AGO" on the issues of constitutional constraints and available remedies. Opening Br. at 32. As this letter (and the OSA's subsequent letters) show, the OSA repeatedly answered the AGO's questions about constitutional constraints and available remedies notwithstanding the Auditor's concern that the Attorney General was not engaging in good-faith dialogue.

the audit, but noted that, should the AGO continue to stonewall the Auditor "without lending its expertise, advice, or resources," the Attorney General could render herself absent under G.L. c. 12, § 26. RA347–48.

Letter from the AGO to the OSA dated August 4, 2025. The AGO's response accused the OSA of taking "inconsistent positions" and failing to provide "*any information*" regarding how the OSA intended to navigate the threshold issue of bringing a mandamus action against the Legislature. RA350 (emphasis added). Astonishingly, the AGO proceeded to provide a list of questions which had been answered *repeatedly* over the past six-plus months, requesting: a description of the scope of the proposed audit; the documents to be sought as part of that audit; the OSA's position on whether core legislative functions are subject to audit; and the cause of action to be brought. RA351.

Letter from the OSA to the AGO dated August 22, 2025. The OSA once again provided responses detailing the scope of the audit and the documents sought and reiterating the OSA's position that the audit would not infringe on the "core legislative functions" of the General Court. RA354–55. The OSA also expressed concern that the Attorney General was abdicating her official duties and acting in a "capricious, arbitrary or illegal manner" by precluding the OSA from obtaining judicial recourse, and stated that the Auditor would initiate litigation through

private counsel if the Attorney General continued to deny access to the courts. RA355–56 (citing *Sec'y of A&F*, 367 Mass. at 159 n.4, 165).

Letter from the AGO to the OSA dated September 18, 2025. Though the OSA had repeatedly maintained that the audit sought to be enforced would not infringe on core legislative functions (while acknowledging that such functions may be protected), the AGO's response claimed that the OSA had not shared "its understanding of how the legislative privilege affects its work," since legislative privilege would complicate an audit "concerning the legislative process and committee and leadership appointments." RA360. The AGO made this claim notwithstanding that: (1) a compulsion of documents concerning the legislative process would not be at issue in the litigation proposed by the OSA (i.e., the AGO was asking about future, hypothetical audits, not the audit sought to be enforced); and (2) this Court had issued *Tran*—its first discussion of legislative privilege in more than 200 years—only eight days prior to the AGO's transmission of this letter. The AGO also stated that it could not authorize suit because the OSA had failed to "explain the cause of action it intends to bring and commit to a scope of litigation." RA360.

Letter from the Auditor to the Attorney General dated October 15, 2025. The Auditor responded to the Attorney General directly via letter to reiterate that the Auditor was seeking to litigate the discrete issue of her compulsion of a narrow set

of financial records from the General Court—not hypothetical questions that may or may not present themselves in the future—and that the audit would not violate Articles 21 or 30 of the Massachusetts Constitution because it sought information regarding the General Court's administrative functions (i.e., "budgetary, financial, and contractual records") rather than legislative functions. RA363. The Auditor stressed that the OSA had repeatedly answered the AGO's questions, and she expressed disappointment that the Attorney General had abdicated her responsibility to enforce the law by giving the OSA the runaround for more than *nine months*. RA362–63.

Letter from the AGO to the OSA dated October 30, 2025. The AGO's response failed to acknowledge the OSA's repeated answers to its questions. Rather, the AGO again requested that the OSA take a position on legislative privilege and disclose "the cause of action it intends to bring and the defendants it intends to sue." RA365–66.

Letter from the OSA to the AGO dated January 26, 2026. The OSA's response requested the appointment of Special Assistant Attorneys General to represent the Auditor's interests, expressing concern that the AGO's most recent letter simply "repeated the same questions to the OSA regarding the cause of action that we intend to bring and the defendants we intend to sue—all of which have been previously asked by the AGO and previously answered by the OSA."

RA368–69. Nevertheless, the OSA *again* answered the AGO's questions (for at least the ***sixth*** time now); the OSA reiterated the audit's scope and four proposed defendants, and it stated again that the compulsion of "taxpayer-funded administrative and financial activities and records" would not infringe upon legislative privilege. RA369–70.

D. The Auditor Files Suit to Enforce the Audit, and the AGO Opts to Represent Named Defendants

On February 10, 2026, after more than a year of answering the AGO's same questions repeatedly, the Auditor filed suit before a Single Justice of this Court. RA7–9. The AGO promptly moved to strike the complaint. RA32–45. Notably, the AGO then, *on behalf of the four named defendants in this suit*, submitted letters to the Assistant Clerk on February 19, 2026, representing that the House and Senate support the Attorney General's effort to strike the Auditor's complaint. RA256–57.

Moreover, since the filing of this suit, the AGO has sent the OSA another letter claiming, yet again, that the OSA has failed to respond to the AGO's questions. RA382–83. In this letter, the AGO asked the OSA to state its position on legislative privilege and the cause of action to be brought against the Legislature—two questions that had been answered repeatedly over the prior year. RA383.

V. SUMMARY OF ARGUMENT

This Court has held that the Attorney General cannot abuse her gatekeeping authority under G.L. c. 12 § 3 to decline to represent a state official in a manner that is arbitrary, capricious, or unlawful. *See Sec'y of A&F*, 367 Mass. at 159 n.4, 165; *Feeney*, 373 Mass. at 368. Relatedly, the Attorney General is duty bound to defend the public interest and defend the laws of the Commonwealth—or appoint a Special Assistant Attorney General to do so. Each independently sufficient condition establishing an abuse of G.L. c. 12 § 3 is present here.

A review of the record leaves no doubt that the Attorney General has acted arbitrarily and capriciously by refusing to permit the Auditor to seek enforcement of the democratically mandated legislative audit in court. For more than a year, the OSA provided thorough responses to the AGO's questions, only for the AGO to continue restating the same questions time and time again. The Attorney General's continued insistence that she remains at the ready to authorize an enforcement action if only the Auditor would cooperate in answering the AGO's questions is patently unreasonable and plainly contradicted by the record. *See* pp. 35–39.

In addition to being arbitrary and capricious, the Attorney General's conduct has also been unlawful. The Attorney General's steadfast refusal to authorize an effort to seek judicial enforcement of the audit—which is mandated by statute and supported by a broad majority of the People—is a straightforward dereliction of

her duty to represent the public interest and defend the laws of the Commonwealth. The Attorney General's actions also violate constitutional principles by denying the Auditor access to the courts—which is expressly provided by her enabling statute—and infringing on the Judiciary's core function of determining the constitutionality of a statute. In sum, the Attorney General's statutory authority cannot and should not supersede the Auditor's statutory authority, the public interest, or the Constitution. *See* pp. 40–49.

The record demonstrates that the Attorney General fundamentally disagrees with the Auditor's position that the legislative audit mandated by the People should, in fact, be enforced. Furthermore, because the Attorney General has acted on behalf of the named defendants in this litigation, it is clear that she has an ethical conflict and cannot effectively represent the Auditor's interests. Under these circumstances, and based on this Court's precedent, the remedy is clear: this Court should permit the Auditor to retain independent counsel, so that the interests of the broad majority of the People who voted for a legislative audit are properly represented. *See* pp. 49–54.

VI. ARGUMENT

A. The Attorney General's Failure to Engage with the Auditor's Efforts to Enforce a Democratic Mandate for More than a Year Is Arbitrary and Capricious

As the Attorney General notes, the primary authority discussing the contours of the Attorney General's gatekeeping authority under G.L. c. 12 § 3 is this Court's decision in *Secretary of Administration and Finance v. Attorney General*, 367 Mass. at 159, which provides that the Attorney General has "control over the conduct of litigation involving the Commonwealth." Critically, however, this Court noted that the Attorney General's powers under G.L. c. 12 § 3 are *not* unlimited; rather, in refusing to represent a government official, the Attorney General may not "act in a capricious, arbitrary or illegal manner," and state officials have "recourse to the courts where such is the case." *Id.* at 159 n.4, 165.

