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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

SUFFOLK, ss. No. BD-2001-050

In the Matter of::

SCOTT T. BUXTON

Respondent.

MOTION FOR LEAVE TO FILE
MEMORANDUM OF LAW AS AMICUS CURIAE

The Real Estate Bar Association for Massachusetts, Inc. (REBA), formerly known as the Massachusetts Conveyancers Association, petitions for leave of Court to file the attached Memorandum of Law as Amicus Curiae. As grounds for this Motion, REBA states as follows:

1. REBA was established by members of the Massachusetts bar more than 150 years ago. Today, REBA is the largest specialty bar in the Commonwealth with approximately 2,500 members practicing in cities and towns throughout the Common-wealth.

2. Part of REBA's mission is to preserve and enhance the integrity and high standards of the bar. To this end, REBA promulgates title standards, practice standards, and ethical standards, actively participates in the legislative process, sponsors educational programs and materials, regularly files amicus curiae briefs before this Court, and promotes fair dealing and good fellowship among members of the real estate bar.

3. As a bar association, REBA is designated by law to petition the court to enjoin the unauthorized practice of law, G.L. c. 221, § 46B, and has sought to protect the integrity of the bar and the interests of the public by seeking to enjoin such unlawful practices when appropriate. See, e.g., The Real Estate Bar Association for Massachusetts, Inc. v. National Real Estate Information Services, No. SJC-10744.

4. In her Petition, Bar Counsel contends that the Respondent Scott Buxton, as a disbarred lawyer, should not be engaged in the delivery of legal services. In addition to the concerns raised by Bar Counsel, and notwithstanding the Respondent's status as a disbarred attorney, his activities involve issues regarding the unauthorized practice of law that are contrary to the policy of Massachusetts law. The Memorandum of Law that REBA seeks leave to file with the Court outlines those issues and will assist the Court in its consideration of this matter.

For the reasons discussed above, The Real Estate Bar Association for Massachusetts, Inc. requests leave of Court to file the attached Memorandum of Law for the Court's consideration.

THE REAL ESTATE BAR ASSOCIATION
FOR MASSACHUSETTS, INC.

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Dated: March 16, 2011

CERTIFICATE OF SERVICE

I, Douglas W. Salvesen, certify that I have this day sent a copy of this Motion for Leave to File Memorandum of Law as Amicus Curiae by first class mail to the following:

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March 16, 2011

EXHIBIT A

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

SUFFOLK, ss. No. BD-2001-050

In the Matter of:

SCOTT T. BUXTON,

Respondent.

MEMORANDUM OF LAW FILED BY REAL ESTATE BAR ASSOCIATION FOR MASSACHUSETTS, INC. AS AMICUS CURIAE

The Real Estate Bar Association for Massachusetts, Inc. (REBA), submits this Memorandum of Law to assist the Court in its consideration of the unauthorized practice of law issues that are raised by the Respondent's activities described in the Petition.

According to the Bar Counsel's Petition, the Respondent has created a Massachusetts corporation and has advertised for staff attorneys on Craigslist. Petition, ¶¶ 3, 5. It is unclear whether the attorneys will be employees of the corporation or independent contractors. By one of these means, the Respondent seeks to use the corporation to deliver legal services to lower income persons residing in four counties who need legal assistance. Petition, ¶ 7. The legal services will be provided, not by the Respondent, but by the attorneys hired for that purpose (either as employees or independent contractors).

In her Petition to this Court, Bar Counsel seeks to enjoin the Respondent. She contends that the Respondent's "conduct in operating a business purporting to provide legal assistance to Massachusetts residents is prohibited by the judgment of disbarment

and SJC Rule 4:01, § 17, and is in contempt of the judgment of this Court." Bar Counsel also contends that the activities of the Respondent's corporation will constitute "legal or unauthorized paralegal work" in violation of SJC Rule 4:01, § 17(8).

In addition to these reasons, the Respondent's provision of legal services through a corporate entity that is not wholly owned by members of the bar would constitute the unauthorized practice of law, as discussed below.

