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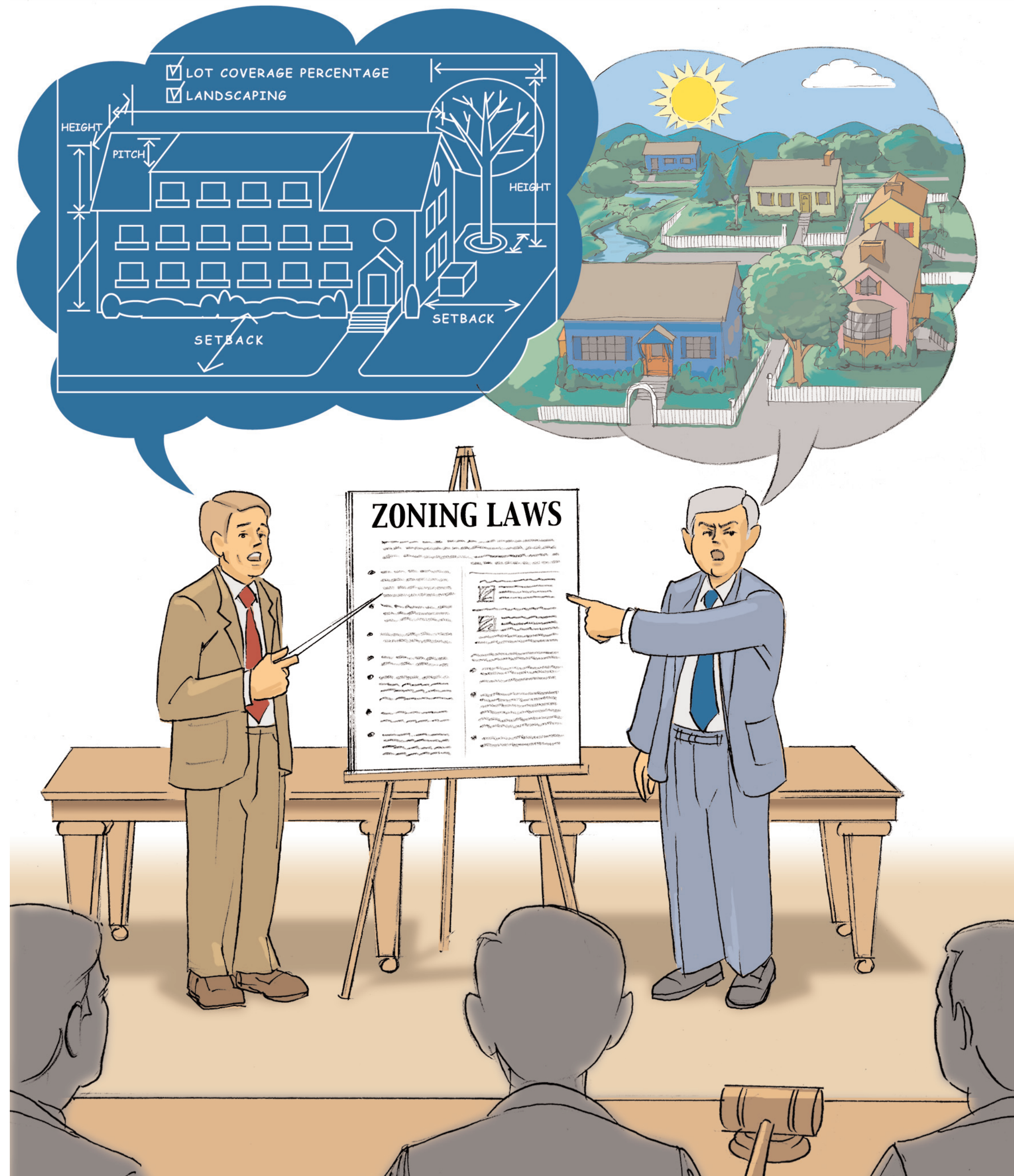
section review

MASSACHUSETTS BAR ASSOCIATION



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Towards a context-based civil right to counsel through "access to justice" initiatives

By Russell Engler

Introduction

The 40th anniversary in 2003 of U.S. Supreme Court's landmark decision in *Gideon v. Wainright* coincided with a revitalization of initiatives to achieve a "civil Gideon" right, that is, a right to counsel in civil cases.[1] The renewed focus on establishing a right to counsel in civil cases arose against two important backdrops. First, recent studies document the increasing incidence of unmet legal needs, leading to enormous numbers of litigants appearing in court in civil cases without counsel. Second, during the past few years, the number of state "access to justice" commissions — formed to develop, coordinate and oversee initiatives to respond to the civil legal needs of low-income people — rapidly expanded.

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I. The backdrop: unrepresented litigants, unmet legal needs and access to justice commissions

Despite the complexity of this country's legal system, enormous numbers of litigants appear in court in civil cases without counsel.[2] Reports from across the country consistently show that 70 to 90 percent of the legal needs of the poor go unaddressed.[3] The flood of unrepresented litigants has caused a re-examination of the operation of many courts. Often, the focus is on the problems that unrepresented litigants create for the smooth operation of the court.

As the problems involving unrepresented litigants have gained attention, the number of state "access to justice" commissions has increased rapidly. Commission members — representatives from the courts, organized bar, civil legal aid organizations and law schools — have "a broad charge to engage in ongoing assessment of the civil legal needs of low-income people in the state and to develop, coordinate and oversee initiatives to respond to those needs."[4] An expanded civil right to counsel is one component of a coordinated range of initiatives designed to achieve access to justice.

II. Articulating the three-pronged strategy

The primary problem that flows from the flood of unrepresented litigants is not that those working in the legal system are burdened and that unrepresented litigants clog the system. Rather, it is that litigants routinely forfeit rights due to the absence of counsel. A system of justice in which large numbers of people forfeit rights because they are unrepresented rather than because the facts of the cases or the governing laws dictate their cases' outcomes is unacceptable. Access to justice initiatives seeking to assist unrepresented litigants must target the forfeiture of rights due to the absence of counsel.