The Attorney General's conduct—a maddening, year-plus cycle of asking questions of the OSA, ignoring the OSA's thorough responses, and repeating the same exact questions over and over—has been patently unreasonable. Because the Attorney General has failed to provide "any rational explanation" for this conduct "that reasonable persons might support," her refusal to provide judicial recourse to the Auditor is "arbitrary and capricious." *See Frawley v. Police Com'r*, 473 Mass. 716, 729 (2016) (quoting *Doe v. Superintendent of Schs.*, 437 Mass. 1, 5–6

(2002)). Indeed, the Attorney General's five explanations as to why her conduct has been "reasonable and proper" are blatantly contradicted by the record.

For instance, the Attorney General notes that she regularly requests information from prospective clients before authorizing litigation to ensure that she is carrying out her duty to "consider the ramifications of that action on the interests of the Commonwealth and the public generally." Opening Br. at 53–54 (quoting *Feeney*, 373 Mass. at 365). In principle, the Auditor agrees; it is sensible for the Attorney General to request information and engage in a dialogue with a state official who seeks to bring a lawsuit. What is *not* reasonable, however, is for the Attorney General to spend more than a year re-asking the same answered questions, ignoring or willfully misconstruing the Auditor's responses, and claiming that the Attorney General is unable to ascertain the Auditor's positions. It is the Attorney General's duty to enforce the law. Either the Attorney General supports the enforcement of the audit or she does not, and it is entirely unreasonable for the Attorney General to sit on the fence for more than a year and fail to meaningfully engage with the Auditor.

The Attorney General also notes that it is reasonable for her to ask for the Auditor's positions on the potential legal hurdles of legislative privilege and the availability of mandamus relief against the Legislature. Opening Br. at 54. Again, in principle, the parties are in agreement. But the Attorney General's insistence

that the Auditor has failed to provide her positions on these issues is inexplicable. From the outset, the OSA has informed the AGO that certain issues regarding "core legislative functions" are likely protected, but that the documents sought in *this litigation* would not interfere with any such functions. The OSA has also made clear that the unique circumstances of this case—the enforcement of a democratic mandate that does not compel the Legislature to take *legislative* action—may provide a pathway to mandamus relief against the Legislature. The Attorney General may ultimately disagree with these positions, but the claim that these positions were not communicated is false.

The Attorney General also makes much of excerpts from the record in which the OSA expressed concern with the AGO's failure to engage with the OSA's responses, and she repeatedly cites these excerpts as evidence that the OSA has failed to "cooperate in its diligence of these issues." *See* Opening Br. at 55–56. What the record actually shows, however, is that each time the OSA expressed this concern, it *also* provided answers to the questions posed by the AGO (the same questions regarding the scope and constitutionality of the audit) in a good-faith effort to cooperate.[16] It simply cannot be the case that the Auditor's duty to cooperate with the Attorney General in order to enforce the law—which is the

[16] *See, e.g.*, RA344–48, 354–56, 362–63, 368–70.

Attorney General's duty—requires her to answer the AGO's same restated questions over and over in perpetuity. After more than a year of the AGO failing to act or acknowledge that its questions had been addressed, the Auditor understandably reached the conclusion that the Attorney General was not acting in good faith.

The Attorney General's final explanations are that she should exercise restraint before political, intrastate disputes are "foisted upon the Judiciary," and that a state official should "distill its legal position" so the Attorney General may "yield a workable solution for all parties."[17] Opening Br. at 56–57. Again, these concerns are reasonable in principle, but not borne out by the record. The Auditor approached the Attorney General at the outset with a litigation plan concerning discrete, narrow categories of documents that had already been requested. There is no record evidence to indicate that the Attorney General engaged with the Legislature to encourage compliance or reach some sort of compromise without the

[17] The Attorney General also noted that it is sensible "to ask a state official eager to take on interbranch litigation to structure that litigation . . . in favor of crystalizing the underlying issues for decision in a single case." Opening Br. at 57. To be clear, the Attorney General *never* provided the Auditor with any feedback indicating that the Auditor should restructure her plan for litigation. Rather, the AGO kicked the can down the road for more than a year by restating the same questions, and it never offered any constructive feedback that indicated an intent to assist the Auditor in bringing a case forward.

need for litigation. Plus, it is difficult to envision how the Attorney General could broker a "workable solution for all parties." As the Attorney General admits, "the Legislature has made clear its view that *any* audit conducted by the OSA is precluded by Articles 21 and 30 of the Massachusetts Declaration of Rights." *Id.* at 29 (emphasis added); RA103, 69–73. There is nothing left to discuss on the issue; the Legislature made clear it would not comply with *any* audit, and litigation is consequently necessary to ensure that the legislative audit supported by the People is enforced. And, even if the Judiciary ultimately decides that legislative privilege or immunity from suit is an insurmountable issue preventing enforcement of a legislative audit, the People are entitled to answers on those issues.

In sum, while the Auditor agrees in principle that it is reasonable for the Attorney General to engage in a basic "vetting" process when a state official requests the initiation of litigation, the Attorney General's arguments pertaining to her "reasonable and proper" conduct are simply not borne out by the record. The Attorney General's effort to stall enforcement of the audit does not demonstrate a good-faith effort to engage in a vetting process; rather, the Attorney General's chronic lack of engagement with the Auditor's thorough cooperation is arbitrary and capricious.

B. The Attorney General's Refusal to Grant the Auditor Access to the Courts to Seek Enforcement of Her Statutory Duties Is Unlawful

In addition to being arbitrary and capricious, the Attorney General's conduct is also unlawful. By unilaterally precluding the Auditor from accessing the courts—and not defending the law of the Commonwealth in court, nor authorizing the Auditor to retain a Special Assistant Attorney General to enforce the law—the Attorney General has acted in dereliction of her duty to represent the public interest and in violation of constitutional principles.

1. *Refusing to Permit the Enforcement of an Audit Backed by an Overwhelming Democratic Mandate Plainly Contravenes the Public Interest*

Related to this Court's holding that the Attorney General may not exercise her authority under G.L. c. 12 § 3 in a manner that is arbitrary, capricious, or unlawful is its holding that the Attorney General must exercise this authority in accordance with the public interest. The Attorney General is mandated to "consider the ramifications" of her actions under G.L. c. 12 § 3 on the public interest, and "[t]o fail to do so would be an abdication of official responsibility." *Sec'y of A&F*, 367 Mass. at 163; *see also Feeney*, 373 Mass. at 366 (noting that the Attorney General may only override the expressed desires of a state official if doing so "would further the interests of the Commonwealth and the public he represents").

While the "public interest" may in many instances not be easily subject to ready ascertainment, the circumstances of this case are highly unique—72% of voters voted not just to permit, but to mandate that the Auditor carry out a legislative audit, and the overwhelming passage of the ballot question by more than 2.3 million Massachusetts voters is perhaps the boldest and clearest expression of public interest possible. And yet, rather than support this suit demonstrating the will of a broad majority of voters—or, in the alternative, appoint a Special Assistant Attorney General to represent the voters' interests—the Attorney General is attempting through her motion to snuff out enforcement of a democratic mandate.

The Attorney General's efforts to undermine the enforcement of G.L. c. 11, § 12 are particularly troubling considering that, as this Court noted in *Feeney*, it is traditionally her duty to "represent the interests of the Commonwealth when the constitutionality of its laws is put in question." 373 Mass. at 366. As this Court has acknowledged, the People's lawmaking authority enshrined in Article 48 "is coextensive with the Legislature's law-making power," *Paisner v. Att'y Gen.*, 390 Mass. 593, 601 (1983), and this authority "is to be construed to support the people's prerogative to initiate and adopt laws," *Yankee Atomic Elec. Co. v. Sec'y of the Commonwealth*, 403 Mass. 203, 208 (1988). The Attorney General's position that the Auditor is not entitled to have *anyone* argue in favor of the

enforcement of a democratically enacted statute is an extraordinary degradation of the People's lawmaking authority.

If the Attorney General reaches the conclusion that the legislative audit mandated by G.L. c. 11, § 12 is unconstitutional or unenforceable, such a conclusion would not constitute an "ordinary disagreement" between the Attorney General and a state official. Disputes regarding the constitutionality or enforceability of a statute are hardly run-of-the-mill political disagreements. And while, as noted above, it is typically the Attorney General's duty to defend the constitutionality of the Commonwealth's legislation, the Attorney General can carry out that duty faithfully notwithstanding disagreement with the Auditor by "appoint[ing] a special assistant to represent the [Auditor's] interests." *Sec'y of A&F*, 367 Mass. at 165 n.8. What the Attorney General cannot be permitted to do, on the other hand, is unilaterally preclude the People from seeking enforcement of their legislation.