ARGUMENT

I. UNDER MASSACHUSETTS LAW, A CORPORATION CANNOT PRACTICE LAW DIRECTLY OR INDIRECTLY.

It is well-settled that a "corporation cannot lawfully practice law."[1] In re Shoe Mfrs. Protective Ass'n, 295 Mass. 369, 370, 3 N.E.2d 746 (1936). See also Grievance Committee of Bar of Fairfield County v. Dacey, 154 Conn. 129, 133 n.2, 222 A.2d 339 (1966) ("Of course it is settled law that a corporation cannot practice law");.Kendall v. Beiling, 295 Ky. 782, 789, 175 S.W.2d 489 (1943) ("there is scarcely any judicial dissent from the proposition that a corporation cannot lawfully engage in the practice of law").

The reasons are plain. To become an Officer of this Court, one must "possess sufficient general knowledge and adequate special qualifications as to learning in the law," pass an examination demonstrating such proficiency, and "be of good moral character," Opinion of the Justices, 289 Mass. 607, 613, 194 N.E. 313 (1935). Artificial entities created by law, which can only act through agents, have no capacity for such

[1] Beyond the common law restriction, there is also a statutory prohibition against corporations practicing law. G.L. c. 221, § 46 ("No corporation or association shall ... practice law").

characteristics. McMurdo v. Getter, 298 Mass. 363, 368, 10 N.E.2d 139 (1937) ("corporation as such cannot possess the personal qualities required of a practitioner of a profession").

It is also settled that a corporation cannot practice law indirectly by employing lawyers to provide such services. McMurdo, 298 Mass. at 368, 10 N.E.2d 139 ("rule is generally recognized that a licensed practitioner of a profession may not lawfully practise his profession among the public as the servant of an unlicensed person or a corporation"); In re Shoe Mfrs. Protective Ass'n, 295 Mass. at 372-3, 3 N.E.2d 746 (collection agency engaged in the unauthorized practice of law where it hired attorneys to pursue litigation on behalf of its clients). See also State Bar Ass'n v. Conn. Bank & Trust Co., 140 A.2d 863, 870 (Conn. 1958) (as a company "cannot practice law directly, it cannot do so indirectly by employing competent lawyers to practice for it, since that would be an evasion which the law will not tolerate"); Spine Imaging MRI, L.L.C. v. Country Cas. Ins. Co., Civil No. 10-480, slip copy, 2011 WL 379100 at *5 (D. Minn. Feb 1, 2011) ("a corporation or layman could not indirectly practice law by hiring a licensed attorney to practice law for others"), quoting Granger v. Adson, 190 Minn. 23, 26, 250 N.W. 722 (1933); Unger v. Landlords' Management Corp., 114 N.J. Eq. 68, 72-73, 168 A. 229 (Ch. 1933) ("since a corporation cannot practice law directly [citation omitted], it cannot do so indirectly, by employing lawyers to practice for it"); In re Tuthill, 256 A.D. 539, 542, 10 N.Y.S.2d 643 (1939) ("public policy does not permit a corporation to directly or indirectly engage in the practice of the law"); Third Nat. Bank in Nashville v. Celebrate Yourself Productions, Inc., 807 S.W.2d 704, 706 (Tenn. App.1990) ("It is well established that a

corporation cannot practice law, nor can it employ a licensed practitioner to practice for it"); Bar Ass'n of Dallas v. Hexter Title & Abstract Co., 175 S.W.2d 108, 116 (Tex. Civ. App. 1943) ("corporation cannot practice law, nor can it circumvent the statutory inhibition by the subterfuge of employing competent lawyers to practice law for it"); W. Va. State Bar v. Earley, 144 W.Va. 504, 527, 109 S.E.2d 420 (1959) ("corporation or other lay agency can not practice law or hire lawyers to practice law for it").

While such lawyers have the necessary skill and training in the law, as well as the required moral character, they "owe their primary allegiance and obedience to their employer rather than to the clients" of their employer. McMurdo, 298 Mass. at 368, 10 N.E.2d 139. Therefore, even where the corporation asserts that it does not interfere with the lawyer's independence of professional judgment, the relation between the corporation and its employee-lawyer necessarily prevents the establishment of an attorney-client relationship. In such situations, a lawyer employed by a corporation cannot provide the confidential and undivided allegiance due a client by a lawyer.[2] Com. v. Allison, 434 Mass. 670, 694, 751 N.E.2d 868 (2001) ("A lawyer owes a duty of undivided loyalty to his or her client"); McCourt Co. v. FPC Props., Inc., 386 Mass. 145, 146, 434 N.E.2d 1234 (1982) (same). Cf. Parkerson v. Borst, 264 F. 761, 765 (5th Cir. 1920) ("In no relationship is the maxim that 'no man can serve two masters' more rigidly enforced than in the attorney-client relationship"), cert. denied, 254 U.S. 634 (1920).