A. Prong 1: roles of the judges, mediators and clerks

The underlying goal of the adversary system is to be fair and just. The ethical rules shaping the roles of the players in that system imply that unrepresented litigants are the exception. Given the realities of many of our courts, our traditional understanding of the roles frustrates rather than furthers the goal of fairness and justice. When faced with abandoning the goal or changing the roles, we should change the roles.

The focus on fairness and justice, in substance, requires shifting the approach to cases involving unrepresented litigants. We must revise our understanding of what it means to be impartial.[5] We can no longer accept the idea that impartiality equals passivity. A system that favors those with lawyers over those without lawyers, without regard to the applicable law and the facts of a case, is an impartial system. To eliminate a system that penalizes those without lawyers requires the courts to play an active role to maintain the system's impartiality.

To achieve meaningful access to justice, we should revise our notions of the proper role of judges and require the judges to assist unrepresented litigants as necessary to

ensure that all relevant information is before the court and unrepresented litigants do not forfeit rights due to the absence of counsel.[6]

We should similarly revise the roles of other court personnel, including court-connected mediators and clerks.[7] In a world full of unrepresented litigants, the roles of mediators and clerks should permit and even require them to assist unrepresented litigants to avoid the unintentional waiver of rights that routinely occurs. Developing guidelines and conducting training sessions for mediators and clerks, as well as judges, will assist them in their active roles.

Another key role in the system is that of the lawyer pitted against the unrepresented litigant. Lawyers routinely violate ethical rules in their negotiations with unrepresented litigants. [8] Far from curtailing or reporting such misconduct, courts instead promote the behavior by sending unrepresented parties into the hallway to negotiate with lawyers in unmonitored settings; courts exacerbate the problem by rubber-stamping the resulting agreements without conducting a detailed inquiry into either the fairness of the provisions or the process that led to the agreement. Solutions to the problem include enforcing existing ethical rules, drafting additional ethical rules, and increasing court oversight of interactions between lawyers and unrepresented litigants.[9]

Philosophical and practical objections sometimes emerge in response to the proposal to revise the roles of judges, mediators, and clerks in cases involving unrepresented litigants. Judges' objections include a belief that court assistance is inconsistent with the court's duty to remain impartial, a belief that unrepresented parties should be held to the same standards as represented ones, and a sense that revising the role of judges would unduly burden scarce judicial resources. Concerns about expanding the roles of non-judicial court personnel include not only impartiality and scarcity of resources but also the need to avoid the unauthorized practice of law.[10]

These objections and concerns do not overcome the justifications for expanding the roles. Moreover, available evidence indicates that judges and other court personnel throughout the country vary considerably in how they handle unrepresented litigants.[11] An examination of the recommended techniques for handling unrepresented litigants reveals a shift over the past decade as the chains of passivity that hinder judges and clerks loosen across the country.[12]

B. *Prong 2: Using, but also evaluating, assistance programs*

Innovative programs across the country now assist unrepresented litigants in the courts. These programs include telephone hotlines, self-help centers, *pro se* offices, advice-only clinics and court-annexed limited legal services programs.[13] Advocates working to increase access to justice should support such programs but should also carefully evaluate them. They should identify those programs that help stem the forfeiture of rights and those that only help the courts run more smoothly without affecting case outcomes. Programs not affecting case outcomes may still be worthwhile, but they are not a solution to the problem of the forfeiture of rights due to the absence of counsel.

Evaluation efforts lag behind the creation of assistance programs. Although the body of evaluation materials is growing, we still lack answers to basic questions. [14] Do assistance programs make a difference? If so, what factors lead to that conclusion? Many evaluation initiatives rely on "customer satisfaction" inquiries: the extent to which the users believe they were helped, or that others in the legal system believe the program is beneficial.[15] Without minimizing the importance of how unrepresented litigants feel about their experiences, advocates for the poor should focus on programs that do the best job in affecting case outcomes.

In the absence of full representation, unbundled legal services and expanded use of lay advocates, depending on the structure and setting, are also ways of assisting those without counsel. The evaluation applies to assessing the effectiveness of the expanded roles here as well. Where litigants receive the help that they need either from the expanded roles of those within the court system or from assistance programs, full representation by a lawyer may not be necessary.

C. *Prong 3: The expanded right to appointed counsel*

When revising the roles of judges, mediators and clerks and enlisting assistance programs are insufficient, we can no longer accept the routine forfeiture of rights as an acceptable outcome. In those instances, we must recognize and establish a right to appointed counsel in civil cases.

As explained in section IIIA of this article, the most promising starting points for expanding the civil right to counsel involve subsets of categories of cases rather than entire categories such as eviction or custody cases. However, regardless of the starting point selected, the context-based approach faces two fundamental issues in its implementation. The first is whether it is any different from the case-by-case evaluation that the U.S. Supreme Court mandated in *Lassiter v. Department of Social Services*.[16] The second is whether the trigger for appointing counsel in civil cases should be a risk of error set forth in *Matthews v. Eldridge* and applied in *Lassiter*; the risk of suffering substantial injustice, as Michael Greco, the American Bar Association's immediate past president, articulated; or some other formulation. [17]

For the right to have any efficacy, the flawed approach enunciated in *Lassiter* must be abandoned. A system that requires the most vulnerable litigants to prove that they are likely to prevail guarantees that the right will be illusory. In each category of cases for which the right to counsel attaches, *Lassiter's* presumption must be reversed, so that effective access requires appointment of counsel absent proof that a particular forum can prevent the forfeiture of rights in a given case without the appointment of counsel. The threshold of factual inquiries should involve the search for the categories of cases in which the absence of counsel is likely to cause the requisite level of harm. Unrepresented litigants in those identified categories would be entitled to appointed counsel and would not have to prove the likelihood of harm in their case.

In defining the subcategories of cases where to establish a right to counsel, acknowledging the differing implications from the choice in terminology for the trigger is more important than selecting a particular means of measurement. Depending on the context, the type of case that may succeed in initially helping establish a civil right to counsel may differ from advocates' preferred ultimate articulation of the right, which may be broader. For example, although most unrepresented litigants might benefit from the appointment of counsel, each litigant does not stand an equal risk of suffering a substantial injustice due to the absence of counsel. Nor does each case involving a risk of substantial injustice run an equal risk of erroneous decision, depending on how those terms are defined. The presence of counsel may protect unrepresented litigants and prevent harm or injustice even where the absence of counsel cannot demonstrably lead to an erroneous outcome.