2. *The Attorney General's Interference with the Auditor's Ability to Seek Judicial Redress Infringes on the Auditor's Constitutional Right of Access to the Courts*

The Attorney General's persistent refusal to represent the Auditor or permit the appointment of independent counsel is unlawful for an additional reason: it violates the Auditor's constitutional right of access to the courts. Article 11 of the Massachusetts Declaration of Rights guarantees each person the right "to obtain

right and justice freely, . . . completely, and without any denial; promptly, and without delay[.]"[18] *Ventrice v. Ventrice*, 87 Mass. App. Ct. 190, 192–93 (2015); *see also Pesce v. Brecher*, 302 Mass. 211, 212 (1939) ("It is elementary and fundamental that every individual is entitled to his own day in court in which to assert his own rights or to defend against their infringement."). "The free access to the courts guaranteed to each citizen by art. 11 requires that all cases be decided *by a judge* . . . ." *Ventrice*, 87 Mass. App. Ct. at 193 (emphasis added). The U.S. Constitution also recognizes the right of access to courts as a fundamental, "discrete, constitutional right," derived from the due process clause, the privileges and immunities clause, and the First Amendment. *See Simmons v. Dickhaut*, 804 F.2d 182, 183 (1st Cir. 1986) (collecting cases). By unilaterally blocking the Auditor from seeking redress through the courts, the Attorney General has infringed on the Auditor's fundamental right of access.

The Attorney General dismissively brushes aside this concern, taking the position that this case does not implicate the Auditor's fundamental right of access

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[18] The selection of adequate counsel is encompassed in this right. As Justice Cordy explained, "A party to any lawsuit, no matter how small, has the right to be represented by an attorney of their choice. This rule should be applied with even greater vigor to a lawsuit that raises important and complex constitutional issues such as the proper scope of the separation of powers." *See Cordy*, *supra*; *see also Mailer v. Mailer*, 390 Mass. 371, 373 (1983) (recognizing "the right of a person to counsel of his choice").

because the Auditor is suing in her official capacity. *See* Opening Br. at 45. The supreme courts of several states have acknowledged, however, that upholding a fundamental right of access for governmental officials is critical in ensuring that public servants can effectively carry out their duties. As the Supreme Court of Iowa explained:

> In our society and under our system of law the nature, scope, indeed the very existence of all rights and obligations turn on what would be decreed if those involved went to court. Governmental departments and agencies, in common with individuals, must ultimately resort to the courts and must submit to the court's decrees to effectuate their acts or to be made to comply with the lawful acts of others. Access to the courts gives life to the affairs of governmental departments and agencies. For government to properly function that access must be unimpeded.

Motor Club of Iowa v. Dep't of Transp., 251 N.W.2d 510, 516 (Iowa 1977).[19]

Accordingly, several state supreme courts have held that an attorney general cannot exercise her authority over litigation involving state actors to impede a state official's access to the courts. For instance, in *Motor Club of Iowa*, the Supreme

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[19] *See also Manchin v. Browning*, 296 S.E.2d 909, 921 (W. Va. 1982) ("[S]tate officers are entitled to have their lawful public policy decisions vindicated in the courts just as individuals are entitled to vindicate their personal rights at law."), *overruled on other grounds by State ex rel. Discover Fin. Servs., Inc. v. Nibert*, 744 S.E.2d 625 (W. Va. 2013); *State v. Hagan*, 175 N.W. 372, 374 (N.D. 1919) ("[T]he time has not yet arrived in this state when any board or officer of the state does not possess the same right as any individual to defend itself or himself by itself or himself in the courts of this state."), *overruled on other grounds by Benson v. N.D Workmen's Comp. Bureau*, 283 N.W.2d 96 (N.D. 1979).

Court of Iowa rejected the state attorney general's argument that he had "total dominion over litigation" involving matters of the state, finding that such authority "would leave all branches and agencies of government deprived of access to the court except by his grace and with his consent," and, consequently, "[i]n a most fundamental sense such departments and agencies would thereby exist and ultimately function only through him." 251 N.W.2d at 515–16. In fact, in *City of Davenport v. Office of Auditor*, 28 N.W.3d 584 (Iowa 2025), the Supreme Court of Iowa recently applied this principle in a case bearing a striking resemblance to the case at bar. The court held that the attorney general had a conflict of interest in representing the state auditor due to a disagreement, and accordingly the auditor could proceed with independent counsel since his access to court must be "unimpeded." *Id.* at 591–97 (quoting *Motor Club*, 251 N.W.2d at 516).

Similarly, in *Manchin*, the Supreme Court of Appeals of West Virginia held that "[w]hen the Attorney General refuses to fulfill his duty, as required by law, to provide effective legal assistance to a state officer involved in litigation, such refusal would operate to deny due process." 296 S.E.2d at 921–22. The court further held that the Attorney General must appoint independent counsel for state officers where "it becomes apparent that the Attorney General is unable to

adequately represent the officers as required by law or that such representation would create professional conflicts or adversity." *Id.* at 922.[20]

The Supreme Court of Mississippi has also held that where an attorney general declines to file suit on behalf of a state official, and the subject matter "is of serious concern to state government" and "is one with which the [official] is called upon to protect and enforce, then the [official] should have its full day in court, which necessarily carries with it the right to have a lawyer represent it." *Frazier v. State ex rel. Pittman*, 504 So. 2d 675, 691 (Miss. 1987).

As these cases recognize, state government can only function properly if its officers may seek enforcement of their duties provided by law, and an attorney general accordingly may not utilize its gatekeeping authority to totally preclude access to the courts. In this case, the impropriety of the Attorney General's actions is particularly evident considering that the Auditor is a fellow constitutional officer whose enabling statute expressly provides that she may seek "to enforce the production of records that the [OSA] requires to be produced" in the courts. *See* G.L. c. 11, § 12. In other words, by precluding the Auditor from judicial access,

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[20] *See also Pub. Util. Comm'n v. Cofer*, 754 S.W.2d 121, 125 (Tex. 1988) ("[A] statute authorizing the Attorney General to represent a state agency does not close either the mouth of the agency or the ears of the courts, when there are complaints that the Attorney General or his assistants are not in fact fulfilling their duty to *represent* the agency.").

the Attorney General has determined that her own statutory authority supersedes that of another constitutional officer, rendering that officer subservient to the Attorney General.

For this reason, the Court should not be persuaded by the Attorney General's argument that her discretion in determining whether to initiate litigation is broader than her discretion in determining whether to defend litigation. *See* Opening Br. at 48–50. In initiating this suit, the Auditor is attempting to enforce her *mandated* duties under G.L. c. 11, § 12. By declining to represent the Auditor or appoint independent counsel, the Attorney General has effectively rendered the People's democratic initiative a dead letter. Under these circumstances, where enforcement of a state official's duties depends on judicial review, the Attorney General should not have discretion to deny that state official's right of access and render that official incapable of exercising her statutory duties.

3. *The Attorney General's Actions Violate the Separation of Powers by Usurping the Judiciary's Role of Determining Whether the Audit is Constitutional*

The Attorney General's efforts to prevent the People from enforcing a democratic referendum by blocking access to judicial review also raise significant separation of powers concerns. This case presents important constitutional issues concerning the proper scope of interaction between the Legislature and an elected constitutional officer of the Executive Branch. Under the Massachusetts

Constitution, only the Judiciary is vested with the authority to determine whether applications of G.L. c. 11 § 12 are constitutional. *See O'Coin's, Inc. v. Treasurer*, 362 Mass. 507, 509 (1972) ("Under our Constitution, the courts of the Commonwealth constitute a separate and independent department of government entrusted with the exclusive power of interpreting the laws."); *1A Auto, Inc. v. Dir. of Off. of Campaign & Pol. Fin.*, 480 Mass. 423, 440 (2018) (describing the Supreme Judicial Court as "the final arbiter regarding the interpretation of our State constitution"). Furthermore, under G.L. c. 11 § 12, it is *the courts'* duty to "order the production" of requested records.