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[2] Where the corporate entity is a professional corporation organized under G.L. c. 156A or a limited liability corporation under S.J.C. Rule 3:06, there is no such schism since all of the owners of the entity are members of the bar and subject to the same duty of loyalty to the client as is the individual lawyer providing the legal services directly.

The Court has properly recognized that the attorney-client relationship demands the attorney's undivided allegiance, as well as a conspicuous degree of faithfulness and disinterestedness, absolute integrity and his utter renunciation of every personal advantage conflicting in any way directly or indirectly with the interests of his client. For this reason, the "judicial branch of government to which is entrusted the regulation of practise by attorneys at law, has never relaxed the rule" prohibiting a corporation from the practice of law directly or indirectly through a lawyer it employs. McMurdo, 298 Mass. at 368, 10 N.E.2d 139.

II. UNDER THIS COURT'S PRECEDENT, A CORPORATION MAY NOT CONTRACT *TO PROVIDE* LEGAL SERVICES (IN RE MACLUB) THOUGH IT MAY CONTRACT *TO PAY FOR* LEGAL SERVICES (IN RE THIBODEAU).

In addition to prohibiting corporations from the practice of law, the Court has strictly limited the extent to which a corporation may be involved in the delivery of legal services by using lawyers who are not employees of the corporation. The guidelines concerning that involvement are set out through two decisions, In re Maclub of America, Inc., 295 Mass. 45, 3 N.E.2d 272 (1936) and In re Thibodeau, 295 Mass. 374, 3 N.E.2d 749 (1936), both of which concern legal services provided by motorist clubs.

In Maclub, the respondent corporation, the Maclub of America, Inc., solicited motorists to become dues-paying members. Among other contractual benefits,[3] a member became entitled to the "Maclub legal defense." The "Maclub legal defense" included

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[3] Members also received a first aid kit, an automobile map, a folder giving information helpful in traveling, and copies of a magazine published by the corporation.

"consultations and advice in any case pertaining to the use of the automobile, legal defense of members in any civil suit arising from the use of a member's automobile that may involve property damage, legal defense of claims for personal injuries where members are not insured," and "legal defense in the courts of members charged with violating any automobile law, any city ordinance or any police regulation, including alleged manslaughter." Maclub, 295 Mass. at 46, 3 N.E.2d 272.

The Court found that the terms of the membership contract obligated Maclub of America to furnish its members with "legal services" that could "be rendered by members of the bar alone and which require the practice of law." Maclub, 295 Mass. at 48, 3 N.E.2d 272. The Court disapproved of Maclub of America serving as the intermediary for the provision of legal services by licensed lawyers chosen from a list provided by Maclub of America.[4]

> "The relation of attorney and client does not exist between those who hold membership in the respondent and the members of the bar who conduct their legal defence. The relation is between the respondent and the attorney. The holders of membership in the respondent do not in truth and fact act for themselves but for the respondent in selecting and consulting attorneys. Those who perform the contractual obligations of the respondent are its attorneys. From it they receive their compensation. To its instructions they are subject. The respondent is the principal throughout the transaction with the attorneys. It can discharge or change them at will. Commonly an attorney and client alone are the parties interested in the relationship. The intervention of the respondent, who employs the attorney, gives a different character to the relationship. It ceases to be highly confidential and fiduciary."

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[4] The Court found that the fact that a member had the option to choose a lawyer who was not within Maclub of America's network of attorneys was inconsequential to the Court's analysis that Maclub of America was obligated to provide legal sesrvices. Maclub, 295 Mass. at 49-50, 3 N.E.2d 272.

Maclub, 295 Mass. at 49, 3 N.E.2d 272.

Significantly, there was no finding that Maclub of America had interfered at any time in the professional judgments of any of the lawyers retained for its members. To the contrary, the single justice had concluded that Maclub of America took no part in the management of any particular case. However, a finding of interference was not pertinent to the rationale of the Court's decision.

