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WHEN IS ATTORNEY WORK PRODUCT EXEMPT UNDER THE MASSACHUSETTS PUBLIC RECORDS ACT?

by Paul Nemser

I. INTRODUCTION

In *DaRosa v. City of New Bedford*,¹ the Supreme Judicial Court addressed the scope of attorney work product protection and attorney-client privilege available to public entities. This article will examine that decision and address issues that will need to be considered in the future.

In 1999, in *General Electric Co. v. Department of Environmental Protection*, the SJC had held that “materials privileged as work product . . . are not protected from disclosure under the public records statute unless those materials fall within the scope of an express statutory exemption.”² The court thus appeared to make attorney work product available through the Public Records Act (PRA) even though it would not have been discoverable in litigation. Now, in *DaRosa v. City of New Bedford*, the court closed most of the gap that it created in *General Electric*. Henceforward, most of the attorney work product in the hands of the government, including reports of consultants engaged by the government, will be exempt from disclosure as a public record. An exception is that the government’s fact work product must be disclosed if it is a “reasonably completed study or report,” and is not intertwined with legal opinions or with analysis leading to legal opinions.³

General Electric turned on the principle that the PRA requires production of all documents or data made or received by the government for a public purpose, unless they fall within one of the express exemptions in the statutory definition of “public record.”⁴ The court left no room to imply an exemption. Because there is no express exemption for protected attorney work product in the PRA — while protected attorney work product is expressly exempted in the federal Freedom of Information Act (FOIA) — the court in *General Electric* refused to imply any blanket exemption for attorney work product. It did, however, leave open the possibility that certain attorney work product might fall under one of the express exemptions — in particular, the “policy deliberation” exemption in General Laws chapter 4, section 7, Twenty-sixth (d).⁵

II. THE *DaROSA* DECISION

Recognizing that intervening decisions had undermined *General Electric*, the *DaRosa* court revisited the *General Electric* court’s



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blanket refusal to imply exemptions to the PRA and then held that most attorney work product in the government’s hands would fall within the policy deliberation exemption. The *DaRosa* court summarized its most important holdings as follows:

[O]pinion work product that was prepared in anticipation of litigation or for trial by or for a party or party representative is protected from discovery to the extent provided under Mass. R. Civ. P. 26(b)(3), even where the opinion work product has been made or received by a State or local government employee. So is fact work product that is prepared in anticipation of litigation or for trial where it is not a reasonably completed study or report, or, if it is reasonably completed, is interwoven with opinions or analysis leading to opinions. Other fact work product that has been made or received by a State or local government employee must be disclosed in discovery, even if it would be protected from discovery under rule 26(b)(3) were it not a public record.⁶

DaRosa involved an environmental clean-up.⁷ The property owners sued the city for damages for soil contamination and the city impleaded a number of private parties. Between the time suit was filed and the time the city brought in the third parties, the city hired an environmental consultant to evaluate the claims in the litigation

1. 471 Mass. 446 (2015).

2. 429 Mass. 798, 801 (1999).

3. *DaRosa v. City of New Bedford (DaRosa)*, 471 Mass. at 448.

4. MASS. GEN. LAWS ch. 4, §7, Twenty-sixth, defines “public record” very broadly: “Public records’ shall mean all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose, or any person, corporation, association, partnership

or other legal entity which receives or expends public funds for the payment or administration of pensions for any current or former employees of the commonwealth or any political subdivision as defined in section 1 of chapter 32, unless such materials or data fall within the following exemptions. . . .”

5. The exemption in section (d) covers: “inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based.” MASS. GEN. LAWS ch. 4, §7, Twenty-sixth(d).

6. *DaRosa*, 471 Mass. at 462.

7. *DaRosa v. City of New Bedford*, 471 Mass. 446, 448 (2015).

and to identify potential sources of contamination.⁸ The consultant provided his services to the city solicitor, and later to the city's outside counsel, in connection with the litigation.⁹ The third-party defendants sought discovery of the consultant's documents, including two letters and his report evaluating the litigation and the possible sources of contamination. The city resisted discovery by invoking work product protection and attorney-client privilege, but the trial judge rejected those arguments.¹⁰ There was no applicable enumerated exception in the PRA.¹¹ The judge recognized that, absent the PRA, the documents would be protected work product.¹²

Eventually, the case reached the SJC on direct appellate review.¹³ The city raised three arguments on appeal: first, even if the documents constituted "public records," the court should exercise its inherent authority to rule that the documents should be protected from discovery during pending litigation by the work product doctrine codified in Rule 26(b)(3) of the Massachusetts Rules of Civil Procedure; second, the documents were not "public records" because they fell within the "policy deliberation" exemption in General Laws chapter 4, section 7, Twenty-sixth (d); and third, the documents were protected from disclosure by the "derivative attorney-client privilege."¹⁴

The court articulated the general structure of the public records provisions in Massachusetts.¹⁵ "Public records" must be disclosed upon request, and "public record" is defined in General Laws chapter 4, section 7, Twenty-sixth to include "all . . . documentary materials or data . . . made or received by any officer or employee" of any agency, office, or authority of state or local government, unless such records fall within one of 20 exemptions. The exemptions are similar, but not identical, to those in the federal FOIA. For purposes of the *DaRosa* court's analysis, the pertinent exemption — for "policy deliberation" — applies to "inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but . . . shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based."¹⁶

Previously, the court in *General Electric* had refused to imply a blanket exemption for attorney work product for several reasons,¹⁷

but did affirm so much of the lower court's ruling that permitted the government to withhold documents that fell within the policy deliberation exemption. The *DaRosa* court moved a good distance away from *General Electric* in the direction of protecting attorney work product. Relying on two cases decided after *General Electric*, the *DaRosa* court overruled *General Electric* to the extent that the earlier case had held that no exemptions would be implied into the PRA.¹⁸ In *Suffolk Construction Co. v. Division of Capital Asset Management*, the SJC had concluded that communications within the attorney-client privilege are impliedly exempt from the definition of "public records," in part, because disclosure of privileged documents would place public agencies at an unfair disadvantage in dealings with private parties.¹⁹ Furthermore, in *Commonwealth v. Fremont Investment and Loan*, the court ruled that documents disclosed by a private party to a public agency pursuant to a protective order did not become public records, but instead were impliedly exempt.²⁰

Having made clear that implying a blanket exemption might be possible,²¹ the *DaRosa* court nonetheless chose not to do so for attorney work product and instead developed an interpretation of Exemption (d) that accomplished many of the same objectives.²² The court interpreted the phrase "policy positions" in Exemption (d) broadly to protect "open, frank inter-agency and intra-agency deliberations regarding government decisions."²³ The court further explained that Exemption (d) effectively incorporates something like the federal "deliberative process" evidentiary privilege, which applies to "pre-decisional" materials that relate to a decision being deliberated by a government agency.²⁴

This reasoning furnished the court with a link between Exemption (d) and attorney work product. When anticipating litigation or actually litigating, an agency's decisions concerning litigation strategy and case preparation count as policy decisions that could fall within the exemption. To refine the analysis, the court relied on the well-established distinction between opinion work product and fact work product contained in the language of Rule 26(b)(3) of the Massachusetts Rules of Civil Procedure.

Opinion work product includes "the mental impressions, conclusions, opinions or legal theories of an attorney or other representative

8. *Id.* at 449.

9. *Id.*

10. *Id.*

11. *Id.* at 450.

12. *Id.*

13. *DaRosa v. City of New Bedford*, 471 Mass. 446, 450 (2015).

14. *Id.*

15. *Id.* at 450-52. In this article, the term "Public Records Act" is used to describe the statutory regime, which includes MASS. GEN. LAWS ch. 66, §10, and MASS. GEN. LAWS ch. 4, §7, Twenty-sixth.

16. MASS. GEN. LAWS ch. 4, §7, Twenty-sixth (d).

17. The court's four main reasons for not implying an exemption included: (1) the PRA and the definition of "public record" are broad in scope; (2) the Act imposes a presumption that the record sought is public and places a burden on the custodian to prove that an exemption applies; (3) although FOIA expressly exempts "inter-agency or intra-agency memorand[a] or letters which would not be available by law to a party other than an agency in litigation with the agency," 5 U.S.C. §552(b)(5), Exemption (d) of the PRA is narrower in scope and expressly covers only "inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency," MASS. GEN. LAWS ch. 4, §7, Twenty-sixth (d); and (4) a bill that eventually became the PRA originally

contained an Exemption (k) for all "records pertaining to any civil litigation in which an agency . . . is involved, except in response to a subpoena, and only prior to final judicial determination or settlement of such litigation," see 1973 House Doc. No. 7433, §1; although the House passed the bill containing Exemption (k), that exemption was not in the PRA as finally enacted. See generally *General Electric Co. v. Department of Environmental Protection*, 429 Mass. 798, 801-04 (1999).

18. *DaRosa*, 471 Mass. at 453-54.

19. 449 Mass. 444, 445-46, 455-61 (2007). See Elissa Flynn-Poppey, Comment, Civil Law — Attorney-Client Privilege under Massachusetts Public Records Law *Suffolk Construction Co. v. Division of Capital Asset Management*, 449 Mass. 444 (2007), 91 MASS. L. REV. No. 3 (2008).

20. 459 Mass. 209, 211-16 (2011).

21. *DaRosa v. City of New Bedford*, 471 Mass. 446, 453 (2015) ("We no longer hold to the view declared in *General Electric* that there are no implied exemptions to the public records act, and that all records in the possession of a governmental entity must be disclosed under the act unless they fall within one of the exemptions identified in G.L. c. 4, §7, Twenty-sixth.").

22. *Id.* at 459-60.

23. *Id.* at 457.

24. *Id.* at 457-58.

of a party concerning the litigation.”²⁵ The court held that opinion work product relates to “policy positions being developed by the agency” in anticipation of litigation and during the pendency of litigation, and therefore, at least during that time period, opinion work product would be protected against a public records request.²⁶

All other attorney work product is called “fact work product.” A classic example of fact work product is a percipient witness statement obtained by an attorney.²⁷ Relying on the proviso at the end of Exemption (d) (that it does “not apply to reasonably completed factual studies or reports on which the development of . . . policy positions has been or may be based”), the *DaRosa* court limited protection of fact work product — even if related to policy positions under development by the agency — so long as the work product is a “reasonably completed factual stud[y] or report[] on which the development of such policy positions has been or may be based.”²⁸ Therefore, the exemption does apply where fact work product is not contained within a “factual study or report,” or where it is contained in a “factual study or report” that is not “reasonably completed.”²⁹ It also applies where factual matter is inextricably interwoven with opinions or with analysis leading to opinions.³⁰ But if the fact work product is: (1) contained in a factual study or report; (2) that is reasonably completed at the time of the request; and (3) the factual material is cleanly separable from opinion material, then the exemption does not apply, and the fact work product is not protected against a public records request.³¹

The court concluded that, even though its interpretation of Exemption (d) did not result in protection coterminous with the protection that would be afforded a private litigant under Rule 26(b)(3), it would not imply a broader exemption.³² The court suggested several reasons why its interpretation would not interfere unduly with the inherent power of the courts or the administration of justice: the precedential effect of the *General Electric* decision; the reality that fact work product receives only qualified protection under Rule 26(b)(3); and the Legislature’s inclusion of the proviso in Exemption (d) for reasonably completed factual reports.³³

The court also ruled that, in the context of ongoing litigation, if fact work product falls within the PRA and outside of Exemption (d), the government should produce the records in discovery, rather than requiring a separate proceeding under the PRA, which could be cumbersome, slow, and inconsistent with the needs of the ongoing case.³⁴

With respect to the PRA and work product, the court analyzed an argument arising on the facts of *DaRosa*. Although the trial judge had ruled that, but for the PRA, the documents at issue were

protected work product that need not be produced, the third-party defendants argued that reports, letters, and memoranda written by an outside consultant working temporarily for the city could not be “inter-agency or intra-agency memoranda or letters” as required by Exemption (d). The court rejected this argument and ruled that, if prepared for the city at the city’s request, the documents could fall within the exemption regardless of whether they were prepared by an outside consultant or a public employee.³⁵

To conclude its analysis, the *DaRosa* court rejected the city’s argument that the materials fell within the “derivative attorney-client privilege,”³⁶ a doctrine that, in limited circumstances, allows a third party access to an attorney-client communication without violating the confidentiality necessary to establish privilege. In essence, the doctrine applies where the third person acts as a “translator” for the messages between attorney and client — analogous to the role of a foreign language interpreter. The court in *Commissioner of Revenue v. Comcast Corp.*³⁷ adopted the doctrine, which was developed initially by the United States Court of Appeals for the Second Circuit.³⁸ As explained in *Comcast*, it is not enough that the presence of the third party improves the attorney’s representation of the client; instead, the third party must be “nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications.”³⁹ The *DaRosa* court stressed the narrow scope of the doctrine:

[T]he derivative attorney-client privilege protects otherwise privileged communications between an attorney and client despite the presence of a third party where, without the assistance of the third party, what the client says would be “Greek” to the attorney, either because the client is actually speaking in Greek or because the information provided by the client is so technical in nature that it might as well be spoken in Greek if there were not an expert to interpret it for the attorney.⁴⁰

Applying this standard to the facts, the *DaRosa* court concluded that the city’s consultant had not “translated” a confidential communication between the city and its attorneys; the consultant had translated “public record technical data relating to the site” — indeed, in discovery, the city produced the records and data reviewed by the consultant.⁴¹ Thus, even if the consultant’s documents were critical to the advice the city’s attorneys gave, the documents fell outside the derivative privilege because they were not part of a chain of confidential communication between client and attorney.⁴²

25. MASS. R. CIV. P. 26(b)(3).

26. *DaRosa*, 471 Mass. at 459.

27. See *Hickman v. Taylor*, 329 U.S. 495 (1947).

28. MASS. GEN. LAWS ch. 4, §7, Twenty-sixth (d).

29. *DaRosa v. City of New Bedford*, 471 Mass. 446, 459-60 (2015).

30. *Id.*

31. *Id.*

32. *Id.* at 460.

33. *Id.*

34. *Id.* at 460-61.

35. *DaRosa v. City of New Bedford*, 471 Mass. 446, 461-62 (2015).

36. *Id.* at 462-64.

37. 453 Mass. 293, 306-08 (2009).

38. See *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961).

39. *Comcast*, 453 Mass. at 307 (quoting *Cavallaro v. United States*, 284 F.3d 236, 249 (1st Cir. 2002)).

40. *DaRosa*, 471 Mass. at 463.

41. *DaRosa v. City of New Bedford*, 471 Mass. 446, 463 (2015).

42. *Id.* at 463-64.

III. ANALYSIS AND DISCUSSION

A. The Public Records Act and Attorney Work Product

PRA exemptions and the attorney work product doctrine are exceptions within regimes of disclosure.