By failing to take action to enforce G.L. c. 11 § 12—and then by attempting to stifle the Auditor's efforts to enforce it herself on behalf of the People—the Attorney General has effectively prevented the Judiciary from resolving an important dispute between the Auditor and the Legislature pertaining to the statute's constitutionality. These actions defy Article 30 of the Massachusetts Declaration of Rights, which prevents the Attorney General from exercising judicial powers, and demands "scrupulous observance." *New Bedford Standard-Times Pub. Co. v. Clerk of Third Dist. Ct.*, 377 Mass. 404, 410 (1979); *see also Gray v. Comm'r of Revenue*, 422 Mass. 666, 671 (1996) ("[T]he essence of what cannot be tolerated under art. 30 . . . [is] interference by one department with the functions of another." (internal quotation omitted)).

Even if the Attorney General herself adopts the position that the legislative audit is unconstitutional or unenforceable, permitting her to block litigation based on these concerns would essentially allow her to be the final arbiter regarding these constitutional issues, rather than the Judiciary. Such an outcome is a straightforward violation of Article 30 and subverts the judicial enforcement mechanism provided by G.L. c. 11 § 12.

C. Where the Attorney General Is Unwilling or Unable to Represent a State Official, the Proper Recourse Is for the Court to Permit the Appointment of Independent Counsel

As the record shows, the Attorney General has steadfastly refused to engage with the Auditor in her efforts to seek judicial review of an overwhelming democratic mandate. In instances such as these, where there is a fundamental disagreement between the Attorney General and a state official, the solution is the appointment of independent counsel to represent the state official's interests. *See Sec'y of A&F*, 367 Mass. at 165 n.8.

The appointment of independent counsel is particularly critical here considering that there are state actors on both sides of the litigation, and the Attorney General clearly has a conflict of interest. It is axiomatic that an attorney cannot ethically represent conflicting sides in a dispute—this principle is enshrined in Rules 1.7(a) and (b) of the Massachusetts Rules of Professional Conduct, which provide that an attorney may not represent a client if "the representation of one

client will be directly adverse to another client," and that representation of a client may not "involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal."[21] (Add. 69). The Attorney General in her opening brief admits that she is bound by the Rules of Professional Conduct,[22] and the courts of the Commonwealth have repeatedly acknowledged that the Attorney General must ensure that her representation is free of conflicts of interest. For instance, in *Town of Wilmington v. Department of Public Utilities*, 340 Mass. 432, 438 (1960), this Court noted that the Attorney General cannot properly represent a state actor and "portions of the public" who oppose that state actor's position, as "[t]he interests would be conflicting." *See also Pinshaw v. Metro. Dist. Comm'n*, 402 Mass. 687, 700 (1988) (flagging that the potential for conflict exists where the AGO represents an officer in a civil rights or intentional tort case and subsequently opposes the officer's claim for indemnification); *Brody v. Commonwealth*, 2005

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[21] While the preamble to the Rules of Professional Conduct generally notes that government lawyers may represent governmental agencies simultaneously in some circumstances where private counsel could not, this provision does *not* provide that the Attorney General may competently represent both sides in the same litigation, especially where the Attorney General has aligned herself with a particular side. *See* Mass. Rules Prof. Conduct, Preamble § 18.

[22] *See* Opening Br. at 19 n.5 (acknowledging that the Attorney General is bound by confidentiality rules of Massachusetts Rule of Professional Conduct 1.6).

WL 2496395, at *2 n.1 (Mass. Super. Ct. Oct. 6, 2005) (Add. 80) (noting the Attorney General's expressed position that there would be a conflict of interest if she were to represent parties in direct adversity).

At this juncture, any argument from the Attorney General indicating that she has yet to "pick a side" in this dispute is simply not credible. The Attorney General stalled enforcement of the audit for more than a year, putting up endless roadblocks to prevent the initiation of litigation. If there were any remaining doubt, the AGO's letters sent on behalf of each named defendant pertaining to this litigation make clear that the Attorney General has sided with the Legislature. RA256–57.

Under similar circumstances, this Court has held that it is proper for the Judiciary to appoint counsel for a state official. In *Clerk of Superior Court v. Treasurer and Receiver General*, 386 Mass. at 518, a group of clerks of the Superior Court Department of the Trial Court of the Commonwealth commenced a Single Justice action against the Treasurer and Receiver General of the Commonwealth and the Chief Administrative Justice of the Trial Court—meaning that there were, as there are here, state officials on both sides of the dispute. Since the Attorney General stated that "the cause of the plaintiffs was not a proper one for him to pursue," this Court held that it was appropriate for the Single Justice to enter an order appointing counsel. *Id.* at 526.

G.L. c. 12, § 26, which permits the courts to, "in the absence of the attorney general . . . appoint some suitable person to perform [her] duties," further supports the appointment of independent counsel. In relation to her duty to represent the Auditor, the Attorney General has indicated through obstructive conduct that she is constructively absent. Plus, the Attorney General is absent in a more literal sense considering that she is ethically barred from representing the Auditor due to a conflict of interest. In other words, the Attorney General is, for all intents and purposes, absent because she will not—and indeed cannot—provide representation, and the judicial appointment of counsel is therefore required.[23]

For the first time in this litigation, the Attorney General also claims that the Court should decline to review her actions in the context of a motion to strike, taking the position that the Auditor should have brought suit against the Attorney General directly. *See* Opening Br. at 50–52. Because the Attorney General never raised this issue before the Single Justice, the Court need not consider it. *See Rufo v. Commonwealth*, 442 Mass. 1051, 1051 n.4 (2004) (issues not raised before the Single Justice are waived).

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[23] Indeed, this is the precise conclusion reached by the Supreme Court of Iowa in *City of Davenport*—since the attorney general could not dutifully represent the auditor due to a conflict of interest, the auditor was permitted to proceed with independent counsel. 28 N.W.3d at 591–97.

Nevertheless, the Attorney General's suggestion that her actions are only reviewable in the context of litigation brought against her contravenes *Feeney*, in which the Court reviewed the propriety of the Attorney General's decision to pursue an appeal over state officials' objections in the context of the state officials' request to dismiss filed *in the appeal itself*—not an independent action brought against the Attorney General. 373 Mass. at 362. The Attorney General's suggestion also wastes the parties' and the Judiciary's resources, considering that these issues are fully briefed and the full Supreme Judicial Court is convening to address them.

The Attorney General's suggestion also fails logically. Just as a state official could "at any time" file suit independently (which may prompt a motion to strike by the Attorney General), a state official could also at any time sue the Attorney General challenging her decisions under G.L. c. 12 § 3—either way, the same issues would be litigated. In fact, litigating these issues in the Auditor's suit against the Legislature is *more efficient* since all disputes are resolved in a single case, whereas the Attorney General's approach would require a suit against the Attorney General regarding litigation against the Legislature and an *additional* suit brought against the Legislature itself. Plus, considering the dearth of case law addressing the Attorney General's authority under G.L. c. 12, § 3, it is difficult to envision that any holding reached by the Court here will open the floodgates of intragovernmental disputes being filed in court.

At bottom, the Attorney General's suggestion would only constitute further delay for the People who have waited more than a year for answers on the audit. The Court should heed Justice Cordy's advice: "The Supreme Judicial Court should order the appointment of a special attorney general to represent the state auditor so all sides of this important issue are properly represented. Indeed, only with full and fair representation can the SJC do its job." *Cordy*, *supra*.

VII. CONCLUSION

For the foregoing reasons, the Court should find that G.L. c. 12, § 3 does not grant the Attorney General unilateral authority to preclude the Auditor (or any duly-elected constitutional officer for that matter) from seeking to enforce her statutory duties in court, particularly where, as here, the Auditor has made significant good-faith efforts to engage with the Attorney General, and those statutory duties are backed by an overwhelming democratic mandate. The Attorney General has also abdicated her duty to defend the Commonwealth's law, without authorizing the appointment of a Special Assistant Attorney General to do so in her stead. The Court should accordingly deny the Attorney General's motion to strike and permit the appointment of a Special Assistant Attorney General to allow this case to proceed.