Thus, distinguishing between what might be sound policy and what might be a compelling test case for the civil right to counsel is crucial. For example, to the extent that the provision of counsel for all unrepresented tenants would lead to a reduction in homelessness, the provision of counsel is not simply humane, but a wise use of resources. However, despite the soundness of the policy, the cases in which eviction would be erroneous due to the absence of counsel would be a smaller subset of those cases. To the extent that political realities prohibit the adoption of a broader-based right to counsel, the narrower subset of cases is the place to start.

III. Targeting contexts: forums, subject areas, litigants

A. *Starting points*

The likely starting points for establishing a civil right to counsel remain areas of family law (e.g., custody proceedings), eviction and immigration cases. The words of the ABA's new resolution are powerful in identifying basic human needs as the areas in which counsel is most likely to be needed, urging the provision of:

> legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.[18]

Advocates have targeted these areas due to the compelling nature of the underlying rights at stake.

Prospects for successfully establishing a right to counsel in civil cases improve if the target is subsets of cases within these broad categories. A first narrowing of the categories should involve cases that pit an unrepresented party against a represented one. Courts are more willing to help if they are doing so equally to both sides, and cases in which both sides are without counsel do not presumptively favor one side over the other, absent data to the contrary. By contrast, cases pitting unrepresented litigants against represented ones illustrate the ultimate breakdown of the adversary system and are presumptively unfair.[19]

Cases pitting unrepresented parties against represented ones are one form of power imbalance where the risk of an erroneous outcome is high. A second form of power imbalance is present in cases involving domestic violence. Even where both parties are "equally" without counsel, the dynamic of domestic violence, with the resulting power imbalance, increases the risk of an erroneous outcome.

Factors beyond the legal claims suggest that certain custody proceedings may be a stronger place to start to advocate a civil right to counsel than eviction proceedings. Because custody cases that pit unrepresented litigants against lawyers are a smaller percentage of the overall docket than eviction cases that do, appointing counsel will require fewer resources, and thus the appointment of counsel will affect less of the court's operation. On the one hand, focusing on custody cases, including domestic violence cases, affords the opportunity to cultivate as allies those who advocate on behalf of domestic violence victims. On the other hand, focusing on eviction cases likely will mobilize the landlord and real estate lobbies in opposition to the right-to-counsel initiative.

Other factors, such as characteristics of litigants, may reveal other starting points that are legally or politically different. For example, advocates in Washington have explored the possibility of a right to counsel for litigants with disabilities. In New York, advocates are exploring the feasibility of starting a right-to-counsel initiative for elderly tenants. The American Bar Association's Commission on Immigration urged the bar association to support the "due process right to counsel for all persons in removal proceedings."[20]

Careful evaluation of potential case outcomes may suggest different starting points. Evaluation data may show that housing cases differ from family law cases in articulation of power imbalances that affect outcomes. In the housing context, providing counsel to the tenant is a crucial factor affecting case outcomes and preventing eviction.[21] Yet studies also show that landlords typically prevail against unrepresented tenants — and they do so with shocking speed — whether or not the landlord is represented.[22] The power imbalances may differ from context to context, and advocates accordingly must tailor the framing of claims and relief.

B. *Reassessing recent cases*

Reviewing and reassessing recent cases is instructive in light of this discussion on starting points. *Frase v. Barnhart*, a custody case, reached the Maryland Court of Appeals on, among other issues, a civil right to counsel.[23] Although three justices produced a powerful concurring opinion supporting such a claim, the majority declined to reach the issue.[24]

The lower court imposed impermissible conditions on Frase's right to custody of her son in a contested proceeding in which she was unrepresented, while the Barnharts, caretakers of her son, had counsel. Not only was Frase unable to represent herself effectively, but the Barnharts' lawyer successfully portrayed his clients as "good Samaritans" and Frase as a homeless alcohol and drug abuser. Frase's own direct testimony was unstructured, and the opposing lawyer's aggressive cross-examination proceeded without objection. The judicial master provided Frase minimal assistance and referred her instead to "the *pro se* clinic." Frase spent countless hours trying to prepare her case and sought assistance from a variety of *pro se* legal assistance programs.[25] Evaluation of those programs revealed that they were inadequate to protect the rights of *pro se* litigants in contested cases, particularly where the other side had representation.[26] Only when Frase obtained representation at the appellate court level to pursue

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a range of claims, including the right to appointed counsel, did the court overturn the custody decision — a dynamic wholly familiar to advocates for the poor.

The analysis presented here suggests that narrowing the requested relief in the initial test case may be necessary for the civil right-to-counsel claim to command a majority. In framing the problem, the advocates for Frase hammered on the fundamental unfairness of cases pitting unrepresented litigants against represented parties.[27] However, in seeking the solution, advocates sought a broader articulation of the right to counsel than that subset of custody cases. The appellant's brief closed with:

> Discussion and debate about the details, and the costs, of a suitably enhanced Maryland program of legal services to the poor are subjects for another day in another place. They should be conducted, however, against a judicial finding that a right to counsel inheres in the Maryland constitution. As Ms. Frase has demonstrated, she is entitled to such a finding here.[28]

The *amici* ended by encouraging the court to "consider the inadequacy of services in Maryland in family law disputes ... [and] require the state to afford *pro se* litigants like Frase full legal representation in order to protect the fundamental rights at issue."[29] Petitioners in *Kelly v. Warpinski* sought an even broader formulation of the right to counsel in Wisconsin; they asked the Wisconsin Supreme Court to "determine whether the Wisconsin Constitution accords the right to counsel in civil cases."[30]

The tailored relief should also mesh more closely with the evidence in the record. The brief that the *amici curiae* filed in *Frase* referred to the inadequacy of the limited assistance programs in protecting the rights of certain *pro se* litigants.[31] Where existing data reveal who the *pro se* litigants are that are likely to suffer harm absent counsel, articulating the relief in relation to that evidence would strengthen the case. If the data do not demonstrate the vulnerabilities of particular categories of unrepresented litigants, the development of such data to strengthen the record should precede the next test case. Although narrowing the reach of the right to counsel at the outset may be distressing to counsel, that step may be necessary to persuade the courts that the claim of a right to counsel is no more expansive than necessary to prevent the forfeiture of rights.