Public records are broadly defined and include all documentary materials made or received by an officer or employee of any corporation or public entity of the commonwealth, unless one of nine statutory exemptions is applicable. On request, public records are subject to mandatory disclosure. Statutory exemptions are strictly construed and the custodian of the document has the burden of proving that the requested document is not within the purview of a public record.⁴³

Similarly, within the regime of broad discovery described in the Massachusetts Rules of Civil Procedure, the work product doctrine, embodied in Rule 26(b)(3), “functions ‘to enhance the vitality of an adversary system of litigation by insulating counsel’s work from intrusions, inferences or borrowings by other parties.’ The purpose of the doctrine is to establish a ‘zone of privacy for strategic litigation planning . . . to prevent one party from piggybacking on the adversary’s preparation.’”⁴⁴ The party claiming work product protection has the burden of demonstrating that the work product was prepared in anticipation of litigation.⁴⁵ “If that burden is met, the burden shifts to the [opposing party] to demonstrate a substantial need for the [work product] and that she cannot obtain the substantial equivalent of the [work product] without undue hardship.”⁴⁶

The PRA issue in *DaRosa* requires balancing the interest in government transparency embodied in the PRA, as qualified by Exemption (d), and the litigation needs of government embodied in the attorney work product doctrine. Implicit in any determination of that balance is defining the relationship between the legislature as author of the PRA and the judiciary as protector of a fair litigation process. The *General Electric* decision appeared to tip that balance strongly in favor of legislatively-mandated transparency, although it left some room for application of Exemption (d).⁴⁷ The decisions in *Suffolk Construction* and *Fremont Investment and Loan* drew the balance back toward protection of government’s need for confidentiality and litigation fairness. The *DaRosa* decision continued this trend, but did so through a clever reconciliation of possible conflict between the legislature and the judiciary. In this way, the court extended substantial protection to the government’s attorney work product and set the limits of this protection using legislatively-drawn lines found in Exemption (d).

The effect of *DaRosa*, and probably a crucial reason for the court’s approach, is to provide government with work product protection comparable to the protection received by other litigants. Although in *Suffolk Construction* the court characterized the work product doctrine as a mere qualified “immunity for the attorney,” and a “tool of judicial administration . . . designed to safeguard the adversarial system,”⁴⁸ the *DaRosa* court apparently did not believe that the legislature intended the PRA to create radical asymmetry between the government and other parties in litigation by exposing the strategies and analysis of government attorneys or permitting the other parties to piggyback on the efforts of government attorneys. At least one obvious effect of such asymmetry could be to discourage government litigators from generating written work product.

An argument that the legislature intended to create such a radical asymmetry would likely imply two underlying concerns: (1) skepticism that government agencies and government litigators are truly working for the public good when litigating, and (2) belief that access to attorney work product would help the public to address the issues raised in the litigation. That is, the public could use the work product to make an independent judgment about the government’s conduct and litigation posture, and the public could find attorney work product helpful in evaluating a real-world problem. For example, a consultant’s report about a public safety hazard could be useful in remediating the hazard even if the report was generated in anticipation of litigation.⁴⁹

To reconcile the interests in protecting government as a litigant and the interests in government transparency, the court linked the goals of Exemption (d) and the work product doctrine: at least while litigation is anticipated or pending, opinion work product — under the *DaRosa* court’s view — “relate[s] to policy positions being developed by the agency.”⁵⁰ Similarly, while litigation is anticipated or pending, fact work product is protected, unless it qualifies as a reasonably complete study or report. Therefore, when the need to safeguard the adversarial system is greatest, the government retains protection for most of its attorney work product. An exception is the fact work product that might be most objective and most useful in evaluating the government’s litigation position or in addressing the underlying real-world problem — a reasonably completed factual study or report. What are some of the implications of the *DaRosa* opinion?

B. The Scope of “Policy”

In reaching its result, the court read “policy” in a manner that would aid in “the protection of open, frank inter-agency and intra-agency deliberations regarding government decisions.”⁵¹ While a

43. *Hull Mun. Lighting Plant v. Mass. Mun. Wholesale Elec. Co.*, 414 Mass. 609, 614 (1993) (citations omitted).

44. *Commissioner of Revenue v. Comcast Corp.*, 453 Mass. 293, 311-12 (2009) (citations omitted).

45. *Id.* at 315.

46. *Id.*

47. *General Electric* also was decided shortly after the court decided *Babets v. Secretary of Executive Office of Human Services*, 403 Mass. 230 (1988), which held that Massachusetts does not recognize a governmental “pre-decisional” or “deliberative process” privilege such as has been recognized in federal law. *See, e.g.*, *EPA v. Mink*, 410 U.S. 73, 86-92 (1973). The federal privilege protects inter-agency and intra-agency materials that bear upon policy-making, but only while the deliberative, policy-making process is under way. *See Texaco P.R. Inc.*

v. Dep’t of Consumer Affairs, 60 F.3d 867, 885 (1st Cir. 1995) (“Because the deliberative process privilege is restricted to the intra-governmental exchange of thoughts that actively contribute to the agency’s decision-making process, factual statements or post-decisional documents explaining or justifying a decision already made are not shielded.”).

48. *Suffolk Construction Co. v. Division of Capital Asset Management*, 449 Mass. 444, 456 (2007) (citations omitted).

49. Furthermore, the justification of work product protection to prevent “piggybacking” by one litigant on another’s work is arguably weaker in the government context, given that government agencies often create reports and analyses that others may use in both public advocacy and private business affairs.

50. *See DaRosa v. City of New Bedford*, 471 Mass. 446, 459 n.16 (2015).

51. *Id.* at 457.

plausible notion, this reading could include nearly everything an agency does — at least everything that is not accidental. For example, virtually any service provider to a city traffic ticket office might bring a collection suit against the agency, or might be a defendant in a suit for shoddy work. In the absence of a lawsuit, the bills or workmanship of the office’s plumber, beverage provider, or data processing provider are unlikely to implicate policy positions concerning traffic tickets. Nevertheless, a broad reading of “policy” might extend protection to the agency’s deliberations on these topics.

Further, suppose a desk clerk of the traffic ticket office wrote a memorandum to her supervisor listing reasons why she believes the agency’s current electrician should be terminated for being lazy on the job. This would fall within the category of “intra-agency memoranda or letters” within the meaning of Exemption (d). Also, under the *DaRosa* court’s reading, a memorandum about the termination of an agency contractor could be viewed as a memorandum “relating to policy positions being developed by the agency” because under *DaRosa* “policy” includes “intra-agency deliberations regarding government decisions.” Faced with a PRA request, the agency could take the position that the memorandum falls within Exemption (d). On the other hand, “policy positions being developed by the agency” would more plausibly mean “positions regarding the subject matters over which the agency has jurisdiction to govern,” and under that narrower definition of “policy,” the memorandum would not be protected under Exemption (d).

In sum, the *DaRosa* court’s definition of “policy” may sweep too broadly. This comprehensive definition of “policy” will not create conflicts with the work product doctrine, but may be a basis for expanding the scope of Exemption (d).

C. When Does Exemption (d) Protection for Work Product Begin and End?

The *DaRosa* court recognized, but did not resolve, a different area of possible conflict between Exemption (d) and the work product doctrine: the temporal scope of Exemption (d)’s protection for attorney work product. Exemption (d), by its terms, applies only to documents “relating to policy positions being developed by the agency.”⁵² Thus, Exemption (d) apparently would not apply if the policy position has already been developed. Furthermore, even if the policy position is actively being developed, Exemption (d) expressly does not protect reasonably completed factual studies or reports on which the policy position is or may be based.

Attorney work product can be created before, as well as during, litigation. “The field of operation of the work product rule is . . . preparation for litigation. This includes litigation which, although not already on foot, is to be reasonably anticipated in the near future.”⁵³ Exemption (d) protects a policy position being developed, and the *DaRosa* court ruled that creating opinion work product involves development of a policy position.⁵⁴ Therefore, under *DaRosa*, opinion work product created before or during litigation retains Exemption (d) protection, at least during the pendency of the litigation for which it was created.⁵⁵

The *DaRosa* court expressly did not resolve questions regarding when, if ever, protection ends for opinion work product in government hands. “[T]he deliberative process is always ongoing and incomplete during the course of litigation, because every decision relevant to litigation may be revisited and revised as circumstances change. We leave for another day the question whether opinion work product might no longer be protected once the litigation is concluded.”⁵⁶ The court further observed that drawing the line might depend on circumstances such as the risk of similar litigation.⁵⁷

As will be seen in the next sections, that line-drawing involves many complexities. In a private party’s hands, attorney work product created in anticipation of litigation would likely retain its protection even if no litigation ensues; furthermore, if litigation does ensue, the work product would likely retain protection even if sought in a second lawsuit, particularly if the two cases involve closely related subject matter. In the hands of a Massachusetts public entity, however, protection of the work product depends on the overlay of the PRA. Here follows a brief analysis of some of the open questions relating to when protection ends for attorney work product in the government’s hands.

(i) If No Litigation Ensues

What happens if the work product in the government’s hands is prepared in anticipation of future litigation that never ensues? Although Massachusetts courts have not spoken definitively on the point, federal authority supports the view that opinion work product created for reasonably anticipated litigation retains its protection even if no litigation ensues. For example, in *Kent Corp. v. NLRB*,⁵⁸ a FOIA case, the work product at issue related to a possible future enforcement action by the agency. The work product included an investigative report describing potential evidence and an analysis of whether to charge Kent with labor violations. Addressing the question whether work product protection continued even if no charges were brought, the United States Court of Appeals for the Fifth Circuit observed that, at the time the work product was created, the possible future enforcement litigation was sufficiently definite and imminent to qualify for protection. Furthermore, the government interest in permitting agency attorneys to make and communicate candid assessments of the case applied, regardless of whether litigation eventually ensued. The court thus ruled that Exemption 5 (which exempts from disclosure “inter-agency or intra-agency memorandums or letters”⁵⁹) protected the materials from FOIA disclosure.⁶⁰

It is not clear how Massachusetts courts would construe Exemption (d) protection for opinion work product created in reasonable anticipation of future litigation that never ensues. The *Kent* court’s reasoning that protection for opinion work product should not turn on whether litigation ensues applies in Massachusetts as elsewhere. The question is open, however, whether Exemption (d) of the PRA, with language different from FOIA Exemption 5, continues to shield the opinion work product once one can no longer reasonably anticipate that suit will be brought. In other words, should Exemption (d)

52. MASS. GEN. LAWS ch. 4, §7, Twenty-sixth (d).

53. *Ward v. Peabody*, 380 Mass. 805, 817 (1980) (citations omitted).

54. *DaRosa*, 471 Mass. at 459.

55. *See supra* note 49.

56. 471 Mass. at 459 n.16.

57. *Id.*

58. 530 F.2d 612, 623-24 (5th Cir.), *cert. denied*, 429 U.S. 920 (1976).

59. 5 U.S.C. §552(b)(5).

60. *Id.*

be construed as coextensive with the work product protection in this context, or does the interest in government transparency warrant granting the government less protection than an ordinary litigant would receive once litigation is not reasonably likely to ensue?⁶¹

A key question could be, “Was the government’s work product useful to litigants only for the one possible future case that is not going forward, or would disclosure of the work product confer a litigation advantage on the government’s potential adversaries in other future litigation?” In the first case, the policy position embodied in the work product is now essentially historical fact of interest to those trying to understand past government conduct and policies, and disclosing the work product will not confer a litigation advantage on the government’s litigation adversaries. In the second case, the reasons for withholding the work product are stronger because the policy position remains, in a sense, in development while reasonably anticipated future litigation plays out, and the government’s adversaries should not be able to gain a litigation advantage by free-loading on the government’s efforts.

The first and second cases, however, are not always easy to distinguish. If the government has already been a party to repeat litigation of some type and the work product has a bearing on many cases of that type, it may be clear that the government can demonstrate a strong interest in keeping its opinion work product from adversaries in future cases, and the government thus may be able to meet its burden of demonstrating the continued applicability of Exemption (d). However, the burden may prove difficult to meet, especially if there have not been a number of prior similar cases. Questions such as whether there will be future litigation and whether the work product is likely to be relevant in that future litigation may be highly speculative. The contents of the work product document, standing alone, will likely provide little illumination. The need to produce or create evidence from outside the work product document, such as a clear government statement that it intends to enforce a particular legal requirement in a given class of cases, or a clear advance articulation of the legal theories the government will pursue, may put the government to hard choices. Would it rather disclose its legal memorandum from the past case, or would it instead prefer to disclose its intentions for future cases?

A dilemma of a related kind could arise in connection with government evaluations of its own conduct. Suppose that the government’s opinion work product revealed past wrongdoing by the government sufficiently serious to provoke a potential opponent (Party A) to start a suit against the government, but Party A has not started suit because he lacks the information. Then suppose, for example, that the government received a PRA request broad enough to sweep in the work product. Should the government be able to bring itself within Exemption (d) by proving that disclosure would reveal the wrongdoing and probably cause Party A to sue? Even if so, would

the government want to offer such proof? Unless the proceedings were sealed, the proof would likely reveal the wrongdoing. The public has an interest in learning of specific government wrongdoing. If the wrongdoing is serious and clear, the public’s interest in learning of it will outweigh any government interest in strategic litigation planning. If the wrongdoing is not particularly serious or the evidence of it is debatable, the balance will be more even. Nonetheless, Party A could argue persuasively that Exemption (d) was never intended as a means of hiding the government’s evaluations of its own misconduct.⁶²

(ii) *If Litigation Ensues, But Ends*

In *FTC v. Grolier Inc.*, the United States Supreme Court considered “the extent, if any, to which the work-product component of Exemption 5 of [FOIA] applies when the litigation for which the requested documents were generated has been terminated.”⁶³ “Exemption 5 [] exempt[s] those documents, and only those documents, normally privileged in the civil discovery context.”⁶⁴ Holding that Exemption 5 does apply after the initial litigation has been terminated, the *Grolier* court observed in dicta that “the literal language of [Federal Rule of Civil Procedure 26(b)(3)] protects materials prepared for any litigation or trial as long as they were prepared by or for a party to the subsequent litigation.”⁶⁵ The court noted that overwhelming authority supported the view that protection extends after the initial litigation has ceased,⁶⁶ and the court concluded that Exemption 5 applies because the work product, even if prepared for an earlier, unrelated litigation, would not normally be available in the subsequent litigation.

As *Grolier* indicates, the great majority of federal courts have concluded, even outside the FOIA context, that protection for work product does not cease when the litigation that generated it ceases. If work product is created for Suit A, courts continue to protect the work product from a FOIA request even after Suit A ceases. Furthermore, the substantial majority of courts would extend the protection of work product developed for Suit A to block disclosure in a later Suit B, at least if Suits A and B are closely related in subject matter.⁶⁷

In dicta in *McCarthy v. Slade Associates Inc.*, the SJC agreed with the dominant federal view: “That opinion work product relates to a different case does not mean that it no longer qualifies as work product.”⁶⁸ The court cited with approval Wright and Miller’s⁶⁹ view of the issue — a view also preferred by Judge Young of the federal district court in Massachusetts: the protections of the work product doctrine extend to subsequent litigation, even if it is “unrelated,” but, “to the extent that the rule seems to give undue protection to material prepared for some other suit the court can view tolerantly the showing necessary to overcome the work product immunity.”⁷⁰

If the government is the party claiming work product protection,

61. The burden would fall on the government to prove that an exemption applies. Therefore, if some likelihood of eventual litigation were a requirement for application of Exemption (d), the government would have to prove that the dispute is reasonably likely to result in active litigation.

62. For a discussion of the PRA’s investigatory exemption, see *infra* Section D.

63. *Grolier*, 462 U.S. 19, 20 (1983).

64. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (footnote omitted).

65. 462 U.S. at 25.