Dated: April 22, 2026

Respectfully submitted,

DIANA DIZOGLIO, State Auditor,

s/ Shannon Liss-Riordan

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the rules of the Court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Mass. R. App. P. 16, Mass. R. App. P. 17, and Mass. R. App. P. 20. I further certify that the foregoing brief complies with the applicable length limit in Mass. R. App. P. 20 because it uses 14-point Times New Roman font and is 10,976 words long, not including the portions of the brief excluded under Mass. R. App. P. 20, counted with the word-count function on Microsoft Word for Office 365.

Dated: April 22, 2026

s/ Shannon Liss-Riordan
Shannon Liss-Riordan

CERTIFICATE OF SERVICE

I, Shannon Liss-Riordan, hereby certify that, on April 22, 2026, a true and accurate copy of the foregoing was filed through the eFileMA system and will be sent by email to:

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ADDENDUM

ORDERS

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

UNPUBLISHED DECISIONS

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-2026-0071

DIANA DIZOGLIO, State Auditor

v.

RONALD MARIANO, Speaker of the House, & others[1]; ATTORNEY GENERAL, intervener.

RESERVATION AND REPORT

This matter came before the court, Wendlandt, J., on a complaint filed by the State Auditor, represented by her office's general counsel, seeking to enforce document requests she made on each chamber of the State Legislature in connection with an audit pursuant to G. L. c. 11, § 12, as amended in 2024 by an initiative petition. The Attorney General filed an unopposed motion to intervene, which I allowed. Before me now is the Attorney General's motion to strike the complaint. The Attorney General contends that the State Auditor improperly commenced this action without her authorization pursuant to G. L. c. 12, § 3. The State Auditor contends that the Attorney General has exceeded the bounds of her authority under that statute by acting "in a capricious, arbitrary or illegal manner in refusing to represent a

[1] Karen E. Spilka, Senate President; Timothy Carroll, House Clerk; and Michael D. Hurley, Senate Clerk.

governmental body." See Secretary of Admin. & Fin. v. Attorney General, 367 Mass. 154, 159 n.4 (1975).

I find that the issues raised by the motion to strike warrant consideration by the full court. Accordingly, I hereby reserve and report the motion to strike, without decision, for determination by the Supreme Judicial Court for the Commonwealth.[2] In the unusual circumstances of this case, the facts relevant to the motion to strike are amply set forth in the materials already submitted by the parties, particularly the correspondence between Office of the State Auditor and the Attorney General's Office. For that reason, I will not require the parties to submit a separate statement of agreed facts. The record before the full court shall consist of the following:

(1) all papers filed in SJ-2026-0071;

(2) the docket sheet for SJ-2026-0071; and

(3) this court's reservation and report.

This matter shall proceed in all respects in conformance with the Massachusetts Rules of Appellate Procedure. For purposes of this reservation and report, the Attorney General and the defendants shall be deemed the appellants and the State Auditor shall be deemed the appellee.

[2] To be clear, at this time, I am not reporting or deciding the merits of the State Auditor's dispute with the Legislature. The motion to strike presents threshold issues that must be resolved first.

By the Court,

/s/ Dalila Argaez Wendlandt

Dalila Argaez Wendlandt
Associate Justice

Dated: March 18, 2026

Massachusetts General Laws Annotated
Constitution or Form of Government for the Commonwealth of Massachusetts [Annotated]
Part the First a Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts

M.G.L.A. Const. Pt. 1, Art. 11

Art. XI. Remedy by recourse to the laws; obtaining of right and justice freely, completely and promptly

Currentness

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

Notes of Decisions (429)

M.G.L.A. Const. Pt. 1, Art. 11, MA CONST Pt. 1, Art. 11
Current through amendments approved February 1, 2024.

Massachusetts General Laws Annotated
Constitution or Form of Government for the Commonwealth of Massachusetts [Annotated]
Part the First a Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts

M.G.L.A. Const. Pt. 1, Art. 30

Art. XXX. Separation of legislative, executive and judicial departments

Currentness

ART. XXX. In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

Notes of Decisions (647)

M.G.L.A. Const. Pt. 1, Art. 30, MA CONST Pt. 1, Art. 30
Current through amendments approved February 1, 2024.

End of Document

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title II. Executive and Administrative Officers of the Commonwealth (Ch. 6-28a)
Chapter 11. Department of the State Auditor (Refs & Annos)

M.G.L.A. 11 § 12

§ 12. Audits; access to accounts; production of records; response to findings; exceptions

Effective: December 5, 2024
Currentness

The department of the state auditor shall audit the accounts, programs, activities and functions directly related to the aforementioned accounts of all departments, offices, commissions, institutions and activities of the commonwealth, including those of districts and authorities created by the general court and the general court itself, and including those of the income tax division of the department of revenue, and for such purposes, the authorized officers and employees of the department of the state auditor shall have access to such accounts at reasonable times and the department may require the production of books, documents, vouchers and other records relating to any matter within the scope of an audit conducted under this section or section 13, except tax returns. In determining the audit frequency of a covered entity, the department shall consider the materiality, risk and complexity of the entity's activities as well as the nature and extent of prior audit findings. Each entity may be audited separately as a part of a larger organizational entity or as a part of an audit covering multiple entities; provided, however, that each entity shall be audited at least once every 3 years and an entity shall be subject to audit as often as the state auditor determines it necessary. The superior court shall have jurisdiction to enforce the production of records that the department requires to be produced pursuant to this section, and the court shall order the production of all such records within the scope of any such audit. All such audits shall be conducted in accordance with the standards for audits of governmental organizations, programs, activities, and functions published by the Comptroller General of the United States. In any audit report of the accounts, funds, programs, activities, and functions of any agency, department, office, commission, or institution of the commonwealth, including those of districts and authorities created by the general court, issued by the department of the state auditor, wherein there appears adverse or critical audit results, the state auditor may require a response, in writing, to such audit results. Such response shall be forwarded to the department of the state auditor within fifteen days of notification by the state auditor. A copy of the response shall be filed with the appropriate secretariat, the secretary of administration and finance, the cognizant executive board in the case of an authority, and the house and senate committees on ways and means. The state auditor shall notify the appropriate secretariat, the secretary of administration and finance, the cognizant executive board in the case of an authority, and the house and senate committees on ways and means in the event of an agency's failure to respond or of the filing of unresponsive answers. This section shall not apply to those accounts which the director of accounts of the department of revenue is required by law to examine; provided, however, that in a town following a majority vote by the board of selectmen or school committee that is ratified by a special or annual town meeting, or in a regional school district following a two-thirds vote of the regional school district committee members, or in a city following a majority vote of the city council and approval by the mayor, or in a county following a majority vote of the county commissioners, the department of the state auditor may make an audit of the accounts, programs, activities and other public functions of said town, district, regional school district, city or county to the extent determined necessary by the state auditor; provided, further, that the expenses incurred for any such audit shall be borne by the city, town or regional school district and the state auditor may charge for the cost of said audit; provided, further, that all funds received for any such audits of said city, town, district, regional school district or county shall be deposited with the state treasurer in a separate account and expended solely for audits of any city, town, district, regional school district or county. On or before April 1 of each year, the state auditor shall submit a report to the house and senate committees on ways and means which shall include, but not be limited to, (i) the number of audits performed under this section; (ii) a summary of findings under said audits; and (iii) the cost of each audit. The department of the state auditor shall, in any audit of the executive

office of health and human services or any agency thereof, refer to the fraudulent claims commission any case coming to its attention in the course of such audit which appears to involve fraud. The department of the state auditor is hereby authorized to inspect, review or audit, in conformity with generally accepted government auditing standards, the accounts, books, records and activities of vendors contracting, having contracted, or agreeing to provide services or materials of any description, or any other thing of value pursuant to any and all contracts or agreements between the commonwealth, its departments, agencies, bureaus, boards, commissions, institutions, or authorities and said vendors to the extent necessary to determine compliance with the provisions and requirements of such contracts or agreements and the laws of the commonwealth. Said access shall include access as defined above, to any grant, contract or agreement between said vendors and any other entity, provided the grant or contract to provide goods or services is specifically related to and funded by the vendor's contract with the commonwealth. Any grant or contract entered into between an entity, including vendors, and a state agency shall include a clause providing the state auditor with access as intended by this section. In addition, any grant, contract or agreement between said vendors and any other entity providing goods or services to said vendors, that is specifically related to and funded by, the vendor's direct contract with the commonwealth, shall include a clause providing the state auditor with access to said other entity's accounts, books, records and activities, except tax returns, as related to the provision of such goods or services to the vendor. The department of the state auditor is hereby authorized to conduct audits, in accordance with generally accepted governmental auditing standards, of the accounts, funds, programs, activities, and functions, of any program or activity funded in whole or in part by state grants, loans or reimbursements and carried out by cities, towns, counties, districts, or regional school districts, and for said purpose the authorized officers and employees of said department of the state auditor shall have access to such records at reasonable times and said department may require the production of books, documents, vouchers, reports and other records relating to any matter within the scope of such audit.