IV. Responding to objections, developing allies and neutralizing opponents and targeting self-interest

Framing the right to counsel in civil cases as part of a comprehensive strategy to stem the forfeiture of rights by those without counsel helps anticipate objections to the civil right-to-counsel initiative, identify and mobilize allies, and neutralize opponents and target self-interest.

A. Responding to objections

1. Drawing the line

One concern is where to draw the line. That no current civil *Gideon* proposal calls for appointed counsel for all parties in every civil case underscores the reality that the question is not whether, but where, to draw the line. Skeptics, let alone cautious supporters, will seek reassurances that the right, once established, will not apply to the majority of civil cases involving unrepresented litigants.

Articulating the civil right to counsel as one component of a more comprehensive strategy to prevent the forfeiture of rights of unrepresented litigants responds to these concerns.[32] A civil right to counsel does not mean that a lawyer must be provided in every case in which poor persons believe themselves to be aggrieved. Where revising the roles of key court personnel stems the forfeiture of rights, that step alone is sufficient. Where that step falls short, if legal assistance programs — either separately or in conjunction with the revised roles of court personnel and changes in the procedural rules — prevent the improper forfeiture of rights, there still may be no need for appointed counsel. But where those steps cannot prevent substantial injustice, a civil right to counsel must be recognized.

Drawing the line there might raise an objection from proponents of a broad-based civil right to counsel, proponents who fear that drawing the line too narrowly might undercut the broader claim rather than be the first step toward achieving the broader claim. Yet drawing lines and making hard choices in the civil right-to-counsel context is not new. The earliest articles on this subject struggled with this problem.[33] Even in the criminal context, defendants are not entitled to appointed counsel in all cases.

2. Philosophical objections to revising the roles of court personnel

Incorporating a civil right to counsel as part of a more comprehensive strategy neutralizes a second objection: that judges, mediators and clerks should not assist unrepresented litigants more than they currently do. I have described above the justifications for expanding their roles. The extent to which the roles expand directly affects the scope of a civil right to counsel.

With judges, for example, wherever we draw the line, judges will not be permitted to take certain actions. Where the prohibited actions are necessary to prevent the forfeiture of rights others must act. Context matters, and the roles of the players are interrelated. If nonjudicial court personnel are permitted to play an expansive role, or if evaluation tools demonstrate that assistance programs for unrepresented litigants are sufficient, the more active role of judges may be unnecessary. The key is not that judges must take certain actions, but that the legal system as a whole must be structured to provide justice for those without counsel.

3. Resources

Developing a civil right to counsel as part of a larger strategy responds to cost concerns. Seeking resources for a subset of cases, rather than for counsel for all unrepresented litigants in certain types of cases, results in a lower price tag. Moreover, the need for counsel becomes minimal to the extent that the other components of the strategy are effective. Revising the roles of the players is the most cost-effective response to the problem because it involves modifying roles for existing players rather than creating new resources. Similarly, the assistance programs short of appointing a lawyer are likely to be less expensive than full

representation. The appointment of counsel is necessary only where the less expensive options are ineffective.

We must compare any cost to the price of inaction. As we develop data on case outcomes, we must also develop data capturing the cost of the evictions that appointment of counsel could have prevented, the harm to parents and children from wrongful custody decisions, and the inefficiencies in the court system due to the presence of unrepresented litigants. These figures may demonstrate that appointed counsel, in some contexts, is less expensive than the costs that result from the failure to appoint counsel.

4. Legal arguments

The strategy advocated here strengthens the legal arguments in favor of appointed counsel. The constitutional arguments used in the civil right-to-counsel context invariably are framed in terms of the three factors set forth in *Matthews v. Eldridge*, and applied in *Lassiter*: private interest at stake, governmental interest and risk of erroneous deprivation.[34] The private-interest factor remains a strong argument under this strategy because the likely categories of cases for an expanded right to counsel, as in past challenges, will involve the potential loss of shelter or custody. When the combination of the private-interest and risk-of-error factors defines the pool of cases, the risk of erroneous outcomes dramatically increases. Any claims the courts make about their treatment of those without counsel evaporate when the cases are sorted on the basis of the risk of error in the first place. The third factor — that of the government's interest — is at least as strong under this strategy as in past challenges, and, as the risk of erroneous outcomes and unfairness increases, this factor becomes stronger.

B. Identifying and mobilizing allies

The discussion in section IIIA of this article identifies types of cases involving power imbalances as a starting point for an expanded right to counsel. A different power dynamic applies to the development of allies. Where those with power in the legal system oppose a civil right to counsel, that right will be difficult to achieve, but where those with power can be persuaded or forced to support it, the prospects are more promising.[35] Viewed in this light, the most instructive aspect of *Gideon* itself might be that attorneys general from 23 states joined amicus briefs supporting Clarence Gideon's petition.

The search for powerful allies underscores the political nature of the enterprise and the importance of the "access to justice" commissions. Formed pursuant to state supreme court rules, the commissions derive their members from the courts, organized bar, civil legal aid organizations and law schools. Imagining a successful civil right-to-counsel campaign that these key players do not support is difficult, even for jurisdictions that have not formed commissions.

The need to cultivate powerful allies is another reason to insist on the rigorous data collection described in section IIB of this article. The legal and political struggle for an expanded right to counsel would be easier to press if the reports from the past decade included data showing where lawyers were necessary to prevent erroneous case outcomes. While we cannot change the past, we can ensure that the efforts of the newly formed "access to justice" commissions and related entities do not similarly fall short. The measurement of case outcomes must be a consistent feature of future examinations of the operation of particular courts, assistance programs and unmet legal needs.

Cultivating powerful allies extends beyond the "access to justice" commissions. ABA President Michael Greco issued powerful statements supporting a civil right to counsel and appointed a Task Force on Access to Civil Justice charged to expand the network of state "access to justice" initiatives and to consider "the issues of a defined right to counsel in certain serious civil matters such as those that threaten the integrity of one's family, shelter or health."[36] In Wisconsin's *Kelly v. Warpinski*, 11 sitting and retired judges filed an amicus brief in support of the civil right-to-counsel litigation; they argued that "*pro se* litigants represent a significant and growing burden on a judicial system which is not well-equipped to deal with them."[37] Targeting custody cases involving domestic violence affords the opportunity to build bridges with mobilized allies fighting to achieve justice and safety for victims of domestic violence more generally.