66. See *id.* at 26-27 & nn. 8, 9 (collecting cases).

67. United States District Court Judge Young provided a detailed discussion of applicable authority in *In re Grand Jury Subpoena*, 220 F.R.D. 130, 149-50 (D. Mass. 2004). See also *Frontier Refining Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 703 (10th Cir. 1998) (collecting circuit authority).

68. 463 Mass. 181, 199 n.37 (2012).

69. 8 Charles Wright, Arthur Miller and Richard Marcus, *FEDERAL PRACTICE AND PROCEDURE* §2024 (1994).

70. *Id.* (citations omitted) (internal brackets and ellipses omitted).

the possibility of tension between the PRA and the work product doctrine is real. Even if, for an agency in litigation, “decisions regarding litigation strategy and case preparation fall within the rubric of ‘policy deliberation,’”⁷¹ is that policy still “being developed” once the case is over? Furthermore, the dicta in *DaRosa* suggest that the “risk of similar litigation”⁷² may be decisive on the question whether Exemption (d) applies after the initial case is over, yet the dicta in *McCarthy* also suggest that work product protection may continue after the case has ended, even if the new case is unrelated to the initial case. This leaves room for more situations — like that discussed in *DaRosa* itself — in which work product protection would apply for a private litigant, but a government litigant would have to disclose the work product because of the PRA. Indeed, the strength of the argument for disclosure might increase as the later case becomes less similar to the case generating the work product.⁷³

More broadly, what factors determine similarity? Must the government be a party to the future suits? Must the legal theories be similar? Must factual subject matter be similar? Consider, for example, this hypothetical: a government housing authority sought to acquire a parcel of property (Parcel A); an eminent domain claim ensued; the authority’s attorneys did a case assessment memorandum analyzing legal and factual issues; and the case settled. The value of Parcel A was arguably affected by gasoline from an underground tank at a gas station on a nearby parcel. The public can request the authority’s appraisal,⁷⁴ but what about the attorneys’ memorandum?⁷⁵

Here are three illustrative variations:

1. The authority seeks to acquire by eminent domain another property (Parcel B) across town. Parcel B is near an underground oil tank across town from Parcel A.
2. The authority sells Parcel A to a private buyer who sues the gas station for the harm caused by the pollution.
3. Buyer buys Parcel C, another parcel near the gas station. Buyer brings a misrepresentation suit against private owner of Parcel C related to the purchase. The history of pollution in the area and the impact of gasoline upon the value of Parcel C are issues in the misrepresentation suit.

In each case, the buyer requests the authority’s case assessment. Under the dicta in *McCarthy*, the case assessment would appear to be protected opinion work product in all cases. Under the dicta in *DaRosa*, the arguments on disclosure could differ among the three cases.

The argument against disclosure in case (1) would focus on the authority’s being the party in both instances, so that the opponent should not be allowed to piggyback on the authority’s work, to the extent such work may be relevant in the case of Parcel B. The opponent would argue that the memorandum relates to a different, closed

case about a different property. The argument against disclosure in case (2) would be that the buyer should not be able to piggyback on the authority’s work concerning Parcel A. That work likely explored issues very closely related to those in the buyer’s suit, such as the nature, extent, and timing of the pollution, the strength of a claim against the gas station, the availability of insurance, and whether the statute of limitations has run out. Moreover, the authority may have an interest in acquiring or may own other properties in proximity to Parcel A. The argument for disclosure is that the memorandum relates to a closed case, the authority is not even a party to the buyer’s case, and the legal issues at stake in the eminent domain case were largely distinct from the tort issues at stake in the buyer’s case. Finally, the arguments against disclosure in case (3) would be like those for case (2), but the argument for disclosure would be stronger because the buyer’s case does not relate to Parcel A.

In sum, the argument for disclosure is weakest in case (1), where the authority is a litigant. The argument for disclosure should prevail in cases (2) and (3), unless the authority could show a continuing, litigation-related need to withhold the work product.

D. The Investigatory Exemption and Attorney Work Product

Even if a document is attorney work product that under *DaRosa* is not protected by Exemption (d), the document may still be protected under one of the other exemptions to the PRA. An important example is Exemption (f), which allows a custodian of records to withhold “investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.”⁷⁶ The inquiry should consider whether: (1) the document contains investigatory materials; (2) the materials were necessarily compiled out of the public view by law enforcement or other investigatory officials; and (3) disclosure would probably harm the public by prejudicing effective law enforcement.

Thus, for example, Exemption (d) will not protect a government attorney’s completed factual report on which litigation decisions will be or have been based. Protection, however, could come from Exemption (f) if the government can show that the attorney performed or directed an investigation of the facts, the people compiling the facts were law enforcement or other investigatory officials, the investigation needed to be kept out of public view, and disclosure would probably prejudice law enforcement efforts.⁷⁷ If the same document also contains a separate legal analysis in addition to the factual report, the legal analysis could be exempt opinion work product under the *DaRosa* court’s interpretation of Exemption (d). Moreover, if the factual and legal work product are sufficiently intertwined, that could provide another argument under *DaRosa* for nondisclosure.

71. *DaRosa v. City of New Bedford*, 471 Mass. 446, 458 (2015).

72. *Id.* at 459 n.16.

73. At least in theory, the “later case” may be a hypothetical case rather than an actual one. For example, the requesting party may not be a litigant, but merely a person making a PRA request. The question of similarity might then be between the case that generated the work product and hypothetical cases reasonably likely to ensue.

74. See MASS. GEN. LAWS ch. 4, §7, Twenty-sixth (i).

75. Assume that the case assessment memorandum was not communicated to

the authority, so that attorney-client privilege is not at issue in the hypotheticals.

76. See MASS. GEN. LAWS ch. 4, §7, Twenty-sixth (f).

77. See *District Attorney for the Norfolk Dist. v. Flatley*, 419 Mass. 507, 512-13 (1995) (“[R]ecognizing the absence of a blanket exemption for police records or investigatory materials, this court has stated that a case-by-case review is required to determine whether an exemption applies, and that there must be specific proof elicited that the documents sought are of a type for which an exemption has been provided. On doubtful questions an in camera inspection may be appropriate.” (citations and internal quotation marks and brackets omitted) (emphasis in *Flatley*)).

E. Private Attorney Work Product in Government Hands

The PRA applies to documents “received by” government agencies. If a government agency employee receives attorney work product belonging to a private party, what protection does the work product receive?

First, assume that the private party voluntarily disclosed the work product to the government. The rules for waiver of work product protection are different from those for attorney-client privilege. While voluntary disclosure of an attorney-client privileged communication to a person who is not the attorney, the client, or one of their agents typically waives the privilege. The waiver rule for attorney work product is less stringent. Work product protection is waived when the document is disclosed to an actual or potential litigation adversary.⁷⁸ Disclosure to a “conduit to a potential adversary” can also waive work-product protection;⁷⁹ that is, waiver occurs if disclosure to a third party “substantially increased the opportunities for potential adversaries to obtain the information.”⁸⁰

There are many circumstances in which a private party could choose to share attorney work product with the government: for example, to persuade the government not to bring an enforcement action against the party, to obtain favorable regulatory treatment on a matter to which the work product pertains, to lobby a legislative body to close a loophole, to persuade the government to bring an enforcement action against another party, and so on. In addition, the attorney work product might range from an attorney’s strategic selection of pertinent key documents, to witness interview memoranda, to a detailed factual chronology, to a formal legal assessment of the potential litigation. Moreover, the government’s interests in the work product could take many different forms. The government’s interests might be sufficiently aligned with those of the private party that the government would not want to convey the information to the adversary. The government might enter into a confidentiality agreement with the private party and promise not to disclose the work product. The government might be adverse to both the private party and the private party’s adversary, but the government might still prefer to keep the party’s work product from the adversary.

Assuming that the work product was prepared in anticipation of litigation, two basic questions arise: (1) was the disclosure to the government agency consistent with keeping the work product from

the private party’s adversary, and (2) even if it was, what are the agency’s obligations under the PRA with respect to the work product? The two questions are potentially related: if the attorney work product would be considered a public record and not within any exemption, could disclosure ever be consistent with keeping the work product from the private party’s adversary?

Consider this example. Party A and Party B, both individuals, are litigating against each other over which one controls a corporation. In that dispute, A and B charge each other with illegal activity. While investigating the alleged illegal activity, the government learns that A’s attorney has prepared a written factual chronology documenting B’s illegal conduct. A’s attorney also has prepared a legal memorandum assessing the likelihood of proving that Party B engaged in illegal conduct, including a description of Party B’s best defenses. Party A discloses the documents to the government upon the government’s request for the documents and agreement to keep them confidential.

Apart from the PRA, the disclosure of the attorney’s chronology to the government would likely not be a waiver of attorney work product protection because the government’s interests militate against disclosure to Party B, and the government has promised to keep the documents confidential. Faced with a PRA request, however, could the government withhold the document? The chronology could not fall within Exemption (d) because Exemption (d) applies only to “inter-agency or intra-agency memoranda or letters.” While *DaRosa* holds that Exemption (d) can apply to an outside consultant’s work product prepared for the government at the government’s request, the chronology and memorandum in the hypothetical were prepared for Party A.⁸¹ Thus, unless some exemption other than Exemption (d) applies, the government would have to disclose the chronology to a requester.

The legal requirement that the government agency disclose the attorney work product upon request raises the question whether Party A’s voluntary disclosure to the government actually constituted a waiver of work product protection. The government’s agreement to keep the documents confidential could have been illegal unless it contained an exception for a public records request. Beyond that, while Party A and the government might have a degree of common interest in establishing that Party B engaged in illegal conduct,⁸² it would be hard to dispute that disclosure to the government

78. See *United States v. Massachusetts Institute of Technology*, 129 F.3d 681, 687 (1st Cir. 1997) (“[T]he cases approach uniformity in implying that work-product protection is not as easily waived as the attorney-client privilege. The privilege, it is said, is designed to protect confidentiality, so that any disclosure outside the magic circle is inconsistent with the privilege; by contrast, work product protection is provided against ‘adversaries,’ so only disclosing material in a way inconsistent with keeping it from an adversary waives work product protection.”).

79. *In re Raytheon Sec. Litig.*, 218 F.R.D. 354, 360 (D. Mass. 2003) (collecting cases) (citation omitted).

80. *Id.* (quoting 8 Charles Wright, Arthur Miller and Richard Marcus, *FEDERAL PRACTICE & PROCEDURE* §2024 (1994)).

81. It is not clear whether an outside consultant’s joint engagement by a government agency together with a private party could qualify under Exemption (d). That is, if the chronology were prepared for the government and a private party at their joint request, could the chronology still constitute an inter-agency or intra-agency memorandum? Furthermore, even if the attorney’s chronology in the hypothetical could qualify as an inter-agency or intra-agency memorandum,

Exemption (d) still might not protect it. Under *DaRosa*, a reasonably completed factual study or report that is not interwoven with attorney opinions would be treated as a public record. If the attorney’s factual chronology fits this description, and no other exemption applies, the government would have to produce the document to the person requesting it.

82. Courts assessing whether a disclosure of work product constitutes waiver have considered whether the parties to the disclosure had a common legal interest. See, e.g., *United States v. Deloitte LLP*, 610 F.3d 129, 141 (D.C. Cir. 2010) (when parties have a common legal interest in a matter, the recipient of the other party’s attorney work product is not likely to disclose the work product to the adversary); *Massachusetts Institute of Technology*, 129 F.3d at 687 (in support of waiver, court notes that the party producing the work product and the party receiving it were not participating in joint litigation and did not have a common legal interest). In the hypothetical discussed in the text, Party A and the government each have litigation interests in establishing Party B’s illegal conduct, but they are not in joint litigation involving that issue, so it is not entirely clear whether they share a common “legal” interest within the meaning of the cases under the common interest doctrine.

substantially increased the opportunity for Party B to obtain the documents through a public records request.⁸³ Thus, Party B would have an argument that Party A waived work product protection by disclosing the chronology to the government. If the argument were successful, waiver would very likely be not just as to the government, but as to the world.⁸⁴ Furthermore, Party B could have an argument that Party A waived protection as to all documents that concern the same subject matter as the chronology and the memorandum, not just the documents themselves. Though Massachusetts appellate courts have not spoken clearly about the subject matter waiver doctrine,⁸⁵ it is well-established in federal law and can apply to voluntary disclosure of opinion work product as well as fact work product.⁸⁶ Thus, to change the hypothetical slightly, suppose that Party A disclosed its attorney's factual chronology to the government, but held back the attorney's legal memorandum analyzing the issue of

Party B's illegal conduct. If attorney work product protection was waived through disclosure of the chronology, that disclosure might be deemed to waive protection for the legal memorandum as well.

In sum, after *DaRosa*, a private party's voluntary disclosure of attorney work product to a government entity covered by the PRA could result in a serious waiver of work product protection, including a waiver as to documents beyond those actually disclosed. Also, such a waiver might apply not just in Massachusetts state courts and not just in cases involving the disclosing party and the Massachusetts government entity to which the materials were disclosed.

F. The Derivative Attorney-Client Privilege

As has been discussed, a secondary holding in *DaRosa* concerned the so-called "derivative attorney-client privilege," an exception to the general rule that the attorney-client privilege protects only

83. The First Circuit and D.C. Circuit have considered a related issue: whether disclosure of attorney work product to an auditor constitutes a waiver. In *Massachusetts Institute of Technology*, 129 F.3d 681, as part of government contract work, MIT disclosed work product to a Department of Defense (DOD) auditing agency. Later, the IRS sought the work product. The First Circuit ruled that though MIT may have hoped it would have no controversy with DOD, DOD was nonetheless a potential adversary at the time of the disclosure. *Id.* at 687. The disclosure thus constituted a waiver. By contrast, in *Deloitte*, 610 F.3d 129, Dow Chemical disclosed attorney work product to its independent auditor, a private accounting firm, and the government sought the work product on the basis of waiver. Analyzing this issue, the D.C. Circuit addressed two questions: (1) was Deloitte a potential adversary of Dow, and (2) was Deloitte a conduit to Dow's actual or potential adversaries? The court ruled that, as an independent auditor — unlike the DOD auditor in MIT — Deloitte was not a potential adversary. *Id.* at 141. The issue was not whether Dow and Deloitte might conceivably become adversaries about something, but whether they would become adversaries over the legal issues raised in the work product. Moreover, Deloitte was not a conduit to potential adversaries because Dow had a reasonable expectation that Deloitte would keep the work product confidential. *Id.* at 142-43. Even though there were many circumstances in which government regulation or private accounting standards might require Deloitte, as independent auditor, to make public disclosure of information about Dow, the government had not identified a single specific regulation or standard that would require Deloitte to disclose the type of attorney work product at issue in the case. *Id.* at 142.

In the Massachusetts hypothetical considered in this article, the government would be required by law to produce the attorney's chronology if someone requested it. That is, the government is a perfect conduit to the adversary, Party B, if there is a public records request broad enough to include the chronology. Thus, it appears that the argument for waiver in the hypothetical is stronger than in *Deloitte*.

84. Massachusetts appellate courts have not spoken to this issue, but the overwhelming majority of federal circuits have rejected the view that a party with attorney-client privileged information or attorney work product can make a selective waiver to the government without waiving as to the rest of the world. *See In re Pacific Pictures*, 679 F.3d 1121, 1127-29 (9th Cir. 2012) (collecting cases). Furthermore, in adopting Fed. R. Evid. 502 concerning waiver, Congress did not adopt a proposal to permit selective waiver.