The department of the state auditor is hereby further authorized to inspect, review, or audit the accounts, funds, books, records, and activities, including audit reports relating to any matter within the scope of the audit, of any vendor contracting, having contracted, or agreeing to provide services or materials of any description, or any other thing of value, with a city, town, county, district, or regional school district pursuant to a contract or agreement funded in whole or in part directly or indirectly with state financial assistance. Said inspection, review, or audit shall be conducted to the extent necessary to determine compliance with the provisions and requirements of the contract or agreement, the grant, and the laws of the commonwealth.

The examination of the accounts of districts and authorities required by this section shall be made in addition to any audit required by the law creating such district or authority.

Credits

Amended by St.1962, c. 733; St.1971, c. 943, § 5; St.1975, c. 270; St.1978, c. 201; St.1979, c. 760; St.1981, c. 556; St.1982, c. 555; St.1985, c. 441; St.1987, c. 63; St.1989, c. 508; St.1998, c. 161, § 57; St.2002, c. 65, §§ 1, 2; St.2003, c. 46, § 7, eff. July 31, 2003; St.2011, c. 68, § 22, eff. July 1, 2011; St.2011, c. 172, §§ 1, 2, eff. Feb. 9, 2012; St.2024, c. 250, § 1, eff. Dec. 5, 2024.

Notes of Decisions (15)

M.G.L.A. 11 § 12, MA ST 11 § 12

Current through Chapter 11 of the 2026 2nd Annual Session. Some sections may be more current; see credits for details.

M.G.L.A. 12 § 3

§ 3. Appearances for commonwealth, prosecution or defense; rendering of legal services; payment of expenses for representation of department of transportation

Effective: June 23, 2010
Currentness

The attorney general shall appear for the commonwealth and for state departments, officers and commissions in all suits and other civil proceedings in which the commonwealth is a party or interested, or in which the official acts and doings of said departments, officers and commissions are called in question, in all the courts of the commonwealth, except upon criminal recognizances and bail bonds, and in such suits and proceedings before any other tribunal, including the prosecution of claims of the commonwealth against the United States, when requested by the governor or by the general court or either branch thereof. All such suits and proceedings shall be prosecuted or defended by him or under his direction. Writs, summonses or other processes served upon such officers shall be forthwith transmitted by them to him. All legal services required by such departments, officers, commissions and commissioners of pilots for districts 1 to 4, inclusive, in matters relating to their official duties shall, except as otherwise provided, be rendered by the attorney general or under his direction.

The Massachusetts Turnpike Authority, or any successor in interest, shall enter into a memorandum of understanding with the attorney general through which the authority shall provide payment to the attorney general of all direct and indirect costs of the attorney general's representation of the authority, and the attorney general may retain and expend such funds without further appropriation for the purpose of defraying such costs.

Credits
Amended by St.1932, c. 180, § 2; St.1943, c. 83, § 1; St.2009, c. 27, § 11, eff. July 1, 2009; St.2010, c. 54, eff. June 23, 2010.

Notes of Decisions (57)

M.G.L.A. 12 § 3, MA ST 12 § 3
Current through Chapter 11 of the 2026 2nd Annual Session. Some sections may be more current; see credits for details.

End of Document

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title II. Executive and Administrative Officers of the Commonwealth (Ch. 6-28a)
Chapter 12. Department of the Attorney General, and the District Attorneys (Refs & Annos)

M.G.L.A. 12 § 10

§ 10. Violations of court orders; restraint of trade; institution of investigations and appropriate actions

Currentness

He shall take cognizance of all violations of law or of orders of courts, tribunals or commissions affecting the general welfare of the people, including combinations, agreements and unlawful practices in restraint of trade or for the suppression of competition, or for the undue enhancement of the price of articles or commodities in common use, and shall institute or cause to be instituted such criminal or civil proceedings before the appropriate state and federal courts, tribunals and commissions as he may deem to be for the public interest, and shall investigate all matters in which he has reason to believe that there have been such violations. Whenever it appears to the attorney general that the commonwealth or any city, town, or other governmental agency, body or authority established under the laws of the commonwealth has been so injured or damaged by any conspiracy, combination or agreement in restraint of trade or commerce or similar unlawful action, as to entitle the commonwealth, a city, town, or other such governmental agency, body or authority to a right to bring any action or proceeding for the recovery of damages under the provisions of any federal anti-trust or other similar law, the attorney general shall have authority to institute and prosecute any such actions or proceedings on behalf of the commonwealth or of any city, town, or other governmental agency, body or authority established under the laws of the commonwealth, and shall have authority to intervene on behalf of the commonwealth or of any city, town or other governmental agency, body or authority in such actions or proceedings. For the purposes of this section, he may appoint necessary assistants, with such compensation as, with the approval of the governor and council, he may fix, and may expend such sums as may be approved by the governor and council. In criminal proceedings hereunder he may require district attorneys to assist him and under his direction to act for him in their respective districts.

Credits
Amended by St.1960, c. 788.

Notes of Decisions (7)

M.G.L.A. 12 § 10, MA ST 12 § 10
Current through Chapter 11 of the 2026 2nd Annual Session. Some sections may be more current; see credits for details.

End of Document

M.G.L.A. 12 § 26

§ 26. Court appointment of substitute in absence of attorney general and district attorney

Currentness

The supreme judicial or superior court may at any sitting, in the absence of the attorney general and district attorney, appoint some suitable person to perform their duties.

Notes of Decisions (1)

M.G.L.A. 12 § 26, MA ST 12 § 26
Current through Chapter 11 of the 2026 2nd Annual Session. Some sections may be more current; see credits for details.

End of Document

Massachusetts General Laws Annotated
Rules of the Supreme Judicial Court (Refs & Annos)
Chapter Three. Ethical Requirements and Rules Concerning the Practice of Law
Rule 3:07. Massachusetts Rules of Professional Conduct and Comments (Refs & Annos)
Client-Lawyer Relationship

Massachusetts Rules of Professional Conduct (Mass.R.Prof.C.), Rule 1.7

Rule 1.7. Conflict of Interest: Current Clients

Effective: October 1, 2022
Currentness

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Credits
Adopted June 9, 1997, effective January 1, 1998. Amended March 26, 2015, effective July 1, 2015. Comment amended July 13, 2022, effective October 1, 2022.

Editors' Notes

COMMENT
General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For the lawyer's duties with respect to information provided to the lawyer by a prospective client, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(g) and (d).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to (1) clearly identify the client or clients; (2) determine whether a conflict of interest exists; (3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and (4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments 5 and 29.

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Paragraph (a) expresses that general rule. Thus, absent consent, a lawyer ordinarily may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, *e.g.*, as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] Combining an attorney-client relationship with an intimate personal relationship raises concerns about conflicts between the attorney's personal interests and the best interests of the client, impairment of the judgment of both lawyer and client, and preservation of the attorney-client privilege. These concerns are particularly acute when a lawyer has a sexual relationship with a client. In some cases, sexual relationships between lawyer and client are prohibited by Rule 1.8(j). Even if the sexual relationship does not violate Rule 1.8(j), the lawyer must consider whether the lawyer's ability to represent the client effectively will be affected by the sexual relationship. Unless it would be clear to a reasonable person that a sexual relationship with the client would not materially affect the representation, the lawyer should either avoid the sexual relationship or withdraw from the representation.