Unlike a lawyer, a professional corporation, or a Rule 3:06 entity, a corporation has inherent legal obligations to its shareholders and it owes its primary allegiance to them and not to its clients.[5] Unlike a lawyer, a corporation cannot renounce these obligations and devote itself entirely, and disinterestedly, to the interests of the client. Therefore, where a corporation controls the lawyer's access to the client, and seeks to interpose itself in the attorney-client relationship it necessarily interferes with that in a way that is incompatible to the policy of the law.[6] See also Joffe v. Wilson, 381 Mass. 47, 53, 407 N.E.2d 342 (1980) (use of an intermediary to place client with attorney is "against the policy of the law"). For these reasons, the Maclub Court held that, with respect to the practice of law, there is no place for a middleman. Maclub, 295 Mass. at 49,

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[5] Unlike lawyers, corporations are not required to (and are unable to) demonstrate their good moral character. "Only people have moral obligations. Corporations can no more be said to have moral obligations than does a building, an organization chart, or a contract." F. Easterbrook & D. Fischel, Antitrust Suits by Targets of Tender Offers, 80 Mich. L. Rev. 1155, 1177 (1982).

[6] Where the only access to the client is through an intermediary, tolls will invariably be charged directly or indirectly by the intermediary for such access. Rule 7.3(f) of the Rules of Professional Conduct prohibits a lawyer from paying any amounts to a third party for such access.

3 N.E.2d 272 (provision of legal services was "not within the legitimate sphere of corporation activity"). Were it otherwise, Sears, Target, Costco, and hundreds of other corporate entities beyond the supervision of this Court could provide legal services to Massachusetts residents.

Two months after the Maclub decision, the Court decided In re Thibodeau, 295 Mass. 374, 3 N.E.2d 749 (1936). In that case, the respondent lawyer conducted a business under the name Automobile Legal Association. Like Maclub of America, Inc., Automobile Legal Association was involved in the provision of legal services to motorists in return for an annual fee. The services consisted in paying for legal advice and for any legal defense provided by a lawyer to members charged with violation of automobile laws and regulations. Although the Automobile Legal Association provided members with a list of lawyers, it had no role whatsoever in choosing the lawyer for its members and did not insert itself into the attorney-client relationship. "The only participation of the association in such matters has been to pay the bills rendered to the association by the attorneys for services rendered to subscribers." Thibodeau, 295 Mass. at 378, 3 N.E.2d 749. The Court distinguished the activities of the Automobile Legal Association from those of the Maclub of America, Inc.

> "But the cases are different in the fundamental respect that in the Maclub Case the respondent bound itself by contract to furnish legal defence to its members. It sold legal services. ... In this case the contract of the respondent is to pay for legal defence undertaken by the 'member,' not to furnish its 'members' legal defence."

Thibodeau, 295 Mass. at 379, 3 N.E.2d 749.

The distinction drawn by the Court is significant. Where a corporation is contractually obligated to provide its client with legal services and then selects the lawyer

who will provide those services, pays the lawyer for those services, and receives compensation from the client for that activity, the corporation is engaged in the unauthorized practice of law notwithstanding the fact that the services are provided by licensed lawyers. Where a corporation is not obligated to provide any legal services, but simply contracts with its client to pay for legal services that the client procures from licensed lawyers, the corporation is not engaged in the practice of law.[7]

With respect to the unauthorized practice of law issue, the question for the Court in this case is whether the Respondent's activity is akin to the provision of a legal service (In re Maclub) or more closely resembles the payment of a legal service procured by a client (In re Thibodeau).

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[7] Where a legal defense is provided by an insurer that will also be liable for any judgment, the insurer is permitted greater control and involvement in the defense since it has interest in the res of the litigation. Conversely, where the insurer seeks to provide a defense under a reservation of rights, asserting that it may not be responsible for the judgment, it has no such interest in the res of the litigation. In that case, the insurer is not entitled to any control of the attorney-client relationship and "the insured may require the insurer either to relinquish its reservation of rights or relinquish its defense of the insured and reimburse the insured for its defense costs." Northern Sec. Ins. Co., Inc. v. R.H. Realty Trust, 78 Mass. App. Ct. 691, 695, 941 N.E.2d 688 (2011). In this matter, the Respondent has no interest in the subject matter of legal services other than any compensation the corporate entity receives.