85. In *Neitlich v. Peterson*, 15 Mass. App. Ct. 622, 626 (1983), the court ruled that a witness who testifies as to a privileged communication does not necessarily waive as to other privileged subject matters. This rule of proceeding subject matter by subject matter prevents selective disclosure of privileged matter. *Id.* at 627. In *Porcaro v. Town of Hopkinton*, No. 965438, 2000 WL 1473038 (Mass. Super. Ct. July 18, 2000), then-Superior Court Justice Botsford carefully

reasoned through many subject matter waiver issues and, in several instances, drew lines based on the date of the disclosed material versus the dates of the material sought to be discovered.

86. *See generally* 8 John Henry Wigmore, Evidence §2327, at 638 (McNaughton rev. ed. 1961) ("[t]he client's offer of his own or the attorney's testimony as to a specific communication to the attorney is a waiver as to all other communications to the attorney on the same matter." (emphasis in original)). *See also id.* (a client's offer of his own or his "attorney's testimony as to a part of any communication to the attorney is a waiver as to the whole of that communication, on the analogy of the principle of completeness." (emphasis in original)).

Federal courts have developed the subject matter waiver doctrine over a long while, mainly in the context of attorney-client privilege. *See, e.g., In re Keeper of the Records (Grand Jury Subpoena Addressed to XYZ Corp.)*, 348 F.3d 16, 22-26 (1st Cir. 2003). Some federal authority has suggested that "work product waiver is not a broad waiver of all work product related to the same subject matter like the attorney-client privilege. Instead, work-product waiver only extends to 'factual' or 'non-opinion' work product concerning the same subject matter as the disclosed work product." *In re EchoStar Comm'n's Corp.*, 448 F.3d 1294, 1302 (Fed. Cir. 2006) (citations omitted). However, Rule 502 of the Federal Rules of Evidence now governs aspects of waiver by disclosure of attorney work product, and the Rule makes no distinction between opinion and fact work product. *See* FED. R. EVID. 502(g)(2). Intentional disclosure of either opinion or fact attorney work product in a federal setting can result in subject matter waiver. Rule 502(a) states:

When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

- (1) the waiver is intentional;
- (2) the disclosed and undisclosed communications or information concern the same subject matter; and
- (3) they ought in fairness to be considered together.

The Rule does not state what happens when an intentional disclosure is made outside of a federal proceeding and is not made to a federal office or agency. Rule 502(b) governs inadvertent disclosure in a federal setting, and inadvertent disclosure cannot lead to subject matter waiver. *See* Advisory Committee Note for Rule 502. Cf. Mass. R. Civ. P. 26(b)(5)(B) (governing inadvertent disclosure). Rule 502(c) governs the effect in a federal proceeding of a disclosure that was made in a state proceeding without a state court order. If disclosure is made in a state proceeding, and then the document is offered into evidence in a federal proceeding, and state and federal law are in conflict, the federal court applies the law most protective of the work product.

“confidential communications between a client and its attorney undertaken for the purpose of obtaining legal advice.”⁸⁷ The *Comcast* court stressed that the exception is narrow and applies to “shield communications of a third party employed to facilitate communication between the attorney and client and thereby assist the attorney in rendering legal advice to the client.”⁸⁸ The third party must be “nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications.”⁸⁹

The limitations on the doctrine reflect courts’ effort to exclude from the privilege the broad range of strategic consultations between a client and an expert, or an attorney and an expert, that do not directly enable attorney-client communications or are not needed for the provision of legal advice. The focus of the doctrine is thus on the third party’s role as a form of “translator” needed to make the communication between attorney and client understandable to the attorney and client. This means that the data on which the third party operates — *i.e.*, what the third party “translates” — must come from the attorney or client, not some other source. And the “translation” must also be for the benefit of the attorney or client, not some other recipient.

In *DaRosa*, the third party, the city’s environmental consultant, Smyth, prepared his analysis of the contaminated site using public record technical data, not data that originated from the attorney or the client. Therefore, the documents Smyth prepared did not fall within the exception. Would the result be the same if Smyth’s analysis had been based on data belonging to the city? Suppose, for example, that Smyth relied on measurements taken on the land by city employees. It would appear that the derivative attorney-client privilege might potentially apply to Smyth’s analysis if the city actually owned the data, the data were not available to the public by a means such as the PRA, and Smyth’s analysis were needed to enable the city’s attorney to give the city legal advice about the pollution on the land.

Finally, while a full analysis of the derivative attorney-client privilege is beyond the scope of this article, it is worth noting that the derivative privilege comes into play when, absent the derivative privilege, the presence of the third party would destroy the confidentiality of the communication; that is, when the third party is not the client, the attorney, or a proxy for the client or attorney who is within the protected circle recognized by the law of privilege. Thus,

the derivative attorney-client privilege can be seen as depending on whether the expert consultant is a proxy for the client or attorney within the protected circle, and that question depends, in turn, on the legal and functional role the expert is playing in the client-attorney relationship.

The proxies are usually characterized as agents of the client and agents of the attorney. Issues may arise related to the timing of retention of the expert; for example, suppose that the client consults an independent physician about whether a particular chemical, as used at client’s plant, causes Disease X. If the consultation occurs before the attorney is retained, the physician-client communication will not be privileged. If the consultation occurs with the attorney present, the exact same statement by the physician might be privileged, at least if the physician is playing an interpretive role. Furthermore, as applied in *DaRosa*, the derivative attorney-client privilege appears to be indifferent to whether the expert is an agent of the client or of the attorney. If the physician is playing an interpretive role facilitating communications between client and attorney for purposes of legal advice, it does not matter who brings the physician into the client-attorney meeting.

It likely does matter, however, whether the expert is an independent outside consultant or instead plays some role internal to the client or the attorney. In other words, should the analysis of the hypothetical be different if the physician is an employee on staff at the client’s plant? Or if the physician is on staff at the attorney’s law firm? These questions raise the issue that the physician’s role in the client-attorney relationship may be broader than merely to consult as an expert on the question of disease causation. For example, the physician may be a percipient witness about the company’s practices or may be among the client’s employees who would be involved in corporate decision-making related to the use of the chemical at the plant — the physician may in effect be part of the organizational “client.” As another example, the law firm staff physician may routinely help the law firm’s attorneys analyze medical issues raised by their cases and may generate medical arguments with legal significance — here the physician may in effect be part of the legal team. It would seem that if the expert is affiliated with the client or the attorney, and the expert’s role in the attorney-client relationship goes beyond the provision of independent expertise, the privilege could provide broader protection than is suggested by *DaRosa*.⁹⁰

87. *Suffolk Construction Co. v. Division of Capital Asset Management*, 449 Mass. 444, 448 (2007). As the *Comcast* court stated: “The classic formulation of the attorney-client privilege . . . is found in 8 J. Wigmore, *Evidence* § 2292 (McNaughton rev. ed. 1961): (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.” *Commissioner of Revenue v. Comcast Corp.*, 453 Mass. 293 303 (2009) (internal quotation marks omitted). A “communication is ‘confidential’ if it is not intended to be disclosed to third persons other than those to whom disclosure is made to obtain or provide professional legal services to the client, and those reasonably necessary for the transmission of the communication.” MASSACHUSETTS GUIDE TO EVIDENCE §502(a)(5) (2017).

88. *Comcast*, 453 Mass. at 306.

89. *Id.* at 307 (quoting *Cavallaro v. United States*, 284 F.3d 236, 249 (1st Cir. 2002)). The court stopped short of requiring that the communication could not have been understood but for the work of the “translator.”

90. The protected circle for privilege purposes could include not just an

employee of the client, but a nonemployee who serves as the functional equivalent of an employee. The functional equivalence doctrine developed in federal cases such as *In re Bieter Co.*, 16 F.3d 929, 937-38 (8th Cir. 1994), and applies when the nonemployee has a significant relationship to the client and to the transaction that is the subject of the legal services. In a well-reasoned opinion, the Land Court applied the functional equivalence doctrine as a matter of Massachusetts law. *See One Ledgemont LLC v. Town of Lexington Zoning Bd. of Appeals*, Misc. 13-PS-477585, 2014 WL 2854788 (Mass. Land Ct. Jun. 23, 2014) (“It is not often that the ability arises to treat someone who is not a principal or employee of an entity, as so close to one as to merit the extension of the privilege to communications in which that person participates. Not all (or even many) real estate brokers and advisors who work with corporate clients will be able to be part of the entity’s dialogue with its lawyers without undoing the privilege. Where the relationship with the company is one the non-employee has with many other clients or customers; is single-purpose and limited in scope, duration, and responsibility; or does not put the non-employee in a high-level, trusted decision-making or guiding role, equivalent to that of an employee, the non-employee does not hold the status necessary to keep communications involving him or her privileged.”).

The Restatement (Third) of the Law Governing Lawyers, which the SJC has cited with approval in related privilege contexts,⁹¹ appears to support this understanding. It defines “privileged persons” to include the client, the lawyer, “agents of either who facilitate communications between them,” and “agents of the lawyer who facilitate the representation.”⁹² An expert consultant may be involved in the communication as the client’s agent for communication,⁹³ or as the lawyer’s agent to facilitate the representation.⁹⁴ These definitions treat the client’s agent and the attorney’s agent differently, and they seem to contemplate that an expert who is an agent of the attorney may not be limited to an interpretive role.

The *Massachusetts Guide to Evidence* leaves room for an even broader role for an expert. It applies the privilege to specified communications⁹⁵ involving a client, an attorney, a representative of the client (“the client’s agent or employee”)⁹⁶ and a representative of the attorney (“one used by the attorney to assist the attorney in providing professional legal services”).⁹⁷ Thus, unlike the Restatement, the guide seems to cover communications with any agent or employee of the client, not just agents for communication. Nevertheless, in view of *Comcast* and *DaRosa*, it is very doubtful that the language of the guide could justify treating as privileged a communication disclosed to an outside expert who was not functioning as an agent facilitating the attorney-client communication.

CONCLUSION

DaRosa makes clear that state governmental entities in anticipated or actual litigation may enjoy some protection for attorney work product. In this respect, *DaRosa* retreats from extreme but plausible readings of *General Electric*, which left open the argument that the PRA eliminated any such protection. The parameters for work product protection as established in *DaRosa* leave fairly small gaps

between the government’s right to withhold work product and the broader rights of a private party to withhold. The gaps mainly arise when litigation is over or its prospect has disappeared — that is, when government’s strongest and most immediate need to withhold the work product has ended. During the pendency of a particular case, *DaRosa* leaves the government in a position very similar to that of any other litigant.

The gaps and ambiguities that exist are largely a function of the legislature’s failure to enact a specific exemption expressly addressing attorney work product. The *DaRosa* court used Exemption (d) to achieve approximate parity between a private litigant and a government litigant, but Exemption (d) is not always a perfect fit for issues involving work product. Why, for example, should the government be at risk of having to disclose before trial a report of a reasonably completed factual investigation prepared by a government employee for a government lawyer to use at trial? To protect fact work product, the government has to put it in a form that does not constitute a “report” or “study,” leave the report or study incomplete, or intertwine the fact work product tightly with opinion work product.

A cleaner approach would be for the legislature to adopt a specific provision regarding work product. The exemption could, but would not have to, confer protection parallel to that available to a private litigant. For example, the exemption could apply only when litigation involving the government was actually pending or reasonably anticipated. Moreover, the exemption could apply to privately created attorney work product in the government’s hands if it was prepared for use in actually pending or reasonably anticipated litigation in which the private party and the government shared a common interest. Finally, the legislature should consider whether opinion work product should receive extra protection under the exemption.⁹⁸

91. See, e.g., *Comcast*, 453 Mass. at 305; *Suffolk Constr.*, 449 Mass. at 451.

92. Restatement (Third) of the Law Governing Lawyers §70 (2000).

93. See *id.*, cmt. f (“An agent for communication need not take a direct part in client-lawyer communications, but may be present because of the Client’s psychological or other need. A business person may be accompanied by a business associate or expert consultant who can assist the client in interpreting the legal situation.”). The expert’s role can be to help explain the situation to the client, or to the attorney, or both. See *id.*, cmt. f, illus. 5.

94. See *id.*, cmt. g (“The privilege also extends to communications to and from the client that are disclosed to independent contractors retained by a lawyer, such as an accountant or physician retained by the lawyer to assist in providing legal services to the client, and not for the purpose of testifying.”).

95. Section 502(b) of the MASSACHUSETTS GUIDE TO EVIDENCE (2017) provides that the privilege protects confidential communications made for the purpose of obtaining or providing professional legal services to the client, and the communication must be:

(1) between the client or the client’s representative and the client’s attorney or the attorney’s representative,

(2) between the client’s attorney and the attorney’s representative,

(3) between those involved in a joint defense,

(4) between representatives of the client or between the client and a representative of the client, or

(5) among attorneys and their representatives representing the same client.

96. MASS. G. EVID. §502(a)(2).

97. *Id.* §502(a)(4).

98. For example, opinion work product could remain exempt even after the litigation for which it was created is no longer pending or reasonably anticipated; on the other hand, if opinion and fact work product were treated alike, there would be less incentive to intertwine the two in a single document.

CASE COMMENT

Criminal Law: Eyewitness Identifications Questioned

Commonwealth v. Johnson, 473 Mass. 594 (2016)

In recent years, courts in Massachusetts have fallen in line with a nationwide trend in their acknowledgment of the steady erosion of faith in the reliability of eyewitness identifications. This lack of confidence has been caused by a variety of factors, including the increasing use of DNA testing where eyewitness identifications were found to be the main reason for wrongful convictions, happening in 236 of 330 wrongful convictions identified through post-conviction DNA testing.¹ In other words, as of the date of that review, almost 75 percent of all wrongful convictions uncovered by DNA tests were caused by erroneous eyewitness identifications.

In fact, of those exonerated by DNA, 33 percent were convicted by mistaken identifications of the same innocent person by more than one witness whose identification proved to be inaccurate.² This may appear counterintuitive to the average juror who has, historically, believed and given great weight to the testimony of an eyewitness who expresses absolute certainty in his or her own identification of another. “Indeed, studies show that eyewitness confidence is the single most influential factor in juror determinations regarding the accuracy of an eyewitness identification.”³

In truth, however, research has shown that an eyewitness’s certitude lends no greater assurance that the eyewitness is correct. In 2012, in *Perry v. New Hampshire*, Justice Sotomayor, in her dissent, declared, “Study after study demonstrates that . . . jurors place the greatest weight on eyewitness confidence in assessing identifications even though confidence is a poor gauge of accuracy.”⁴ The Supreme Judicial Court of Massachusetts (SJC) echoed this sentiment two years later in *Commonwealth v. Crayton* when it stated, “Social science research has shown that a witness’s level of confidence in an identification is not a reliable predictor of [its] accuracy . . . especially where the level of confidence is inflated by its suggestiveness.”⁵

The *Crayton* case was followed in rapid succession by *Commonwealth v. Collins*⁶ and *Commonwealth v. Gomes*.⁷ In *Collins*, the court warned that, because a juror may be unaware that the confidence of eyewitnesses in their own identifications may have no relation

to whether or not they are in fact correct, and may not appreciate a witness’s vulnerability to manipulation, even the best cross-examination may be insufficient to expose this.⁸

In *Gomes*, the court ruled that a new model jury instruction on identification was required since the old model — although stating that the jury might consider a number of factors in evaluating the testimony of an eyewitness — did not give specific instructions on how the factors would affect the accuracy of the identification.⁹ The *Gomes* court reasoned that the factors had to be put in context for the jurors because, “[t]he problem with this approach is that the research makes clear that common sense is not enough to accurately discern the reliable eyewitness identification from the unreliable, because many of the results of the research are not commonly known, and some are counterintuitive.”¹⁰ Hence, a new Massachusetts model jury instruction on eyewitness identification was introduced in November 2015, with the intention of guiding the jury to a greater understanding of the accuracy of eyewitness identification testimony.¹¹

In sum, in recent years, Massachusetts has moved with great rapidity to adopt and encourage better practices for the enhanced accuracy of eyewitness identifications in criminal law, including the establishment of the Supreme Judicial Court Study Group on Eyewitness Evidence (Study Group), the new model jury instruction, a plethora of new case law, and even legislative initiatives to encourage more advanced and reliable police protocols for identification procedure.