C. Neutralizing opponents and targeting self-interest

Along with identifying and mobilizing allies comes the need to identify those with a self interest in the status quo and develop strategies to change their self interest so that they favor the provision of counsel. The extent to which many judges, mediators, clerks, lawyers and litigants benefit from a system with so many unrepresented litigants should not be underestimated. Despite the widespread complaints about the difficulties that unrepresented litigants cause, the absence of counsel allows the dockets to operate swiftly with minimal judicial oversight per case in high volume courts. Most non-defaulting cases in courts handling family and housing matters settle, and they settle quickly. In this sense, the system "works" for many of the "repeat players."[38]

The strategy outlined here recognizes the need to change the self interest of those who might otherwise resist the expansion of a right to counsel in civil cases. The primary justification for the first prong — expanding the roles of the judges, mediators and clerks — is the need to provide fair outcomes for those without counsel. This prong also should increase the likelihood that these players prefer the appointment of counsel. To prevent the unrepresented poor from forfeiting their rights, a more careful handling of cases will require court personnel to allocate more resources per case. Opposing lawyers currently face no repercussions for unethical behavior in the hallways as they press for settlements with unrepresented litigants. Lawyers, who understand that overreaching has ramifications in terms of discipline, reputation and speed in the handling of their cases, will have an easier time transacting business if the other side has representation.

V. Nonnegotiable bottom line

I do not intend to suggest here that a strategy focused on a context-based civil right to counsel will yield immediate success. Rather, the strategy is designed to respond to the flood of unrepresented litigants in the courts and the advent of "access to justice" commissions. A coherent "access to justice" movement articulates an overarching goal of

obtaining justice for all, including those without lawyers in civil cases. An expanded civil right to counsel is one component of a coordinated range of initiatives to achieve access to justice.

The nonnegotiable bottom line must be that those without counsel may not forfeit rights due to the absence of counsel. Narrowing the scope of the right to counsel and collecting data to demonstrate the risk of erroneous outcomes in these cases will hasten the gathering momentum for an expanded right to counsel. Cases pitting unrepresented litigants against represented ones present the greatest challenge to those involved. They also are a potential source of embarrassment to the legal system because they expose the difficulties in achieving fairness. A disciplined focus on these cases will shift the self interest of the players wedded to the status quo and move them toward a consensus for change. Where the articulated right-to-counsel claim is the least intrusive way to solve a problem that will not go away, the call for a civil *Gideon* might finally be answered.

The full-length version of this article was first published in Clearinghouse Review ©, Sargent Shriver National Center on Poverty Law, July-August 2006.