[12A] Sexual relations with a representative of an organizational client who supervises, directs, or regularly consults with the outside lawyer concerning the organization's legal matters can also raise the risk that the lawyer's independent professional judgment will be impaired and the attorney-client privilege compromised. A client representative in an intimate personal relationship with outside counsel may not be able to assess and waive any conflict of interest for the organization because of the representative's personal involvement, and another representative of the organization may be required to determine whether to give informed consent to a waiver.

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, Chapter 268A of the General Laws may limit the ability of a lawyer to represent both a state, county or municipal government or governmental agency and a private party having a matter that is either pending before that government or agency or in which the government or agency has an interest, even when the interests of the government or agency and the private party appear to be similar.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a “tribunal” under Rule 1.0(r)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(g) (informed consent).

The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments 30 and 31 (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(d). See also Rule 1.0(s) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(d). The requirement of a writing does not supplant the need for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, *e.g.*, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant, or more than one person under investigation by law enforcement authorities for the same transaction or series of transactions, including any grand jury proceeding. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment 7. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment 8.

[27] Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the lawyer should make clear his or her relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client confidential information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that confidential information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and thus that the clients may be required to assume greater responsibility for decisions than when each client is independently represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the joint representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client. As to lawyers representing governmental entities, see Scope [18].

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Notes of Decisions (43)

S.J.C. Rule 3:07, Massachusetts Rules of Professional Conduct (Mass. R. Prof. C.), Rule 1.7, MA R S CT RULE 3:07 RPC Rule 1.7
Current with amendments received through January 15, 2026. Some rules may be more current; see credits for details.

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20 Mass.L.Rptr. 97
Superior Court of Massachusetts.

Richard E. BRODY, Laurence E. Hardoon, Samuel Perkins, Leonard H. Kesten, and Jocelyn M. Sedney, Partners, d/b/a Brody, Hardoon, Perkins and Kesten, LLP, and Bruce Lint, Plaintiffs
v.
COMMONWEALTH of Massachusetts, the Executive Office of Administration and Finance, and the Department of State Police, Defendants.

No. 03-4907.
|
Oct. 6, 2005.

MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

RALPH D. GANTS, Justice.

***1** In 2001, State Police Trooper David Fisher filed suit in Worcester County Superior Court against the Commonwealth of Massachusetts, the Department of State Police, senior commanders of the State Police, and Sgt. Bruce Lint of the State Police, alleging violation of his civil rights. *David Fisher v. Bruce Lint,* et al., Civ. No. WOCV2001-613B. Sgt. Lint retained attorneys Leonard Kesten and Thomas Campbell of the law firm of Brody, Hardoon, Perkins and Kesten, LLP ("the Brody Firm") to represent him in this civil rights action. On November 6, 2001, Sgt. Lint wrote Eleanor Sinnott, the State Police Chief Legal Counsel, informing her that he had been named as a defendant in the *Fisher* case and had retained the Brody Firm to represent him, and asking that he be indemnified pursuant to G.L. c. 258, § 9A. In her written response to Sgt. Lint, Sinnott declared, "Indemnification will be made in accordance with M.G.L. c. 258, § 2 and 9A and any other applicable law."

The Brody Firm later submitted legal bills for payment by the State Police for its work in defense of Sgt. Lint, in which Kesten's time was billed at $300 per hour and Campbell's time at $200 per hour. The State Police, however, only paid for their time at the $125 per hour rate that it pays all attorneys who defend State Police personnel in civil rights actions. Having obtained from Sgt. Lint an assignment of any right he may have to indemnification for legal fees, the Brody Firm then brought this instant complaint which, under various legal theories, essentially seeks a legal declaration from this Court that the Commonwealth of Massachusetts, in accordance with its obligation under G.L. c. 258, § 9A to indemnify State Troopers for the legal fees and costs they incur in defending themselves against civil rights claims, must pay Sgt. Lint's legal fees at the hourly rate billed by Kesten and Campbell rather than the $125 per hour rate. All parties have cross-moved for summary judgment.

DISCUSSION

Under the Massachusetts Tort Claims Act, a State Police officer, like other state employees, is not personally liable for any injury arising from his negligence committed while acting within the scope of his employment; only his public employer is liable. G.L. c. 258, § 2. If a plaintiff were improperly to file suit individually against the State Police officer in a negligence action, the police officer "may request representation by the public attorney of the commonwealth." *Id.* "If, in the opinion of the public attorney, representation of the public employee ... would result in a conflict of interest, the public attorney shall not be required to represent the public employee." *Id.* When there is such a conflict, the public employee may retain private counsel, and "the commonwealth shall reimburse the public employee for reasonable attorney fees incurred by the public employee in his defense of the cause of action...." *Id.*

If a state employee, other than a State Police officer, is sued for an alleged intentional act or for an alleged violation of civil rights committed while acting within the scope of his employment, the Commonwealth "*may* " indemnify him "from personal financial loss, all damages and expenses, including legal fees and costs" arising out of the claim in an amount not to exceed $1,000,000. G.L. c. 258, § 9 (emphasis added). If a State Police officer, however, as here, is sued for an alleged intentional act or for an alleged violation of civil rights committed while acting within the scope of his employment, "the commonwealth, at the request of the affected police officer, *shall* provide for the legal representation of said police officer." G.L. c. 258, § 9A (emphasis added). Section 9A further provides:

> ***2** The commonwealth shall indemnify members of the state police ... from all personal financial loss and expenses, including but not limited to legal fees

> and costs, if any, in an amount not to exceed one million dollars arising out of any claim, action, award, compromise, settlement or judgment resulting from any alleged intentional tort or by reason of an alleged act or failure to act which constitutes a violation of the civil rights of any person under federal or state law; provided, however, that this section shall apply only where such alleged intentional tort or alleged act or failure to act occurred within the scope of the official duties of such police officer.

Presently, the State Police provides for the legal representation of a State Police officer sued for an alleged civil rights violation in three alternative ways. First, the State Police officer may request representation from the Office of the Attorney General at no expense to the officer. Second, the Attorney General's Office and/or the State Police may determine, under the circumstances of the case, that there is a conflict of interest or other need to appoint a Special Assistant Attorney General to represent the officer, again at no expense to the officer. Third, the State Police officer may notify the State Police that he intends to retain private counsel. When the officer retains private counsel, that attorney is told by the State Police that it will pay him at the hourly rate of $125 per hour and that he must comply with the billing rules applicable to outside counsel.

To apply the provisions in Section 9A regarding the payment of attorney's fees, the Department of State Police and the Executive Office of Administration and Finance ("A & F") have promulgated regulations establishing "procedures and standards" for the indemnification of private legal fees arising out of civil rights claims brought against State Police officers. 515 CMR 4.01 *et seq* . Under these regulations, "[t]he public safety employee shall give written notification to his or her employer at the outset that he or she has been sued and intends to retain private counsel." 515 CMR 4.02(1). There is no dispute that Sgt. Lint gave such notice here. [1] When a claim is made for indemnification of private legal fees and costs, "no claim ... shall be approved unless the employer agency has determined that those fees and costs are reasonable and necessary." 515 CMR 4.02(2). "Maximum hourly rates for private defense attorneys shall be set at the standard hourly rate which the Attorney General pays to Special Assistant Attorneys General." 515 CMR 4.02(3).

It is undisputed that the State Police has one hourly rate that it pays for all time incurred by attorneys representing State Police officer defendants in civil rights actions-$125 per hour. The origin of that hourly rate is somewhat murky. According to the testimony in the summary judgment record, it was the hourly rate negotiated with A & F in 1997 by attorney Timothy Burke (who represents many State Police officers in such actions) concerning his legal fees, and A & F then told the State Police orally that this is the hourly rate to be paid to all privately retained attorneys representing officers in civil rights actions. [2] It is undisputed that the State Police never made an independent determination that the $125 hourly rate was the reasonable hourly rate to pay attorneys Kesten and Campbell for their work in this case. The State Police simply understood that this was the hourly rate that A & F had directed them to allow. It is also undisputed that this hourly rate was not set by the Attorney General and does not reflect the "standard hourly rate which the Attorney General pays to Special Assistant Attorneys General." Indeed, it is also undisputed that the Attorney General has no fixed "standard hourly rate" that it pays to all Special Assistant Attorneys General. According to a letter written by the Attorney General's Office of Legal Counsel, "Rates of compensation from the [Office of the Attorney General] are determined pursuant to the Attorney General's discretionary authority to establish salaries for 'assistants and employees as the duties of the department require.' M.G.L. c. 12, § 2."