The decision in *Commonwealth v. Johnson*¹² is a logical and major step in this progression of the law of identification. In *Johnson*, the SJC continued to address concerns about the unreliability of eyewitness identifications and laid the framework for evaluating suggestive identifications that do not, initially, involve police.¹³

In this case, the SJC upheld the suppression of an identification “impermissibly tainted by suggestive circumstances.”¹⁴ This, despite that the circumstances were not generated by law enforcement. A later in-court identification procedure conducted by law

1. *Commonwealth v. Gomes*, 470 Mass. 352, 365 n.21 (2015).

2. Saul Kassin, Daniel Bogart, Jacqueline Kerner, “Confessions That Corrupt: Evidence from the DNA Exoneration Case Files,” 23 *PSYCHOL. SCI.* 41 (2012).

3. “Supreme Judicial Court Study Group on Eyewitness Evidence: Report and Recommendations to the Justices” (July 25, 2013) (Study Group Report), at 69-70 (citing Michael Leippe, Donna Eisenstadt, & Shannon Rauch, “Cueing Confidence in Eyewitness Identifications: Influence of Biased Lineup Instructions and Pre-Identification Memory Feedback Under Varying Lineup Conditions,” 33 *LAW & HUM. BEHAV.* 194, 194 (2009) and Gary Wells, R. Lindsay and Tamara Ferguson, “Accuracy, Confidence and Juror Perceptions in Eyewitness Identification,” 64 *J. APPLIED PSYCHOL.* 440, 446 (1979)).

4. *Perry v. New Hampshire*, 132 S. Ct. 716, 739 (2012). (Sotomayor, J., dissenting).

5. *Commonwealth v. Crayton*, 470 Mass. 228, 239 (2014) (citing Study Group Report, *supra* n.3)).

6. *Commonwealth v. Collins*, 470 Mass. 255 (2014).

7. *Commonwealth v. Gomes*, 470 Mass. 352 (2015).

8. *Collins*, 470 Mass. at 264.

9. *Gomes*, 470 Mass. at 363.

10. *Id.* at 365-66.

11. Criminal Model Jury Instructions for use in the District Courts, Instructions 1.340 & 9.160 (November 2015).

12. *Commonwealth v. Johnson*, 473 Mass. 594 (2016).

13. *Id.* at 603.

14. *Id.* at 595 (citing *Commonwealth v. Jones*, 423 Mass. 99, 109 (1996)).

enforcement based on the earlier non-police-involved identification was also held improper, since “a subsequent in-court identification cannot be more reliable than the earlier out-of-court identification, given the inherent suggestiveness of in-court identifications and the passage of time.”¹⁵ “In sum, because a judge declares an out-of-court identification to be inadmissible under *Jones* only where it is unreliable, the commonwealth cannot prevail in proving by clear and convincing evidence that the witness’s in-court identification would be reliable.”¹⁶

In *Johnson*, the victim received a telephone call from a neighbor that his apartment door in Brockton was open.¹⁷ He returned home, met an armed stranger there, struggled with him, and the stranger’s gun went off (though the bullet hit no one).¹⁸ The stranger fled. The victim reported to the police that his assailant was a light-skinned black male wearing a gray hooded sweatshirt.¹⁹ However, the victim did not comply with the police request to come to the station to review photographs of possible suspects.²⁰

Later, the victim spoke to his cousin, T.J. Hendricks, who, just the day before the Brockton incident, had his own Boston home broken into.²¹ Hendricks had reviewed a neighbor’s surveillance video that showed the Boston break-in and, by the “size and shape” of the suspect, determined that it “could possibly be” the defendant, who was the boyfriend of a cousin of both Hendricks and the victim.²² Hendricks then obtained a photo of the defendant at a family cookout, showed it to the victim, and the victim identified the defendant as the intruder in Brockton.²³

The police put together an eight-person photo array that included the defendant’s photo that was shown to the victim.²⁴ The victim identified the defendant as the intruder.²⁵

As a result, the defendant was indicted on seven charges, including armed assault in a dwelling, in violation of Massachusetts General Laws chapter 265, section 18A, and breaking and entering in the day time, in violation of Massachusetts General Laws chapter 265, section 17.²⁶ The motion judge granted the defendant’s motions to suppress all the identifications.²⁷ The judge suppressed the out-of-court identifications under the principles of fairness established in *Commonwealth v. Jones*,²⁸ noting that the identification was “impermissibly tainted by the suggestive circumstances.”²⁹ The judge then ruled that the in-court identification must be suppressed, because the commonwealth failed to show by clear and convincing evidence that it was based on a source independent of the tainted

identification, as required under *Commonwealth v. Botelho*.³⁰

In its ruling in *Johnson*, the SJC first restated, at length, the current state of the law concerning eyewitness identification, before applying the law to the facts of the case at hand.³¹ In addressing out-of-court identifications made during a police identification procedure, the court stated that an identification is not admissible under Article 12 of the Massachusetts Declaration of Rights if the defendant proves by a preponderance of evidence that the identification was “so unnecessarily suggestive and conducive to irreparable misidentification that its admission would deprive the defendant of his right to due process.”³² In order to determine whether to suppress such an identification, a court must, each time, evaluate the totality of the circumstances to determine whether the procedure was unnecessarily suggestive.³³ This is key to the Massachusetts per se exclusion rule — that not only was the procedure suggestive, but that it was “unnecessarily suggestive.”³⁴

The question of necessity hinges on whether the police had “good reason” to conduct a suggestive identification procedure.³⁵ Determination of “good reason” depends upon:

the nature of the crime involved and corresponding concerns for public safety; the need for efficient police investigation in the immediate aftermath of a crime; and the usefulness of prompt confirmation of the accuracy of investigatory information, which, if in error, will release the police quickly to follow another track.³⁶

The Massachusetts per se exclusion rule specifically rejects the federal two-step analysis, pursuant to the Fourteenth Amendment to the United States Constitution, that first asks whether the police procedure was unnecessarily suggestive and, second, whether in spite of that, the eyewitness identification is still reliable.³⁷ The SJC rejected the federal test because the court believed that it would not deter intentional police misconduct. To accept the federal test would send “a message to police that, absent extremely aggravating circumstances, suggestive show-ups will not result in suppression.”³⁸ Under Massachusetts law, an unnecessarily suggestive out-of-court eyewitness identification procured through a procedure conducted by the police will always be inadmissible, but a subsequent identification may be admitted if the prosecution can prove “by clear and convincing evidence that the identification came from a source independent of the suggestive” method.³⁹

The court then addressed out-of-court eyewitness identifications

15. *Id.* at 603 (citing “Model Jury Instructions on Eyewitness Identification,” 473 Mass., 1051, 1055 endnote j (2015), (quoting Study Group Report, *supra* n.3, at 31–32)).

16. *Johnson*, 473 Mass. at 603.

17. *Id.* at 595.

18. *Commonwealth v. Johnson*, 473 Mass. 594, 595 (2016).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 595–96.

23. *Id.*

24. *Commonwealth v. Johnson*, 473 Mass. 594, 596 (2016).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Commonwealth v. Jones*, 423 Mass. 99 (1996).

29. *Johnson*, 473 Mass. at 595.

30. *Commonwealth v. Botelho*, 369 Mass. 860, 868 (1976).

31. *Commonwealth v. Johnson*, 473 Mass. 594, 596–603 (2016).

32. *Id.* at 597. See also *Commonwealth v. Walker*, 460 Mass. 590, 599 (2011).

33. *Commonwealth v. Silva-Santiago*, 453 Mass. 782, 795 (2009) (quoting *Commonwealth v. Odware*, 429 Mass. 231, 235 (1999)).

34. *Commonwealth v. Crayton*, 470 Mass. 228, 235 (2014) (quoting *Commonwealth v. Figueroa*, 468 Mass. 204, 217 (2014) (emphasis in original)).

35. *Johnson*, 473 Mass. at 597.

36. *Commonwealth v. Austin*, 421 Mass. 357, 361–62 (1995).

37. *Manson v. Brathwaite*, 432 U.S. 98, 110 (1977); *Perry v. New Hampshire*, 132 S. Ct. 716, 726 (2012).

38. *Commonwealth v. Johnson*, 473 Mass. 594, 598 (2016).

39. *Id.*

made without police involvement, noting that, in that instance, there is no need to deter police misconduct through suppression because there is no state action.⁴⁰ Yet even where there is no police involvement, a court may still keep out a “highly” or “especially” suggestive identification due solely to its unreliability.⁴¹ The common law principle of fairness dictates that even relevant evidence may be suppressed “if its probative value is substantially outweighed by the danger of unfair prejudice.”⁴²

It is here that SJC Chief Justice Ralph Gants, the author of the opinion, elaborates at length on how a tainted eyewitness identification is more difficult for juries to reliably evaluate, because they are unaware of the variety of factors that may compromise and prejudice an eyewitness’s mistaken perception. He cited a number of sources for this premise, including a comprehensive Massachusetts study released in 2013, titled “Supreme Judicial Court Study Group on Eyewitness Evidence: Report and Recommendations to the Justices” (Study Group Report).⁴³ That study reported that, “Social science research has shown that a witness’s level of confidence in an identification is not a reliable predictor of [its] accuracy . . . especially where the level of confidence is inflated by its suggestiveness.”⁴⁴ The goal of the Study Group was to attempt to resolve the recurring problem of unnecessarily suggestive identification procedures caused by imperfect police and court procedures, and to determine whether the commonwealth’s model jury instructions provided sufficient guidance to jurors.⁴⁵

An eyewitness’s sureness and certainty are ineffective measures of the truth.⁴⁶ Therefore, suppression motions may be the most effective protection against eyewitness assertions based upon unreliable, unnecessarily suggestive situations. Cross-examination of witnesses at trial or even a judge’s jury instruction concerning eyewitness identifications are insufficient to combat the prejudice that results from a tainted identification.⁴⁷

The suggestive circumstances of an identification can be outweighed, however, if there are sufficient independent factors that overcome the influence of the suggestive features of the identification.⁴⁸ Such factors are the quality of the witness’s opportunity to observe the offender at the time of the crime, the amount of time between the crime and the identification, whether the witness’s earlier description of the perpetrator matches the defendant, whether the witness earlier identified another person as the perpetrator or failed to identify the defendant as the perpetrator, and the witness’s prior familiarity with the person identified (such as whether that person

is a family member or acquaintance).⁴⁹ After balancing the possibility of prejudice arising from the suggestiveness of the identification against the value and reliability of the independent source, the judge must resolve whether the identification’s reliability still remains so suspect that the jury should not consider it.⁵⁰

Addressing the situation of a subsequent out-of-court or in-court identification after the initial out-of-court identification was excluded due to an overly suggestive police procedure,⁵¹ the court held that the commonwealth must prove by clear and convincing evidence that the subsequent identification is based solely on an independent source unaffected by the earlier tainted encounter.⁵² However, when previous out-of-court identifications without police involvement have been found inadmissible under *Jones* due to unreliability, the independent source doctrine will not apply.⁵³ As noted above, the court concluded that a subsequent in-court identification cannot, as a matter of law, be more reliable than an earlier out-of-court identification.⁵⁴

In applying the law to the case at hand, the court acknowledged that there was no involvement by the police in obtaining the pre-trial identification, and that therefore, suggestiveness, by itself, did not mandate suppression.⁵⁵ However, to trigger a *Jones* analysis, “the circumstances surrounding the identification need only be so suggestive that there is a substantial risk that they influenced the witness’s identification of the defendant, inflated his or her level of certainty in the identification, or altered his or her memory of the circumstances of the operative event.”⁵⁶

The court further noted that where the independent source of an identification is not substantial, a lower level of suggestiveness may be sufficient to render the evidence inadmissible; but where the independent source contains more heft, a greater level of suggestiveness would be needed to require suppression of the identification. The court concluded that, in the instant case, the identification was sufficiently suggestive to warrant an analysis requiring a high level of reliability.⁵⁷ The court was persuaded that the motion judge could have reasonably found that the suggestion to the victim that the man who broke into his home was someone he knew, combined with the photograph of the defendant at the cookout, could have presented a substantial risk “that this suggestion affected the witness’s level of certainty in the identification and his recollection of his observations of the intruder during the incident.”⁵⁸

It was then permissible for the motion judge to give little probative weight to the independent source of the identification.⁵⁹ The

40. *Id.* at 598-602.

41. *Id.* at 598-99 (quoting *Commonwealth v. Jones*, 423 Mass. 99, 109 (1996)).

42. *Commonwealth v. Crayton*, 470 Mass. 228, 249 n.27 (2014) (quoting *MASS. G. EVID.* §23 (2014)).

43. Study Group Report, *supra* n.3.

44. *Id.* at 19.

45. *Id.* at 1-5.

46. *Commonwealth v. Johnson*, 473 Mass. 594, 600-01 (2016).

47. *Id.* at 601 (citing *Commonwealth v. Jones*, 423 Mass. 99, 110 (1996)).

48. *Id.* See also *Allen v. Moore*, 453 F.2d 970, 975 (1st Cir.), cert. denied, 406 U.S. 969 (1972).

49. *Johnson*, 473 Mass. at 601-02; *Commonwealth v. Botelho*, 369 Mass. 860, 869 (1976). See also “Model Jury Instructions on Eyewitness Identification,” 473

Mass. 1051, 1054 (2015).

50. *Johnson*, 473 Mass. at 602.

51. *Id.* at 602-03.

52. *Commonwealth v. Crayton*, 470 Mass. 228, 236, 241 (2014).

53. *Commonwealth v. Johnson*, 473 Mass. 594, 603 (2016).

54. “Model Jury Instructions on Eyewitness Identification” at 1055 endnote j (quoting Study Group Report, *supra* n.3).

55. *Johnson*, 473 Mass. at 604.

56. *Id.*

57. *Id.* at 604-05.

58. *Id.* at 605.

59. *Commonwealth v. Johnson*, 473 Mass. 594, 605 (2016).

judge noted that the victim's encounter with the intruder was brief and his description meager: a light-skinned black male wearing a gray hooded sweatshirt, with no information regarding the intruder's height, weight, or facial hair, or the lighting conditions in the apartment.⁶⁰ The judge also noted from his own observation that the defendant was not light-skinned.⁶¹ Since a motion or trial judge, acting as a finder of fact, is given considerable discretion, the court concluded that the judge properly suppressed the identification.⁶²

The court explicitly decided not to consider the issue of eliminating or revising the independent source doctrine pertaining to in-court identifications where the out-of-court identification is disallowed due to a suggestive police procedure, because the identifications obtained here were not obtained through police involvement.⁶³ Additionally, the court left undecided the issue of whether an identification may be suppressed if it is simply unreliable, and not the result of any suggestiveness.