End notes

1. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (establishing the right to appointed counsel in criminal cases).
2. See, e.g., Jona Goldschmidt et al., *Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Court Managers (1998).* For data regarding unrepresented litigants in family law, housing, and bankruptcy courts, see Russell Engler, *And Justice for All — Including the Unrepresented Poor: Revisiting the Role of Judges, Mediators, and Clerks,* 67 Fordham Law Review 1987 (1999).
3. See, e.g., Legal Services Corporation, Documenting the Justice Gap In America: The Current Unmet Civil Legal Needs of Low-Income Americans (2005), www.lsc.gov/press/documents/LSC%20Justice%20Gap_Final_1001.pdf.
4. Robert Echols, *The Rapid Expansion of "State Access to Justice Commissions,"* Management Information Exchange Journal, Summer 2005, at 41, www.nlada.org/DMS/Documents/1125688879.69/MIE%20Journal%20summer%2005-ATJ%20article.pdf.
5. See, e.g., Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help,* 73 Fordham Law Review 969, 977 (2004); Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance,* 40 Family Court Review 36 (2002).
6. Engler, *supra* note 2, at 2011-2031.
7. *Id.,* at 1992-1998, 2007-2011 and 2031-2040.
8. See Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons,* 85 California Law Review 79 (1997).
9. See *id.*, see also Nancy Kaufman, Can we Talk: Communicating with Unrepresented Litigants, www.state.ma.us/obcbbo/talk.htm (last visited May 15, 2006) (guidance published by the Massachusetts Office of Bar Counsel, charged with prosecuting ethical misconduct by attorneys).
10. See Engler, *supra* note 6 at 1992-98, 2002-11.
11. See Goldschmidt et al., *supra* note 6, at 47-62.
12. Compare *id* at 52-61 (discussing judicial attitudes and strategies for handling cases involving at least one *pro se* litigant) with Cynthia Gray, Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants 51-57 (2005) (listing "Proposed Best Practices for Cases Involving Self-Represented Litigants").
13. See Engler, *supra* note 6 at 1998-2007 (discussing programs that assist unrepresented litigants inside and outside the courthouse); Model Rules of Prof'l Conduct R. 6.5 (2002) ("Nonprofit and Court-Annexed Limited Legal Services Programs").
14. See, e.g., Paula Hannaford-Agor and Nicole Mott, *Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations,* 24 Justice System Journal 163 (2003); www.findarticles.com/p/articles/mi_qa4043/is_200301/ai_n9198377#continue; John Roman et al, Urban Institute, *Estimating Costs and Benefits of Pro Se Litigants (2003);* Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment,* 35 Law and society review 419 (2001), www.findarticles.com/p/articles/mi_qa3757/is_200101/ai_n8942109.
15. See, e.g., Bonnie Rose Hough, *Evaluation of Innovations Designed to Increase Access to Justice for Self-Represented Litigants,* 7 Journal of the Center for Families, Children and the Courts (forthcoming 2006) (discussion draft at 5, on file with Russell Engler), www.courtinfo.ca.gov/programs/cfcc/resources/publications/journal/; Jessica Pearson & Lanae David, Center for Policy Research, The Hotline Outcomes Assessment Study: Final Report — Phase III: Full-Scale Telephone Study 5 (2002), www.nlada.org DMS/Documents/1037914822.9/hlexec.pdf. But for a critique challenging the hotline evaluation tools in Pearson and David's report, see Ross Dolloff, *Let's Talk about Values, Not Systems*, Management Information Exchange Journal, Summer 2003, at 38.
16. *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) (Clearinghouse No. 29,118).
17. The *Lassiter* court relied on the three elements articulated in *Matthews v. Eldridge*: "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." *Lassiter* 452 U.S. at 27 (citing *Matthews,* 424 U.S. 319, 335 (1976)). Regarding the risk of suffering substantial injustice, see Michael Greco, *Court Access Should Not Be Rationed: Defined Right to Counsel in Civil Cases Is an Issue Whose Time Has Come*, ABA Journal, Dec. 2005, at 6.
18. The ABA House of Delegates adopted Resolution 112A on August 7, 2006, at its Annual Meeting. *See,* http://abanet.org.
19. See, e.g., Boston Bar Association Report of the BBA (Boston Bar Association) Task Force on Unrepresented Litigants 26 (1998), www.bostonbar.org/prs/reports.htm; Goldschmidt et al., *supra* note 6, at 52-53 (stating that judges found maintaining their impartiality difficult where one litigant was unrepresented); Jona Goldschmidt, *Pro Se Litigation: How Are Courts Handling the Self-Represented?*, 82 Judicature 13, 17-18 (1998).
20. American Bar Association Commission on Immigration, Report to the House of Delegates: Recommendation 1, 307 (2006), www.abanet.org/publicserv/immigration/107b_comprehensive_immig_reform.pdf. However, because the proposal seems to call simply for the right to appear with counsel, rather than to have counsel appointed at public expense, the proposal provides limited guidance.
21. See, Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem,* 14 Housing Policy Debate 461, 485 (2003), www.fanniemaefoundation.org/programs/hpd/pdf/hpd_1404_hartman.pdf; Seron, et al., *supra* note 24, at 420; Russell Engler & Craig S. Bloomgarden, Summary Process Actions in Boston Housing Court: An Empirical Study and Recommendations for Reform, 5 (May 20, 1983)(unpublished manuscript, on file with Russell Engler).
22. The titles themselves are disturbing and revealing. See, e.g., William E. Morris Institute For Justice, Injustice In No Time: The Experience of Tenants in Maricopa County Justice Courts 8 (2005), www.lawhelp.org/documents/254951Injustice%20In%20no%20Time1_final 10-10-05 pdf?stateabbrev=/AZ/ (87 percent of landlords represented); Lawyer's Committee for Better Housing No Time for Justice: A Study of Chicago's Eviction Court 13 (2003), *www.lcbh.org/pdf/full_report.pdf* (53 percent of landlords represented); City Wide Task Force on Housing Court, 5 Minute Justice or "Ain't Nothing Going on But the Rent!": A Report of the Monitoring Subcommittee of the City Wide Task Force on Housing Court (1986).
23. *Frase*, 840 A.2d 114 (year?).
24. *Id.* at 131 (Cathell, J., concurring).
25. See Brief of Appellant Deborah Frase at 5, 6, & 29-32, *Frase*, No. 6 (Clearinghouse No. 55,347D).
26. Brief of *Amici Curiae* in Support of Petitioner Deborah Frase, filed by the University of Baltimore Family Law Clinic and the Women's Law Center of Maryland, at 21-28, *id.* (Clearinghouse No. 55,347A) (examining the available assistance programs).
27. See *id.*
28. Brief of Appellant Deborah Frase at 59, *id.*
29. Brief of Amici Curiae in Support of Petitioner Deborah Frase at 29, *id.*
30. Memorandum in Support of Petition Requesting that the Supreme Court Take Jurisdiction of an Original Action for Declaratory Judgment at 23, *Kelly*, No. 04-2999-OA (Clearinghouse No. 55,816B) (for case abstract, see 38 Clearinghouse Review 769 (March-April 2005)).
31. See Brief of Amici Curiae in Support of Petitioner Deborah Frase at 21-28, *Frase*, No. 6.
32. See Alan W. Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 Fordham Urban Law Journal 1213 (2002) (calling for "a comprehensive integrated system" to ensure "equal justice under the law for low-income persons").
33. Note, *The Indigent's Right to Counsel In Civil Cases*, 76 YALE LAW JOURNAL 545, 552-62 (1967).
34. *Matthews*, 424 U.S. at 335; *Lassiter,* 452 U.S. at 27.
35. I explore elsewhere the importance of understanding the civil Gideon initiative as an exercise in effectuating social change rather than framing legal claims. See my *Shaping a Context-Based Civil Gideon from the Dynamics of Social Change,* 15 Temple Political And Civil Rights Law review (forthcoming 2006).
36. Greco, *supra* note 28, at 6.
37. Brief of *Amicus Curiae* of Eleven County Judges in Support of Petition Requesting Supreme Court Take Jurisdiction of Original Action at 2, *Kelly,* No. 04-2999-0A.
38. See, e.g., Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change,* 9 Law and Society Review 95, 149 (1974) (describing relative success of repeat players versus one-shot players in court).

NLRB issues new guidelines for determining supervisory status

By Michael R. Brown and Andrew L. Eisenberg

On Oct. 2, 2006, the National Labor Relations Board published three decisions that set forth new guidelines for determining the supervisory status of employees under the National Labor Relations Act. In *Oakwood Healthcare, Inc.*, 348 N.L.R.B. No. 37 (Sept. 29, 2006), *Golden Crest Healthcare Center*, 348 N.L.R.B. No. 39 (Sept. 29, 2006), and *Croft Metals, Inc.*, 348 N.L.R.B. No. 38 (Sept. 29, 2006), the board re-evaluated its position with respect to the supervisory status of employees as a result of the finding by the United States Supreme Court in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001) that the board had misapplied its supervisory test with respect to professional employees.

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Background regarding the supervisory status of professional employees

Section 2(11) of the act defines a "supervisor" as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in conjunction with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

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29 U.S.C. § 152(11). Thus, under Section 2(11), if an individual: (1) has any one of the 12 specified authorities; (2) uses "independent judgment" in the exercise of any of those authorities; and (3) exercises this authority in the "interest of the employer," that individual is considered a "supervisor" for representation purposes under the act. At all times, the burden rests with the party asserting supervisory status to establish these three requirements.

