



MASSACHUSETTS LEGAL PRACTICE LIBRARY

Volume 1

MASSACHUSETTS
CRIMINAL
PRACTICE

District Court and Pretrial

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Massachusetts Criminal Practice

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and

**MEMBERS OF THE MASSACHUSETTS
CRIMINAL LAW BAR**

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**Massachusetts
Criminal Practice**

Volume 1

**District Court
and
Pretrial Proceedings**

For my parents,
Beatrice H. and Seymour E. Blumenson

E.B.

For Frank, for Rose, and for Jenny

S.Z.F.

For my parents, and for Ginny,
Emily, and Hannah

D.K.

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Professor of Law at Suffolk University Law School; J.D., Harvard Law School, 1972. In addition to his teaching, Professor Blumenson has long been involved in the provision of legal services to indigent clients, as Director of the Suffolk Voluntary Defenders, an attorney in the Seattle Public Defenders Office, a visiting attorney in a South African legal clinic, and a local legal services board member. As an attorney, he has represented litigants at all levels of the state and federal courts, and has argued cases concerning criminal justice on behalf of the ACLU, CLUM, and Massachusetts Association of Criminal Defense Lawyers. Prof. Blumenson currently serves as Reporter for the S.J.C. Advisory Committee on the Criminal Rules.

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PREFACE TO FIRST EDITION

(Massachusetts Criminal Defense, 1990)

This book constitutes the collective effort of many people over many years. It began in 1980 as a manual for my clinical students at Suffolk Law School, and over the years benefited greatly from the suggestions, comments, and contributions of students who tested it daily in the district courts. But it was always clear to me that the amount of law out there was so vast, and the experiential wisdom of practicing lawyers so useful if it could be made accessible, that a defense manual should enlist the efforts of many specialists within the field. Members of the defense bar proved more than willing to contribute to the project, devoting prodigious time and effort in the midst of the daily demands of practice or teaching, and the result is this first edition.

Many colleagues, friends, and students have provided generous and enthusiastic support for this project. Jay Carney, Stanley Fisher, Eva Nilsen, and William Robinson read extensive portions of the manuscript and offered exceptionally insightful and detailed comments. Many others were willing to share their expertise or answer my incessant questions, including Jack Cunha, Fran Burns, Helen Fremont, William Genego, Nancy Gist, Richard Hamilton, Marjorie Heins, Richard Klein, Daniel Klubock, William Leahy, Ray Loomis, Michael McEneaney, Martin Rosenthal, Joseph Rousseau, John Salsberg, Robert Sheketoff, and Norman Zalkind. I am also fortunate to have been able to draw on the advice of valued Suffolk colleagues such as Professors Steven Callahan, Charles Kindregan, and Sarah Landis.

I am grateful for the support of Suffolk University Law School in this long endeavor, its President, David Sargent, its Dean, Paul Sugarman, its librarian, Ed Bander, and its support staff. I am fortunate to teach at a law school that values scholarship that might help make legal rights a reality for more persons, wherever situated. I am especially grateful to Elizabeth McGlynn, who typed much of this volume (I hope that her painstaking work on the drafts and redrafts finds new relevance for her as she begins her legal career); to Jeff Clark, Diane Burke, and Kimberly Short for their work in typing portions of this manuscript; and to Linda Watlack and Gina Gaffney at the Suffolk Computer Resource Center for rescuing me and the book from electronic oblivion on numerous occasions. Students who contributed unstinting research and illuminating advice include Meaghan Barrett, Kathleen Duggan, David Feakes, Kari Kipf, Margaret Lundy, Alexander McCann, Susan Naughton, Dennis Sargent, James Thom, Amy Merlo-Valletta, and Sirdeaner Walker. Some of the contributing authors also wish to acknowledge the assistance of their students: Helaine Gregory, Thomas Hayman, Robert Kester, Norah Shapiro, and Webb Steadman.