It is unclear how the law will play out in practice. On the one

hand, there is a high threshold for suppression — “whether the identification is so unreliable that it would be unfair for a jury to give it any weight in their evaluation of the evidence”⁶⁴ On the other hand, to trigger judicial review, there is a somewhat lower threshold for a *Jones* analysis, where the circumstances need only be so suggestive that there is a “substantial risk” of influence.⁶⁵

In *Johnson*, the SJC continued its recent enormous strides to clarify the law of eyewitness identification, particularly in light of the recent groundbreaking research in the field. However, the court unambiguously stated, in suggesting that other areas of eyewitness identification would be addressed in the future as such cases came before it, that the law concerning eyewitness identification has by no means yet been settled in its entirety.⁶⁶ Rather, identification law is in a particularly dynamic state of flux, and trending in the direction of better educating jurors, law enforcement, the bar, and the courts about its pitfalls and fallibilities.

— Peter T. Elikann

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 602-03.

64. *Id.* at 602.

65. *Commonwealth v. Johnson*, 473 Mass. 594, 604-05 (2016).

66. *Id.* at 602-03.

CASE COMMENT

SJC Holds that Parties May Not Expand the Statutory Scope of Judicial Review of Arbitration Awards

Katz, Nannis & Solomon PC v. Levine, 473 Mass. 784 (2016)

The central question presented in *Katz, Nannis & Solomon PC v. Levine* (*Katz*) was whether parties to a commercial arbitration agreement may agree to alter the statutory grounds for judicial review of an arbitration award that are set out in the Massachusetts Uniform Arbitration Act for Commercial Disputes (MAA).¹ On March 9, 2016, the Supreme Judicial Court (SJC) held, “the grounds of judicial review are limited to those delineated in Mass. G. L. ch. 251, §§12 and 13.”² In so holding, the SJC referenced and echoed decisions of the United States Supreme Court (Supreme Court) evaluating the same question as it pertained to the Federal Arbitration Act.³

FACTUAL AND PROCEDURAL BACKGROUND

The underlying arbitration concerned the termination of Bruce Levine (Levine) as director-stockholder of Levine, Katz, Nannis & Solomon PC, an accounting firm. The firm’s three other stockholders and the reconstituted firm, Katz, Nannis & Solomon PC (KNS), alleged that Levine had failed to disclose to them the existence of a lawsuit against the firm and had engaged in other acts detrimental to KNS.⁴ The stockholder agreement provided for two types of forced exit from the corporation: (i) involuntary withdrawal, and (ii) for-cause withdrawal.⁵ Both types of termination were defined in the stockholder agreement.⁶

Pursuant to the stockholder agreement, a departing stockholder’s share redemption and deferred compensation were to be treated differently depending on how the stockholder was terminated.⁷ If a stockholder: (i) was terminated for cause, or (ii) competed with the firm after an involuntary (but not “for-cause”) withdrawal, the stockholder agreement provided that he must forfeit his shares without compensation and was not entitled to receive deferred compensation.⁸ If a stockholder: (i) voluntarily withdrew from the corporation, or (ii) was required to withdraw involuntarily and he did not compete with the corporation after his withdrawal, the stockholder agreement generally entitled the stockholder to share redemption

and, in some instances, deferred compensation.⁹

The stockholder agreement contained the following dispute resolution clause, excerpted in relevant part:

Binding Arbitration. In the event of any dispute concerning any aspect of this agreement, the parties agree to submit the matter to binding arbitration before a single arbitrator appointed by the American Arbitration Association.... The decision of the arbitrator shall be final; provided, however, solely in the event of a material, gross and flagrant error by the arbitrator, such decision shall be subject to review in court....¹⁰

After hearing from 11 witnesses over nine days, the arbitrator issued a partial final award finding that Levine had been properly terminated for cause.¹¹ The arbitrator also concluded that it did not matter whether Levine’s termination had constituted a for-cause withdrawal or an involuntary withdrawal because, following his termination, Levine had competed with KNS.¹² Because the arbitrator found that Levine was terminated for cause, the arbitrator concluded that Levine forfeited his shares and was not entitled to receive deferred compensation.¹³ After a hearing on damages, the arbitrator awarded KNS \$1,749,293.20 and statutory interest, which incorporated, *inter alia*, certain liquidated damages and monies paid by former KNS clients to Levine’s new, competing firm.¹⁴

KNS sought confirmation of the arbitration award against Levine in Norfolk Superior Court, and Levine cross-moved to vacate or modify the award.¹⁵ Levine’s argument for vacating the award was premised on his contention that the arbitrator “fundamentally misinterpreted the [stockholder] agreement” by conflating the types of withdrawal permitted under the stockholder agreement and the corresponding monetary consequences.¹⁶ After the superior court confirmed the arbitration award, Levine sought and obtained direct appellate review.¹⁷

1. 473 Mass. 784, 785 (2016); MASS. GEN. LAWS ch. 251.

2. *Id.*

3. 9 U.S.C. §1, *et seq.*; *Id.* at 791-92 (*citing* Hall St. Assocs. LLC v. Mattel Inc., 552 U.S. 576 (2008)).

4. *Id.* at 785, 787-88. The accounting firm dropped Levine’s name and became Katz, Nannis & Solomon PC.

5. *Id.* at 785-86.

6. *Katz, Nannis & Solomon PC v. Levine*, 473 Mass. 784, 785-86 (2016).

7. *Id.* at 786.

8. *Id.*

9. *Id.*

10. *Id.* at 786-87 (emphasis added).

11. *Id.* at 788.

12. *Katz, Nannis & Solomon PC v. Levine*, 473 Mass. 784, 788 (2016).

13. *Id.*

14. *Id.*

15. *Id.* at 788-89.

16. *Id.* at 790.

17. *Id.* at 789.

GROUND FOR VACATING AN ARBITRATION AWARD UNDER THE MAA

The SJC determined that the parties' agreement to arbitrate was governed by the MAA.¹⁸ Section 11 of the MAA requires that the court confirm an arbitration award unless statutory grounds for vacating or modification exist.¹⁹ The grounds for vacating an arbitration award pursuant to the MAA are set out in section 12 of the statute:

- (a) Upon application of a party, the court shall vacate an award if:
 - (1) the award was procured by corruption, fraud or other undue means;
 - (2) there was evident partiality by an arbitrator appointed as a neutral, or corruption in any of the arbitrators, or misconduct prejudicing the rights of any party;
 - (3) the arbitrators exceeded their powers;
 - (4) the arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing...as to prejudice substantially the rights of a party; or
 - (5) there was no arbitration agreement and the issue was not adversely determined in proceedings under [section 2]....²⁰

In *Katz*, the SJC noted that its prior decisions held that sections 11 and 12 of the MAA require confirmation of an award even if the "arbitrator's findings and legal conclusions, . . . appear erroneous, inconsistent or unsupported by the record at the arbitration hearing."²¹ An arbitration award containing "grossly erroneous" conclusions nevertheless "is binding in the absence of fraud."²²

Levine argued that the court's review should be broader because the parties specifically agreed in their arbitration clause that any award would be subject to judicial review for "material, gross and flagrant error" by the arbitrator.²³

SUPREME COURT JURISPRUDENCE CONCERNING GROUNDS FOR VACATUR

Levine's appeal focused on a question that had been the subject of substantial discussion in the federal courts — *i.e.*, whether parties can agree to alter the statutory scope of judicial review of

an arbitration award. On the one hand, arbitration is a "creature of contract," and courts must "enforce [arbitration agreements] according to their terms," which would presumably include the parties' agreement concerning the scope of judicial review.²⁴ On the other hand, permitting parties to agree to expand the scope of judicial review of arbitration awards could potentially undermine the "predictability, certainty and effectiveness of the arbitral forum" by permitting lengthy, wide-ranging inquiries into the propriety of arbitration awards.²⁵

The Federal Arbitration Act (FAA) is the federal cognate to the MAA, and it applies to contracts evidencing transactions involving interstate commerce.²⁶ The FAA enumerates the following grounds for vacating an arbitration award, which are substantially similar to those in the MAA:

- (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —
 - (1) where the award was procured by corruption, fraud or undue means;
 - (2) where there was evident partiality or corruption in the arbitrators, or either of them;
 - (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or;
 - (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.²⁷

Eight years ago, in *Hall St. Assocs. LLC v. Mattel Inc.*²⁸ (*Hall St.*), the Supreme Court was called upon to determine whether the grounds in the FAA for vacating or modifying an arbitration award were the exclusive grounds, or whether the parties could expand the scope of judicial review by agreement. The case came to the Supreme Court following a complicated procedural track through the United States District Court for the District of Oregon and the Court of Appeals for the Ninth Circuit.²⁹ The underlying arbitration award related to a dispute between a commercial landlord and tenant over

18. *Katz, Nannis & Solomon PC v. Levine*, 473 Mass. 784, 789 & n.7 (2016).

19. MASS. GEN. LAWS ch. 251, §11 ("Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in sections twelve and thirteen.").

20. MASS. GEN. LAWS ch. 251, §12. The grounds for modifying an arbitration award are found in section 13. *See* MASS. GEN. LAWS ch. 251, §13.

21. *Katz*, 473 Mass. at 790, (*citing* *Lynn v. Thompson*, 435 Mass. 54, 61 (2001), cert. denied, 534 U.S. 1131 (2002)).

22. *Id.* at 790 (*citing* *Tr. of the Bos. & Me. Corp. v. Mass. Bay Transp. Auth.*, 363 Mass. 386, 390 (1973)).

23. *See Katz*, 473 Mass. at 790-91. In the alternative, Levine claimed the arbitrator had exceeded his authority or that the award had been procured by fraud.

See id. at 795. These arguments were ultimately unsuccessful.

24. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); *Commonwealth v. Philip Morris Inc.*, 448 Mass. 836, 843 (2007).

25. *Plymouth-Carver Reg'l Sch. Dist. v. J. Farmer & Co.*, 407 Mass. 1006 (1990).

26. 9 U.S.C. §2. State arbitration law is preempted only where the state act seeks "to limit the enforceability of arbitration contracts." *Miller v. Cotter*, 448 Mass. 671, 678-79 (2007). Thus, it is conceivable that both the FAA and MAA could apply to the same arbitration agreement without raising a preemption problem. *Id.* at 678.

27. 9 U.S.C. §10.

28. 552 U.S. 576, 578 (2008).

29. *Id.* at 579-81.

indemnification liability for environmental violations.³⁰ The parties had signed an arbitration submission agreement that included the following language:

The United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous.³¹

In an opinion authored by Justice Souter, the Supreme Court held that the FAA "carries no hint of flexibility" insofar as it states that the court "must grant" an order confirming an arbitration award "unless the award is vacated, modified or corrected as prescribed in sections 10 and 11 of this title."³² The Supreme Court went on to state in *Hall St.*:

Instead of fighting the text, it makes more sense to see the three provisions, §§9-11, as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.³³

In *Hall St.*, the Supreme Court concluded that "the statutory text gives us no business to expand the statutory grounds" for vacatur.³⁴

THE POST-*HALL ST.* LANDSCAPE

Despite the clarity with which the Supreme Court seemed to decide the issue in *Hall St.*, there is a nagging inconsistency in federal case law concerning the exclusivity of the grounds for vacatur post-*Hall St.* Before *Hall St.*, several federal courts had held that an arbitrator's "manifest disregard" of the law was sufficient grounds to vacate an arbitration award.³⁵ "Manifest disregard" is a judicially created basis for vacatur; it is not found in the FAA.³⁶ Since the Supreme Court decided *Hall St.*, several federal Courts of Appeals have stated that an arbitrator's "manifest disregard" of the law remains a valid ground for vacating an arbitration award.³⁷ Other Circuits have held that manifest disregard does not survive *Hall St.* In *Hall St.*,³⁸ the Supreme Court posited:

Maybe the term "manifest disregard" was meant to name a new ground for review, but maybe it merely referred to the §10 grounds collectively, rather than adding to them.³⁹

Two years after *Hall St.*, the Supreme Court decided *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*,⁴⁰ in which the court was presented with the opportunity to decide the fate of the "manifest disregard" doctrine, but declined to do so.⁴¹ Thus, the circuit split continues.

State courts in other jurisdictions have reached different conclusions when called upon to determine whether the grounds for vacatur enumerated in their respective state arbitration statutes are exclusive.⁴² Until *Katz*, the question was open in Massachusetts.⁴³ In *Katz*, the SJC reached the same result with respect to the MAA as the Supreme Court reached in *Hall St.* with respect to the FAA: "[T]he grounds of judicial review are limited to those delineated in Mass. Gen. Laws ch. 251, §§12 and 13."⁴⁴ In its decision, the

30. *Id.* at 579.

31. *Id.*

32. 9 U.S.C. §9; *Hall St. Assocs. LLC v. Mattel Inc.*, 552 U.S. 576, 587 (2008).

33. *Hall St.*, 552 U.S. at 588 (quotations and citations omitted).

34. *Id.* at 589.

35. *See, e.g.*, *Advest Inc. v. McCarthy*, 914 F.2d 6, 10 (1st Cir. 1990).

36. *See Wilko v. Swan*, 346 U.S. 427, 436-37 (1953).

37. *See, e.g.*, *Oshidary v. Purpura-Andriola*, 564 Fed.Appx. 325, 325 (9th Cir. 2014) (memorandum opinion) ("The district court properly denied Oshidary's petition because Oshidary failed to establish any of the limited grounds on which to vacate an arbitration award under section 10 of the Federal Arbitration Act, or to demonstrate that the arbitral decision was in manifest disregard of the law"); *Wachovia Sec. LLC v. Brand*, 671 F.3d 472, 480 (4th Cir. 2012) ("Although we find that manifest disregard did survive *Hall St.* as an independent ground for vacatur, we conclude that Wachovia has not demonstrated that the arbitrators manifestly disregarded the law here"); *Am. Univ. of Antigua Coll. of Med. v. Leeward Const. Co. Ltd.*, 653 Fed.Appx. 48, 49 (2nd Cir. 2016) (summary order) ("Manifest disregard of the law may, on limited occasions, provide the basis for vacating an arbitral award").

38. *See, e.g.*, *Citigroup Glob. Mkts. Inc. v. Bacon*, 562 F.3d 349, 350 (5th Cir. 2009); *Med. Shoppe Int'l Inc. v. Turner Invs. Inc.*, 614 F.3d 485, 489 (8th Cir. 2010).

39. *Hall St. Assocs. LLC v. Mattel Inc.*, 552 U.S. 576, 585 (2008).

40. 559 U.S. 662 (2010).

41. *Id.* at 671 n.3. Admittedly, a judicially-created ground for vacatur presents a slightly different question than a private agreement to expand the grounds for vacatur. However, if the statutory grounds for vacatur are exclusive, it follows that both judicially and privately created grounds would be invalid. In the past, parties have attempted to rationalize their own agreement to expand the basis for vacatur by pointing to the manifest disregard standard as proof that the statutory grounds are not exclusive. *See, e.g.*, *Hall St.*, 552 U.S. at 584.