When interpreting Section 2(11) of the act, the board previously relied in large part on the Supreme Court's decision in *NLRB v. Health Care and Retirement Corp.*, 511 U.S. 571 (1994), in which the Court held that nurses at a private nursing home facility who "directed" nurses' aides and other nonprofessionals in the provision of patient care were supervisors under the act. In that case, however, the parties stipulated that the nurses in question utilized "independent judgment" in undertaking this responsibility. Thereafter, the board routinely relied upon the "independent judgment" requirement of Section 2(11) in rejecting efforts by employers, particularly health care employers, to argue that nurses and other health care professionals were acting in a supervisory capacity.

The Supreme Court's *Kentucky River* decision

In 2001, the Supreme Court in *Kentucky River*, in a 5-4 decision authored by Justice Scalia, criticized the board's analytical approach in determining supervisory status, particularly the board's interpretation of the term "independent judgment" as used in Section 2(11) of the act. The Court found that the board's "independent judgment" test improperly focused on whether an employee (e.g., nurse or physician) uses ordinary professional or technical judgment in directing less skilled employees to deliver services in accordance with employer-specified standards. In *Kentucky River*, the Supreme Court affirmed the Sixth Circuit's refusal to enforce the board's decision that six registered nurses working for Kentucky River Community Care Inc. were not supervisors. In the past, nurses and physicians who direct other less skilled employees in providing patient care services routinely have been included in the bargaining unit on the grounds that the alleged supervisor was using ordinary professional or technical judgment in directing less skilled employees. Under the test articulated by the Supreme Court in *Kentucky River*, the test for supervisory status applies no differently to professionals than other employees.

Over the years, the board has struggled with adequately defining the terms "assign," "responsibly to direct," and "independent judgment," as those terms are used in Section 2(11) and applying them in a consistent fashion. As a result of its repeated failures to articulate a sustainable position, as noted in the *Health Care and Retirement Corp.* and *Kentucky River* cases, the board, in an attempt to secure further guidance and re-examine its guidelines for determining whether an individual is a supervisor under the act, requested amicus briefs from interested parties in July 2003. The parties were asked to address 10 particular supervisory questions raised by the board. Three years later, these three new decisions are the board's attempt to establish, with some finality, an approach to resolving issues regarding supervisory status that will withstand judicial scrutiny.

The board provides further guidance regarding the supervisory status of employees

In *Oakwood Healthcare*, the employer sought to exclude from a petitioned-for unit of registered nurses a group of "permanent" and "rotating" charge nurses. In determining the supervisory status of these nurses, the board clarified its position with respect to three terms used in the statutory definition of supervisor—the meaning of "assign," "responsibly to direct" and "independent judgment."

"Assign" and "responsibly to direct"

In *Oakwood Healthcare*, the board (Battista, Schaumber and Kirsanow with Liebman and Walsh dissenting) defined the term "assign" as the act of "designating an employee to a place (such as a location, department or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." Moreover, "assign" refers to the "designation of significant overall duties to an employee, not ... the ad hoc instruction that the employee perform a discrete task." For example, the board distinguished between "assigning" a nurse the responsibility for caring for a particular patient or group as opposed to telling that nurse to give a sedative to a particular patient.

The board defined the term "responsibly direct" as follows: "If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both responsible . . . and carried out with independent judgment." In particular, the board majority specified that the person directing the work must be held accountable if the directives are not properly carried out. As the board stated, "for direction to be 'responsible,' the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly."

Independent judgment

With respect to "independent judgment," the board in *Oakwood Healthcare* found that "independent judgment" regarding supervisory authority is different from "professional" judgment. To establish that an employee exercises "independent judgment," the judgment exercised must not be controlled by another authority. The determination whether a putative supervisor exercises independent judgment depends on the "degree" of discretion exercised by the employee rather than the "kind of discretion exercised—whether professional, technical, or otherwise." Thus, where an employee's work is controlled or dictated by "detailed instructions," company manuals or guidelines, "instructions from a higher authority," or provisions contained in the collective bargaining agreement, the board does not consider the employee's actions sufficiently "independent." The degree of discretion exercised must be more than merely "routine or clerical."

Particularly useful are examples given by the board regarding the exercise of independent judgment. For example, a nurse may exercise independent judgment in making hiring recommendations if, during the process, the nurse is asked to assess the applicant's experience, ability, attitude and character references. Similarly, the board explained that if the nurse weighs the individualized conditions and needs of a patient against the skills or special training of available nursing personnel, the nurse's assignment decision involves the exercise of independent judgment.

The board further stated that the mere existence of company policies "does not eliminate independent judgment from decision-making if the policies allow for discretionary choices." For instance, if the hospital has a policy that details how a nurse responds in an emergency, but the nurse has the discretion to "determine when an emergency exists" or has the authority to "deviate from that policy based on the charge nurse's assessment of the particular circumstances, those deviations, if material, would involve the exercise of independent judgment." The key factor in determining whether the "judgment" is "independent" is the amount of discretion allowed.

The board ultimately held in *Oakwood Healthcare* that the employer's permanent charge nurses (excluding emergency room charge nurses) were supervisors based on their "delegated authority to assign employees using independent judgment." The employer demonstrated that charge nurses made staffing assignments both "tailored to patient conditions and needs and particular nursing skills sets" and made patient assignments based upon their own assessment of the probable amount of nursing time each patient would require during the shift.

Part-time supervisors

The board also examined the supervisory status of the employer's "rotating" charge

nurses in *Oakwood Healthcare.*

These were registered nurses who were not assigned permanently as charge nurses but rather took turns filling in or "rotating" into that position. Their rotation schedule, worked out among themselves and on an ad-hoc basis, depended upon the needs of the unit and their particular work shift. The board held that putative supervisors must spend a "regular and substantial" part of their workday performing supervisory functions. The board noted that "regular" means "according to a pattern or schedule, as opposed to sporadic substitution." Although not setting a specific standard for determining what constitutes "substantial," the board noted that it has found supervisory status where putative supervisors spend only 10 to 15 percent of their work time performing supervisory functions. The board determined that the employer's rotating charge nurses were not supervisors because they did not rotate with any particular "regularity."