I also wish to acknowledge the authors and scholars whose books preceded this volume, and whose work and wisdom made our efforts immeasurably easier: the

Massachusetts Committee for Public Counsel Services, whose training manuals guided us to many of the cases cited herein; Smith's Criminal Practice and Procedure; the District Court's *Jury Trial Manual*; Liacos's *Handbook of Massachusetts Evidence*; McNaught and Flannery's *Massachusetts Evidence: A Courtroom Reference*; and Amsterdam's *Trial Manual for the Defense of Criminal Cases*. The West Publishing Company made its Westlaw database available for this project.

I know that I could not have sustained this project without the encouragement, critical advice, and patience of my wife, Eva Nilsen, and without the delightful and essential efforts of my daughter, Claire, to entice me away from the computer for interludes of play.

Finally, this book would not have been written had not my parents, Beatrice and Seymour Blumenson, taught me to care about and write about the public interest. This book is dedicated to them.

Eric Blumenson
Cambridge, Massachusetts
May 1990

PREFACE TO SECOND EDITION (*Massachusetts Criminal Practice*, 1998)

Almost a decade has passed since the original publication of *Massachusetts Criminal Defense* — a decade of great change and unanticipated challenges for lawyers practicing in the criminal justice system. At the federal level, the laws now governing habeas corpus, immigration, police procedure, and drug offenders are distant cousins to their antecedents in the 1980s. In Massachusetts during this period, we lost our centuries-old *de novo* court system and gained a new code of professional responsibility; and the legislature substantially rewrote the laws applying to bail, juveniles, parole, and sentencing. (Mandatory sentencing guidelines and major changes to the Rules of Criminal Procedure are visible on the horizon.) Such consequential developments could not justly be relegated to a pocket part; it was clearly time to take stock of these events and produce a wholly revised edition of the book. What you now have in your hands is in some respects a new book, covering much new ground, and produced this time by a team of three coeditors with both prosecutorial and defense experience. It also bears a new title — *Massachusetts Criminal Practice* — on the conviction that all participants in the criminal process are equally concerned with guaranteeing the delivery of the rights and procedures we describe herein.

This Second Edition has benefited from the insights and hard work of a great many people who contributed to the three intermediate supplements and to this new edition. In addition to the authors and to those identified in the Preface to the First Edition, many of whom have continued to participate in this project, we wish to acknowledge the contributions of David McCord, Stephanie Page, James R. Pigeon, Sara Burgess Reed, and Thomas A. Reed. We also thank our research assistants over the past decade for their work on supplementing the original book, including Jason Bassett, Mary Kuusisto Bejar, Kevin G. Collimore, Jeffrey Colwell, Therese Dillingham, Christopher Drinan, Jenny Epstein, Tamar Finkelstein, Gina Finocchio, Lisa Fisher, Christine Fortune, Andrea E. Girolamo, Margaret R. Guzman, Laura Hancock, Michael D. Handler, Casey McCarthy, Kamyar Mehdiyoun, Moyenda Mutharika, Brett W. Newkirk, Jacqueline Perczek, Kimberly Pope, Jennifer A. Rudd, Vanessa Rush, Lawrence J. Sheh, Catherine V. Tannen, and Christine Verity. For patient and thorough secretarial assistance, we thank Alice Drew, Tracey Hefner, William Kaleva, Jeannie Kelly, Barbara Koocher, Joan Luke, and Nicole York.

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September 1998

Closing Date for the Second Edition: This edition covers changes in the law up to June 1, 1998. Periodic publication of supplements will update all chapters.

Proper Use of this Book: Readers should recognize that this book is intended as an aid to research. Given the depth and breadth of the criminal law, we can make no claim to completeness. Attorneys should read and research any authorities cited herein before relying on them.

Comments: All comments, corrections, or suggestions would be appreciated and will help assure the continued vitality and accuracy of this project. Please send any comments to: Prof. Eric Blumenson, Suffolk Law School, 110 Tremont St., Boston, MA 02108.