42. For states where an appellate court has held that the statutory grounds enumerated in the state arbitration statute are exclusive, *see, e.g.*, *Brookfield Country Club Inc. v. St. James-Brookfield LLC*, 287 Ga. 408, 413, 696 S.E.2d 663, 667 (2010); *HL 1 LLC v. Riverwalk LLC*, 15 A.3d 725, 727, 736 (Me. 2011); *John T. Jones Constr. Co. v. City of Grand Forks*, 665 N.W.2d 698, 704 (N.D. 2003); *Pugh's Lawn Landscape Co. v. Jaycon Dev. Corp.*, 320 S.W.3d 252, 260 (Tenn. 2010).

For states reaching the opposite conclusion — i.e., that the grounds for vacatur enumerated in their state arbitration statutes are not exclusive — *see, e.g.*, *Cable Connection Inc. v. DIRECTV Inc.*, 44 Cal.4th 1334, 1340, 190 P.3d 586, 589 (2008); *Tretina Printing Inc. v. Fitzpatrick & Assocs. Inc.*, 135 N.J. 349, 358, 640 A.2d 788, 792-93 (1994); *Nafta Traders Inc. v. Quinn*, 339 S.W.3d 84, 87 (Tex. 2011).

43. The specific question answered in *Katz* was open, but the SJC pointed out that the narrow, statutorily-defined scope of judicial review of arbitration awards has long been recognized in Massachusetts. *Katz*, *Nannis & Solomon PC v. Levine*, 473 Mass. 784, 793-94 (2016).

44. *Id.* at 785.

SJC referenced *Hall St.* extensively, stated that the Supreme Court’s interpretation of the FAA was “instructive” to its analysis of the question presented in *Katz*, and set out the following reasons for its holding.⁴⁵

The court first turned to the plain language of the confirmation and vacatur provisions of the MAA.⁴⁶ Specifically, section 11 of the MAA states that the court “shall confirm” an arbitration award unless grounds for vacating or modifying it exist pursuant to sections 12 (vacatur) or 13 (modification).⁴⁷ The SJC quoted *Hall St.*’s directive in stating that the statutory language “carries no hint of flexibility” to permit an expansion of the scope of judicial review.⁴⁸

The SJC then contrasted the mandatory language of section 11 with other provisions of the MAA “in which the Legislature explicitly endorsed the parties’ right to contract.”⁴⁹ Specifically, section 3 of the MAA addresses arbitrator selection and offers a default method of selection to be used only in the absence of an agreed-upon method of selection.⁵⁰ The SJC distinguished section 11, which commands that “the court shall confirm an award,” and held that the MAA “leaves no room for parties to contract” to expand the scope of judicial review.⁵¹

Finally, the SJC recognized the important policy considerations at stake in *Katz*:

If parties were able to redefine by contract language the scope of what a court was to review with respect to every arbitration award, it would spawn potentially complex and lengthy case-within-a-case litigation devoted to determining what the parties intended by the contractual language they chose. This is fundamentally contrary to the intent and purpose of our arbitration statute.⁵²

In doing so, the SJC made an important statement in support of arbitration as an “expeditious and reliable alternative to litigation for commercial disputes.”⁵³

MOVING BEYOND *KATZ*

Katz settled a key area of arbitration law in Massachusetts, insofar as the SJC stated unequivocally that parties may not contract for expanded judicial review of arbitration awards under the MAA. This development is likely to limit the number of motions for vacatur filed in Massachusetts, and where a motion for vacatur is filed, the *Katz* decision will enable efficient judicial review of arbitral awards pursuant to the grounds outlined in section 12 of the MAA.

— Ashly E. Scheufele

45. *Id.* at 791-92.

46. *Id.*

47. *Id.* at 791.

48. *Id.* (quoting *Hall St. Assocs. LLC v. Mattel Inc.*, 552 U.S. 576, 587 (2008)).

49. *Katz, Nannis & Solomon PC v. Levine*, 473 Mass. 784, 792 (2016).

50. *Id.* at 792-93.

51. *Id.* at 793.

52. *Id.* at 794.

53. *Id.* at 794-95.

CASE COMMENT

Maling v. Finnegan, Henderson, Farabow, Garrett & Dunner LLP, 473 Mass. 336 (2015) and *Bryan Corp. v. Abrano*, 474 Mass. 504 (2016)

Rule 1.7 of the Massachusetts Rules of Professional Conduct sets forth a lawyer's duty to decline a new engagement where acceptance might adversely affect the lawyer's full responsibility to a present client, unless old and new clients give informed consent to such accommodation.¹ Representing new Client B against present Client A in any matter is generally regarded ipso facto as conflict.² Rule 1.9 imposes an attenuated form of conflict-related obligation where a lawyer accepts a new client engagement "materially adverse" to a former client.³ The acceptance of the new client is permissible, without notice to and even over objection of the former client, if the subject matter of old and new engagements are unrelated and if there is no danger of violating rule 1.6 regarding confidentiality obligations to the old client.⁴ Determining whether the "old" client is a former client can be problematic; a lawyer's unilaterally and arbitrarily turning a present client into a former client to enable taking on the new client quickly and opportunistically can be a violation of rule 1.7 and/or of the uncodified "duty of loyalty," as well as possibly sanctionable under the "hot potato" doctrine, "which 'limit[s] the ability of a law firm to terminate its relationship with an existing client "like a hot potato" so that it may accept a representation of another client in an adverse, but more lucrative, matter."⁵ Rule 1.10 imputes ethical duties of a lawyer to all members of the lawyer's law firm and the firm itself.⁶ The rules, as a whole, speak to individual lawyers' obligations but with some reference to supervisor and subordinate lawyers' responsibilities. Professional conduct rules are intended as guides and boundaries for lawyers with the enforcement mechanisms of bar discipline.⁷ They are not intended for direct use as standards for malpractice liability or disqualification but, in fact, are often so used and, conversely, lawyer discipline case rulings can guide malpractice and disqualification exposure.⁸ The recent opinions of the Supreme Judicial Court in the cases *Maling v. Finnegan, Henderson, Farabow, Garrett & Dunner LLP*⁹ and *Bryan Corp. v. Bryan Abrano*,¹⁰ applying the Rules of Professional

Conduct, provided some guidance to lawyers and firms for addressing malpractice and disqualification issues.

In *Maling*, a patent law firm with branch offices in several states had two of its branches representing two separate clients in patenting their separate inventions in screwless eyeglass frames.¹¹ The respective inventions were related by market category but neither identical to nor obvious variants of each other, and being adverse in the "same patent space," *i.e.*, the same market space, standing alone, is not a conflict requiring withdrawal.¹² The Massachusetts office of the law firm represented Christopher Maling and his company, The Formula Inc., and its Washington, D.C. (main) office represented Masunaga Optical Manufacturing Co. Inc.¹³ Both offices of the law firm achieved issuance of patents for their respective clients.¹⁴ But, according to Maling's malpractice complaint, the patents obtained for Masunaga deterred potential investors from investing in his scale-up of production and marketing — causing loss to him of millions of dollars of his prior investment to date and anticipated new investments, and of potential new customers and profits — all due to an undisclosed conflict.¹⁵ When the facts were revealed, he asked the law firm to give him an opinion letter distinguishing the Maling and Masunaga patents.¹⁶ The firm refused, and Maling sued.¹⁷ Maling's complaint was dismissed in the superior court under Rule 12(b)(6) of the Massachusetts Rules of Civil Procedure, and Maling appealed (though his company dropped out).¹⁸

The SJC took direct appellate review and affirmed, with cautionary comments for all lawyers (in all areas of practice, not just intellectual property) to carefully screen new client opportunities.¹⁹ The SJC also warned that rule 1.7 conflicts can apply to representations in non-litigated transactional matters.²⁰ The *Maling* case has already had ripple effects. The New York State Bar Association Commission on Professional Ethics opined later that competing economic interests, without more, do not disqualify law firms from representation in the context of present versus former clients, noting that

1. SJC General Rule 3:07, as amended, 471 Mass. 1304 (2015).

2. MASS. R. PROF. C. 1.7.

3. MASS. R. PROF. C. 1.9.

4. MASS. R. PROF. C. 1.6, 1.9.

5. *Bryan Corp. v. Abrano*, 474 Mass. 504, 509 (2016)(citation omitted).

6. MASS. R. PROF. C. 1.10.

7. SJC Rule 3:07 preamble to MASS. R. PROF. C.

8. An ethical rule designed to protect a particular type of client can be offered in evidence in a malpractice suit. *Fishman v. Brooks*, 396 Mass. 643, 649 (1986).

9. *Maling v. Finnegan, Henderson, Farabow, Garrett & Dunner LLP*, 473 Mass. 336 (2015).

10. *Bryan*, 474 Mass. at 504.

11. *Maling*, 473 Mass. at 337.

12. *Id.* at 341 (citing MASS. R. PROF. C. 1.7 comment 6).

13. *Id.* at 338.

14. *Id.*

15. *Maling v. Finnegan, Henderson, Farabow, Garrett & Dunner LLP*, 473 Mass. 336, 339 (2015).

16. *Id.* at 344.

17. *Id.*

18. *Id.* at 338.

19. *Id.* at 348-49.

20. *Id.* at 344.

such competing economic interests did not result in disqualification in prior concurrent clients cases (including *Maling*), and a fortiori could not disqualify in a former client situation.²¹ Similarly, in a Massachusetts case, *Gillette Co. v. Provost*, a former in-house patent lawyer of *Gillette* moved to work in-house for a competitor company in the shaving field; a Business Law Session judge found no violation of rule 1.9 where he worked on different inventions in the shaving field for the two companies, and the plaintiff alleged no facts plausibly suggesting any breach of confidentiality obligation.²²

In *Bryan Corp. v. Abrano*, a law firm was representing Bryan Corporation, defending it in a suit for fees by an unpaid vendor of consulting services.²³ During pre-trial activities, including completion of pleadings, discovery and related preparations, the firm was approached by the client's minority shareholders to represent them in an intra-corporate dispute and accepted engagement by them.²⁴ The firm then made a claim on their behalf to the company client and its majority shareholder, warning that the situation might lead to conflict if the company removed the minority shareholders as directors and/or as employees.²⁵ The company did remove them as directors, and the firm submitted its withdrawal to the company and to the court in which the collection case was pending.²⁶ One of the minority shareholders, now represented by the firm, sued the majority stockholder of the company for alleged Wage Act²⁷ violations.²⁸ The company then sued that shareholder for breach of fiduciary duties and the firm defended him.²⁹ The two suits were consolidated on the shareholder's motion despite company objection.³⁰ The company then moved to disqualify the law firm.³¹ The superior court granted the disqualification motion and the SJC granted direct review of the shareholder's (in effect, the law firm's) appeal.³²

On review, the SJC applied an abuse-of-discretion standard and affirmed the superior court's disqualification ruling on the ground of violation of rule 1.7 of the Massachusetts Rules of Professional Conduct.³³ The court deemed the conflict one between present clients rather than handling it under the more liberal standard of rule 1.9, governing former clients, and took account of the firm's violation of its "duty of loyalty" to the company, as well as violation of rule 1.7.³⁴ Citing *Maling*, the SJC noted:

In this case, we are particularly concerned with rule 1.7's function in furthering the lawyer's duty of loyalty, which forms the bedrock of the attorney-client relationship. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 692 (1984) (duty of loyalty is "perhaps the most basic of counsel's duties"); Mass. R. Prof. C. 1.7 comment 1 ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client").³⁵

The court further quoted from comment 6: "[The] client 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."³⁶ The SJC did not accept or reject the "hot potato" doctrine as a standard for Massachusetts bar discipline, malpractice liability or disqualification, concluding that the court's rules and prior case law "provide an adequate framework for resolving the issues in this case."³⁷

The *Maling* and *Bryan* decisions included some important warnings. First, in *Maling*, the plaintiff's argument that the firm's separate representations of *Maling* and *Masunaga* were directly adverse because they were in the same "patent office" (*i.e.*, prosecuting separate applications for patents in the U.S. Patent & Trademark Office (PTO)) was rejected by the SJC, quoting comment 6 of rule 1.7 of the Massachusetts Rules of Professional Conduct: "... 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."³⁸

Nevertheless, while rejecting the plaintiff's various claims, the SJC stated in dictum an important caution:

This case also raises important considerations under Mass. R. Prof. C. 1.10 . . . which prohibits lawyers associated in a firm from "knowingly represent[ing] a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7." . . . To ensure compliance with both rules 1.7 and 1.10, firms must

21. Op. 1103 (July 15, 2016), full text available at <http://www.nysba.org/CustomTemplates/Content.aspx?id=66270>.

22. 33 Mass. L. Rep. 327 *1-*2, *4, *8 (Mass. Super. Ct. May 5, 2016).

23. *Bryan Corp. v. Abrano*, 474 Mass. 504, 506 (2016).

24. *Id.*

25. *Id.* at 507.

26. *Id.*

27. MASS. GEN. LAWS ch. 149, §148.

28. *Bryan*, 474 Mass. at 507.

29. *Bryan Corp. v. Abrano*, 474 Mass. 504, 507 (2016).

30. *Id.* at 508.

31. *Id.*

32. *Id.*

33. *Id.* at 509.

34. *Id.* at 509-10

35. *Bryan Corp. v. Abrano*, 474 Mass. 504, 510-11 (2016) (emphasis added).

36. *Id.* at 511 (quoting *Strickland v. Washington*, 466 U.S. 668, 692 (1984), and MASS. R. PROF. C. 1.7 comment 6) (emphasis in original).

37. *Id.* at 510; *See also* *Markham Concepts Inc. v. Hasbro Inc.*, 196 F. Supp. 3d 345 (D. RI. 2016). There, a multi-state law firm representing a Rhode Island defendant abandoned it to represent the plaintiff in a patent infringement action. The firm was disqualified for violating the hot potato doctrine, recognized in several states, including Rhode Island. Two lawyers already representing the plaintiff were ready to join the firm and before accepting the lawyers, the firm asked the defendant to waive any conflict. The firm had been representing the defendant in patent matters. The defendant refused to waive the conflict, the firm withdrew, and the lawyers joined the firm. Defendant's motion to disqualify the firm was granted, applying the rule 1.7 present conflict standard rather than rule 1.9. The court stated that to allow a firm to drop a client to move from rule 1.7 to rule 1.9 applicability would render a lawyer's duty of loyalty meaningless.