***3** Therefore, it is plain that the State Police, by accepting what it understood to be A & F's directive to pay private attorneys under Section 9A a fixed hourly rate of $125 per hour, is violating the regulation it helped to promulgate in two ways. First, this maximum hourly rate was set in 1997 and remains unchanged today without any determination by the State Police that it is a "reasonable" hourly rate to pay these attorneys in this case. Second, there is no evidence that the maximum hourly rate set in 1997 reflected then (and continues to reflect today) the standard hourly rate that the Attorney General, in his discretion, would pay to these private attorneys for comparable work as appointed Special Assistant Attorneys General. See *Royce v. Commissioner of Correction,* 390 Mass. 425, 427 (1983) ("Once an agency has seen fit to promulgate regulations, it must comply with those regulations."); *Town of Northbridge v. Town of Natick,* 394 Mass. 70, 76 (1985) ("An agency must follow its

own regulations even in the face of inconsistent internal guidelines.").

While it is easy to determine that the State Police is failing to act in conformance with its own regulations in paying privately retained attorneys under Section 9A, it is less easy to determine how it must pay such attorneys in conformance with applicable statutes and its own regulations. Section 9A does not grant a State Police officer the right to retain private counsel and be indemnified for the legal fees incurred. Rather, Section 9A simply provides that, at the police officer's request, the Commonwealth "shall provide for the legal representation of said police officer." G.L. c. 258, § 9A. The Commonwealth could satisfy this statutory obligation simply by having an Assistant Attorney General represent the police officer or, if there is a conflict, having the Attorney General appoint a Special Assistant Attorney General to represent him. The State Police, however, in its discretion, has chosen to give its officers the third alternative of retaining their own private counsel by promulgating 515 CMR 4.02.

With this third alternative, the State Police has not agreed to give privately retained counsel the equivalent of "a blank check"-the right to be reimbursed by the Commonwealth for any legal fee he chooses to charge his client police officer. Instead, the State Police regulations provide that an indemnification claim for attorney's fees and costs shall be approved only when the State Police determines that the fees and costs "are reasonable and necessary." 515 CMR 4.02(2). The regulations do not provide guidance as to what is a reasonable hourly billing rate.[3] Presumably, the reasonableness of attorney's fees depends on at least two factors: the reasonableness of the hourly billing rate and the reasonableness of the amount of time billed. The reasonableness of the hourly rate presumably would depend on at least three sub-factors: the difficulty of the legal work, the amount at stake, and the experience and ability of the private attorney retained. Having chosen to give its officers the ability to retain private counsel of their choice to defend them against civil rights claims, the State Police must determine the reasonableness of the hourly rate charged considering the experience and ability of the private attorney actually retained, not the experience and ability of the private attorney whom the Attorney General might have retained as a Special Assistant Attorney General to represent the police officer in this case if the police officer had opted for that alternative. Moreover, the determination as to the reasonableness of the hourly rate must be made mindful of the risk that the police officer will be required to pay the attorney the difference between his attorney's hourly rate and the rate deemed "reasonable" by the State Police, and therefore may not be wholly indemnified if the "reasonable" rate is below the rate billed. See *Fillipone v. Mayor of Newton,* 392 Mass. 622, 628 (1984) ("Provisions for indemnity should be construed in a manner which will effectuate their purpose."). Here, the State Police has failed to make any determination as to whether the hourly rates charged by attorneys Kesten and Campbell were "reasonable" under the circumstances of this case. Instead, it has abdicated that responsibility and simply followed what it understood to be an old oral directive of A & F.

***4** While the regulations are silent as to what constitutes a "reasonable" hourly rate, they do declare a maximum beyond which the State Police will not pay-"the standard hourly rate which the Attorney General pays to Special Assistant Attorneys General." 515 CMR 4.02(3). This provision reasonably can be understood to mean that the State Police will not pay a privately retained attorney more than it would have paid if a Special Assistant Attorney General had been appointed by the Attorney General to represent that police officer. While A & F and State Police, in promulgating this regulation, appeared to have been under the erroneous impression that the Attorney General had a standard hourly rate it paid to Special Assistant Attorneys General, the spirit of that regulation still applies-the State Police will not pay more to the private counsel selected by the State Police officer than it would have paid had a Special Assistant Attorney General been appointed by the Attorney General to represent that police officer. Since the Attorney General, having resisted the inflexibility of a standard hourly rate, determines in his discretion how much each Special Assistant Attorney General should be paid, the regulation effectively means that the State Police must look either to the Attorney General's Office for guidance as to the maximum hourly rate to be paid to these privately retained attorneys or to the Attorney General's recent experience in retaining Special Assistant Attorneys General in comparable cases. The summary judgment record is silent as to what the Attorney General would pay these privately retained attorneys in this or a comparable case.

The cross-motions for summary judgment essentially give the Court two choices-allow the plaintiff's motion and order the State Police to pay the amounts billed, or allow the defendants' motion and permit the State Police to limit payment to $125 per hour. This Court, on this summary judgment record, is not ready to make either of those choices and therefore

RESERVES decision on the cross-motions for summary judgment. Before such a decision can be made:

1. the State Police must first exercise its obligation under 515 CMR 4.02(2) to determine whether the hourly rates billed by the two attorneys are "reasonable." Such a determination must be made no later than November 4, 2005; [4] and

2. the summary judgment record needs to be supplemented with evidence either (a) as to what the Attorney General would pay these privately retained attorneys in this case or (b) as to what the Attorney General has paid Special Assistant Attorneys General of similar experience in comparable recent cases.

This Court will permit the parties to re-open discovery for a period of three months (until January 6, 2006) for the limited purpose of obtaining this necessary evidence. Each party may file supplements to the summary judgment record no later than February 10, 2006. This Court will hear the renewed cross-motions for summary judgment on February 28, 2006 at 3 p.m. [5]

ORDER

5** For the reasons stated above, the cross-motions for summary judgment are ***RESERVED. Before such a decision can be made:

1. the State Police must first exercise its obligation under 515 CMR 4.02(2) to determine whether the hourly rates billed by the two attorneys are "reasonable." Such a determination must be made no later than November 4, 2005; and

2. the summary judgment record needs to be supplemented with evidence either (a) as to what the Attorney General would pay these privately retained attorneys in this case or (b) as to what the Attorney General has paid Special Assistant Attorneys General of similar experience in comparable recent cases.

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All Citations

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Footnotes

1 Attorney Campbell has attested, "Throughout the litigation, it has been apparent that [the Brody Firm] (as opposed to the Attorney General's office) represents Sgt. Lint due to the potential for a conflict of interest in that case." While attorney Campbell contends that there would be a potential for a conflict of interest if the Attorney General were to represent Sgt. Lint (since the Attorney General represents the Commonwealth, the State Police, and the Colonel of the State Police in the *Fisher* litigation), it appears that neither the Attorney General nor the State Police have made any determination that the potential for a conflict of interest required the appointment of a Special Assistant Attorney General to represent Sgt. Lint. The summary judgment record is unclear as to whether no such determination was made because the issue was rendered moot once Sgt. Lint declared that he wished to retain private counsel, or because the Attorney General and the State Police did not believe there was a conflict of interest.

2 No writing has been located communicating this directive.

3 Nor does G.L. c. 258, § 2 provide guidance as to how to determine whether attorney's fees are “reasonable” when a public employee in a negligence action must retain private counsel because of a conflict of interest with the public attorney.

4 While an agency determination as to what constitutes reasonable attorney's fees is owed great deference by the courts, it is still subject to review in the Superior Court. See *Pinshaw v. Metropolitan Dist. Com'n,* 402 Mass. 687, 693 (1988)(“if indemnification is disputed, the officer's entitlement is determined in the Superior Court”).

5 Of course, nothing precludes the parties from settling this dispute once this additional evidence is elicited.