38. *Maling v. Finnegan, Henderson, Farabow, Garrett & Dunner LLP*, 473 Mass. 336, 341 (2015) (quoting MASS. R. PROF. C. 1.7 comment 6).

implement procedures to identify and remedy actual and potential conflicts of interest. *See* Mass. R. Prof. C. 5.1 comment 2, as appearing in 471 Mass. 1445 (2015) (requiring firms to make “reasonable efforts to establish internal policies. . . designed to detect and resolve conflicts of interest”).³⁹

Some of the reasonable efforts include robust conflict checks extending across all offices of a multi-state or multi-national firm, or even a law firm collaboration type known as a “verein.”⁴⁰

The conflict check must state friendly and adverse parties and affiliates.⁴¹ It is also important to screen the subject matter of the representation. The SJC did not give detail as to the content of the specific patent applications handled by the firm for Masunaga or Maling, but inspection of public records at www.uspto.gov shows four patent applications prosecuted for Masunaga by the firm’s D.C. office, resulting in four patents for Masunaga, only one of which (the last) was arguably pertinent to Maling’s later patent. That fourth patent had a filing date priority a few months ahead of the first of four patent applications filed and prosecuted by the firm’s Boston office for Maling. However, the relevant Masunaga patent could not, and did not, prevent issuance of claims in Maling’s patents if the Masunaga patent did not dominate or anticipate eyeglass products made in accordance with the specifications and claims of the Maling patents, i.e., would not infringe the Masunaga patents, nor limit the scope of allowable claims for Maling (and indeed was cited as prior art in the last one of Maling’s issued patents).⁴² Any

lawyer could have opined to the same effect, even though the defendant law firm, sensing conflict liability exposure, declined to do so.⁴³

These checks should be done before intake of a new client and before accepting a new matter for an existing client, and when new persons or new subject matter appear.⁴⁴ This is not limited to patent cases. It is applicable to all areas of practice. But subject matter checking is easier said than done, since the subject description should tell enough but not too much. In the *Maling* case, “eyeglasses” would be too broad, and “eyeglasses with screw-less ties between lens and bows with a spring configuration enabling tightening” would be too narrow, compromising confidentiality if, in fact, there is a conflict.⁴⁵ Conflicts can also arise after proper initial screening and intake of clients A and B, e.g., if B merges with C, a litigant against A.⁴⁶

The *Bryan* case takes legal ethics learning a step further with a rejection of narrow distinctions.⁴⁷ The law firm tried to position itself as forced into a conflict situation, withdrawing only as a result of an unanticipated client action and therefore operating under the more liberal rule 1.9 as to former clients, rather than rule 1.7 as to present clients.⁴⁸ The argument did not pass muster where the adversity and conflict were not speculative possibilities, but rather were deemed by the superior court and the SJC to be foreseeable.⁴⁹ The SJC found a breach of an implicit duty of undivided loyalty and a violation of rule 1.7 without being clear if these were two overlapping standards or just one standard.⁵⁰

39. *Maling*, 473 Mass. at 348 (quoting MASS. R. PROF. C. 1.10(a), and 5.1 comment 2).

40. A “verein” is essentially an umbrella law firm with constituent law firms with a common brand, i.e., the verein name, and a common marketing management and control center (but with financial independence of the constituent firms). Many large U.S. multi-state and international firms purport to be vereins or are so characterized by others. Courts are likely to rule that conflict avoidance responsibility is shared among the diverse local branch firms under ABA MODEL R. PROF. C. 1.10. An administrative law judge (AJL) treated U.S. and Canadian-branch firms of the Denton’s verein as a single firm for conflict purposes in an International Trade Commission (ITC) proceeding. *See, e.g.*, www.aba-journal.com/news/article/does-dentons-verein-structure-shield-it-from-conflict-claim-malpractice-suit.html (April 27, 2016). The ALJ held that two divisions of the verein in separate countries were subject to disqualification for conflict. The holding was vacated and the case settled before a full commission decision and a collateral civil case against the U.S. verein branch was settled as well. The question remains to be answered another day. On the other hand, there are many recognized alliances of law firms, providing non-exclusive referral arrangements among members that are independently managed, that do not share client confidences, and that use distinct public-facing identities. Member firms of these associations are not conflicted by the activities of the other member firms.

41. Company clients, adverse companies and adverse employees, key personnel or owners, and key witnesses should be identified if known at the outset or when later emerging.

42. The last of the Masunaga patents, U.S. patent 6,787,096, was based on an application for patent filed April 21, 2004, but incorporating parts of earlier filed applications from 1998 to 2001. The four *Maling* patents, numbers 7,101,039; 7,341,343; 7,354,149 and 7,703,914, were based on applications filed from June 24, 2004 to April 7, 2008. Present patent law awards priority to a first inventor to file, but at the relevant times of events during this case, a first-to-invent standard was applicable. *Maling* alleged that the firm “inexplicably” took 14 months to prepare and file its first application, so there could have been a real first-to-invent issue if there was a common patentable invention. *Maling*,

473 Mass. at 338. Nevertheless, no such commonality or priority was plausibly alleged in *Maling*’s complaint, and *Maling* did not try to institute an “interference” proceeding at the U.S. Patent & Trademark Office to contest priority. *Id.* at 344.

43. Claims of the patent determine its patent protection scope as well as the scope of difference from prior art. 35 U.S.C. §112(b) (2017). Claims can also be construed as being broader or narrower than their facial appearance. If the firm’s Boston office did give an opinion to *Maling* of non-domination of any *Maling* products by the Masunaga patent, there would be the appearance, if not the fact, of denigrating the scope of the Masunaga patents claims (or failing to do so), or otherwise pulling a punch or two in favor of one client or the other. *Maling*, 473 Mass. at 346-47 (dictum).

44. Upon discovery of such fortuitous late persons or issues conflicts, the firm must resolve the conflict by gaining informed consent of both clients (if feasible), withdrawing from one client or both, or defending a position of no ethical duty to withdraw.

45. The rules and courts give some slack for intra-firm disclosures for purposes of conflict checking. But, as a client relations matter, consider the discomfort a firm feels in keeping secrets from its clients. *See Maling v. Finnegan, Henderson, Farabow, Garrett & Dunner LLP*, 473 Mass. 336, 344 (2015) and Mass. R. Prof. C. 1.18(d).

46. It can also arise with lateral movement of attorneys between firms, or from in-house law departments to law firms or other related enterprises. However, ABA MODEL R. PROF. C. 1.10 (adopted in Massachusetts) allows for early detection of conflict and establishment of an ethical wall to screen the incoming lawyer so that the host firm is not conflicted. The screening must limit access to firm paper and electronic files relating to the client/case matter to be protected.

47. *Bryan Corp. v. Abrano*, 474 Mass. 504, 512 (2016).

48. *Id.* at 507

49. *Id.* at 510.

50. *Id.* at 511.

Neither Maling nor Bryan indicated a need to take evidence.⁵¹ The superior court judge in *Maling* dismissed the complaint relying only on the complaint and its exhibits.⁵² In *Bryan*, the superior court acted on the disqualification motion and response and respective exhibits by way of summary disposition.⁵³ The *Maling* complaint and appellate brief allegations as to adversity and its causal connection to alleged damage were conclusory.⁵⁴ Similarly, in *Bryan*, the firm's balancing of harms argument did not outweigh the facial conflict presented by the company's response.⁵⁵ In rule 1.6 practice, a client's stated need for a disqualification does not need detailed proof by the client, since that would aggravate the fact or appearance of dangers of breach of confidentiality even when done under a protective order.⁵⁶ In most instances (not all), there is a presumption of danger and respect for the client's reliance on its onetime relationship to opposing counsel. Rules 1.7 and 1.9 involve protection of confidentiality, as well as the duty of loyalty (whether as parts of rules 1.7 and 1.9 or independent of those rules).⁵⁷

There is little room for denying a disqualification under circumstances akin to those of the *Bryan* case.⁵⁸ In *Bryan*, the SJC set the standard: "[A] firm may not undertake representation of a new client where the firm can reasonably anticipate that a conflict will develop with an existing client, and then choose between the two clients when the conflict materializes. Both the duty of loyalty and the rules clearly forbid such conduct."⁵⁹ It is still an open question whether the "hot potato" rule, per se, applies in Massachusetts. The SJC declined to address the issue, stating only that ethics rules and case law "provide an adequate framework for resolving the issues."⁶⁰

The *Bryan* and *Maling* cases do not reach the legal ethics frontier of positional conflicts under rule 1.7 — a situation where a lawyer or a law firm simultaneously asserts two diametrically opposed (or nearly so) positions of law on behalf of two different clients to the same court, contemporaneously in different cases, or alternative

versions of this paradigm (different courts, different times, variant circumstances).⁶¹ However, in *Maling*, the SJC observed as to party and subject matter conflicts (and, arguably, equally applicable to possible positional conflicts) the following:

This court has not defined a minimum protocol for carrying out a conflict check in the area of patent practice, or in any other area of law. However, no matter how complex such a protocol might be, law firms run significant risks, financial and reputational, if they do not avail themselves of a robust conflict [checking] system adequate to the nature of their practice. Although Maling's complaint does not plead an actionable violation of rule 1.7 sufficiently, the misuse of client confidences and the preferential treatment of the interests of one client, to the detriment of nearly identical interests of another, are serious matters that cannot be reconciled with the ethical obligations of our profession.⁶²

The necessary robustness of conflict checking may be an ever-moving target. Today, small, medium and large firms, solo practitioners and in-house counsel, alone or with the aid of consultants, use ever more powerful data analytics tools. These are used to manage e-discovery and paper discovery in litigation; to identify competitive landscapes commercially and technically; to vet witnesses and jurors (within regulatory limits); to identify prior rights and disclosures or activities blocking prospective patent, trademark, and copyright rights; to identify marketing prospects; and for customer relations management. It would not be surprising to see the public and courts claim a duty of law firms in ever-increasing instances to use technology as such tools become more powerful, economically available, and widely used by others.⁶³ However, there will always be a further and pre-emptive element of human judgment in assessing conflicts as a matter of legal ethics, reputation, and personal integrity.

— Jerry Cohen

51. *Id.* at 509; *Maling v. Finnegan, Henderson, Farabow, Garrett & Dunner LLP*, 473 Mass. 336, 337 (2015).

52. *Maling*, 473 Mass. at 338.

53. *Bryan Corp. v. Abrano*, 474 Mass. 504, 509 (2016).

54. *Maling*, 473 Mass. at 345.

55. *Bryan*, 474 Mass. at 514-15.

56. MASS. R. PROF. C. 1.6 comment 3(a).

57. MASS. R. PROF. C. 1.7, 1.9.

58. *Bryan*, 474 Mass. at 506.

59. *Bryan Corp. v. Abrano*, 474 Mass. 504, 516 (2016). The court noted that rule 1.7 has dual purposes "as a prophylactic [measure] to protect confidences . . . [and] safeguard[ing] loyalty as a feature of the lawyer-client relationship. . . . In this case we are particularly concerned with rule 1.7's function in furthering the lawyer's duty of loyalty" *Id.* at 511 (citing *Maling v. Finnegan, Henderson, Farabow, Garrett & Dunner LLP*, 473 Mass. 336, 340 (2015)).

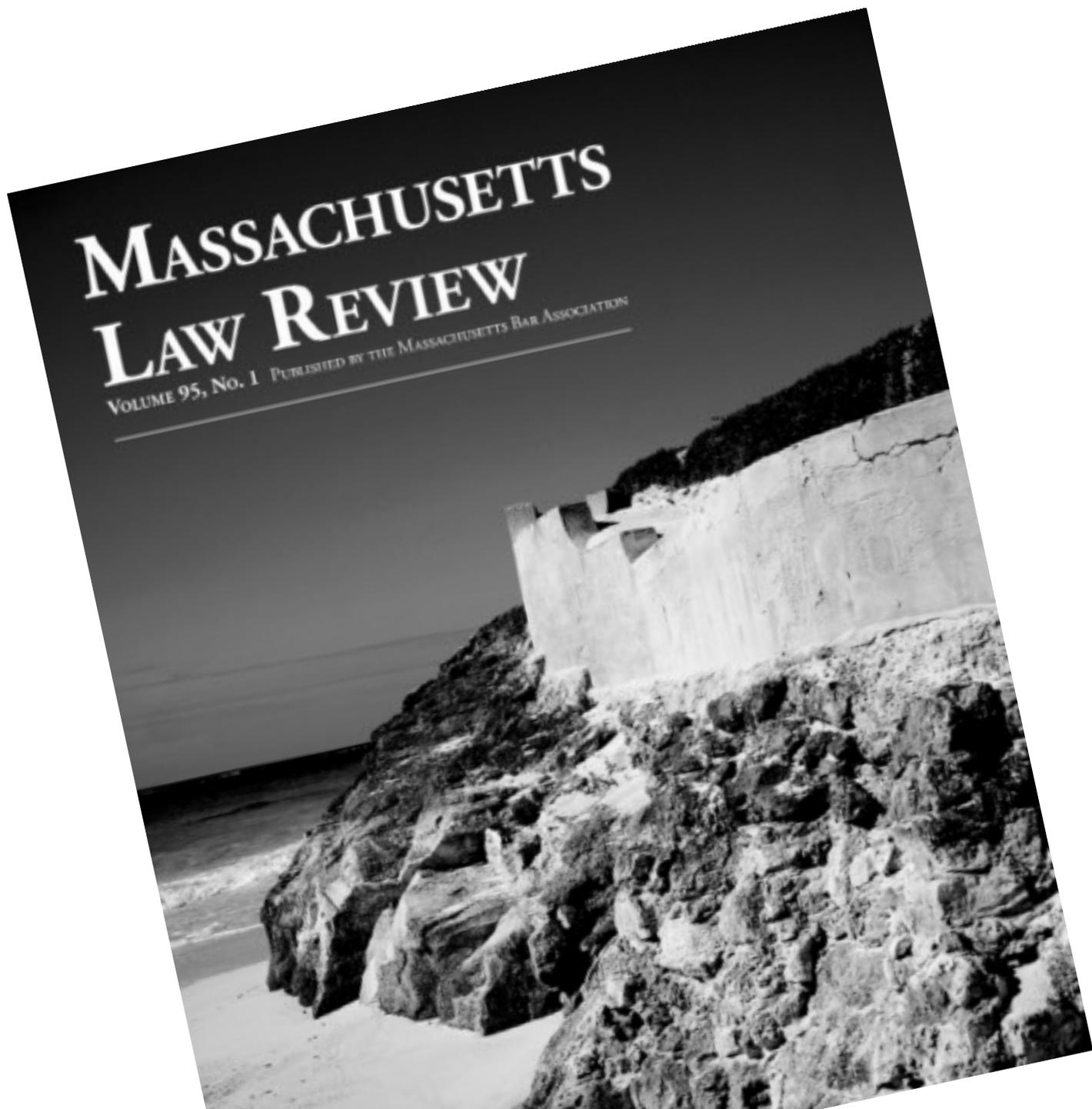
60. *Bryan*, 474 Mass. at 510. But in an article in *Massachusetts Lawyers Weekly*, attorney Thomas F. Maffei argued that the hot potato standard does now apply

in Massachusetts in view of *Bryan*. Vol. 45 MASS. LAWYERS WEEKLY, Issue No. 27.

61. Comment 24 to MASS. R. PROF. C. 1.7 does state: "Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients . . . [unless] . . . there is a significant risk that . . . [it] will materially limit the lawyer's effectiveness . . . [e.g.] when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client"

62. *Maling v. Finnegan, Henderson, Farabow, Garrett & Dunner LLP*, 473 Mass. 336, 349 (2015) (emphasis added).

63. See, e.g., *The T. J. Hooper*, 60 F.2d 737 (2d Cir. 1932) (the wide availability of reliable radios and weather reports imposed on tugboat operators a duty to have a reliable radio for learning of storm warnings, and liability for failure to use such advanced technology), and its extensive progeny in tort law. Law schools, corporate clients and bar associations now pound away at lessons of enhancing computer usage and skills for effective practice. Note also the latest versions of rules 1.1 and 1.6, stating obligations to "consider" the use of technology in aid of meeting competence and confidentiality obligations.



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