Application of the board's standards in *Golden Crest* and *Croft Metals*

Applying the standards articulated in *Oakwood*, the board (Battista, Schaumber and Kirsanow) in *Golden Crest*, 348 N.L.R.B. No. 39 (Sept. 29, 2006), determined that Golden Crest's charge nurses, who worked at a nursing home, did not "assign" or "responsibly direct" employees. In particular, the employer failed to establish that the charge nurses at issue were held accountable for the work performance of other employees and, thus, the charge nurses did not "responsibly direct" employees. The board found that charge nurses did not "assign" work to a group of certified nursing assistants (CNAs) where the charge nurses lacked the authority to require the CNAs to work past the end of their shift, to call-in CNAs when short-staffed or to change assignments during the course of the shift. In terms of "responsible direction to CNAs," although the board found that the charge nurses "direct" the work of CNAs, the board determined that the employer did not hold the charge nurses "accountable" for their actions in directing the CNAs. Specifically, the employer failed to provide any evidence that charge nurses experienced any "material consequences" to their terms and conditions of employment — positive or negative — as a result of their performance in directing the CNAs. As such, the employer's charge nurses were not supervisors.

In *Croft Metals Inc.*, 348 N.L.R.B. No.38 (Sept.29, 2006), the same board panel found that lead persons at a manufacturing plant were not supervisors because the employer failed to establish that the lead persons "assigned" work or exercised "independent judgment" when performing their purported supervisory functions. Here, the lead persons worked alongside their regular line or crew members and performed the same task or job on the line or in their department every day. The board found that the lead persons "responsibly direct[ed]" their line or crew members, and that lead persons had been disciplined by the employer if their crew failed "to meet production goals or because of other shortcomings of their crews." The record, however, reflected that the lead persons' actions were largely governed by the employer's policies, that the lead persons exercised little or no discretion and that any judgment they exercised was merely routine in nature.

Implications of the board's decisions

Unions' reaction to the decisions

Unions have been quick to decry the board's decisions. Mary Kay Henry, executive vice president of the Service Employees' International Union, perhaps today's fastest growing union in the country, stated that "the Bush administration's rulings are bad for nurses and their families, bad for patients, and coming at a time when we are already struggling to attract nurses back to the bedside to provide the quality of care our patients deserve."

Unions have several options to try to mitigate the impact of the board's decisions. For instance, they can attempt to negotiate collective bargaining agreements that will prevent an employer from assigning duties to an employee that would support a finding of supervisory status. They can seek to broaden contractual arbitration provisions if necessary in order to have issues regarding supervisory status resolved by arbitration rather than board proceedings. They can attempt to make greater use of voluntary recognition agreements in order to avoid NLRB review of supervisory status issues. Finally, should these options fail, they can seek legislative relief.

Next steps for employers

The board's decisions provide helpful guidance to employers in determining whether employees such as charge nurses or lead persons qualify as statutory supervisors under the act since the board majority has in a much clearer fashion delineated the functions and responsibilities an employer must assign an individual in order for the individual to qualify as a statutory supervisor.

For many employers, these decisions present an opportunity. Accordingly, we would recommend that employers:

- review positions currently considered supervisory to ensure that they can meet the requirements articulated by the board in its decisions, and
- where appropriate, consider filing unit clarification petitions with the board to have current members of the bargaining unit declared supervisors and thereby excluded from the bargaining unit.

Civil litigation and surveillance: Practical considerations for civil litigators

By Joseph M. Desmond and David Viens

Introduction

Video surveillance of allegedly injured plaintiffs is often the most persuasive evidence in a personal injury trial, and in some cases may determine the outcome of a case. While every picture is worth 1,000 words, good video surveillance often says the four words that defense lawyers are trained not to say to a jury: "The plaintiff is lying." The importance of the role of video surveillance in impeaching the plaintiff was best described by the Eastern District of Pennsylvania in *Snead v. American Export-Isbrandtsen Lines, Inc.*,[1] in the following passage:

> The main purpose for secret motion pictures of a plaintiff is to impeach his credibility. Films taken without the knowledge of the subject often have a dramatic impact in court. One who has described in elaborate detail his disabilities, their extent and duration, and the limitations they impose may be shown by the camera to be a fraud. The possibility that such pictures exist will often cause the most blatant liar to consider carefully the testimony he plans to give under oath.[2]

Video surveillance is not only an effective tool in cross-examining a plaintiff, but in many cases it is also substantive evidence that demonstrates the plaintiff's physical abilities. Such evidence may be used, at a minimum, to demonstrate that the plaintiff has a residual earning capacity that must be considered in light of a plaintiff's common law duty to mitigate his damages. When surveillance can be used as substantive evidence, and not merely for impeachment purposes, counsel should be cognizant of the duty to disclose the evidence to avoid its exclusion at trial.

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Notwithstanding the importance of surveillance to civil litigants, there is little guidance in the rules of civil procedure or in Massachusetts case law that is instructive on the permissible scope of surveillance or the obligations of counsel in the disclosure and use of video surveillance at trial. This article examines the substantive limits on the use of surveillance and the additional procedural considerations that must be weighed during the course of the litigation when surveillance is involved.

Permissible scope of surveillance activities

Investigation and surveillance efforts are constrained primarily by state and federal laws that provide private causes of action for invasion of privacy. There appears to be little or no authority in Massachusetts that would permit the exclusion in a civil case of surveillance evidence obtained in contravention of a person's right to privacy. In the criminal context, law enforcement surveillance is constricted by the Fourth Amendment, which protects citizens from unlawful searches and seizures by the government and operates to exclude from trial any illegally obtained evidence. The Fourth Amendment only applies to govern-

ment actors, however, and does not apply in civil cases to exclude illegally obtained evidence. Indeed, in criminal cases, the government may introduce evidence that was illegally obtained by private citizens and voluntarily handed over to the state where the government was not involved in obtaining the evidence or coercing its disclosure.[3] Exclusion of such evidence as "fruit of the poisonous tree" is justified only where the government participated in the activity that offends the individual's Fourth Amendment rights. Although the Fourth Amendment does not apply to non-government surveillance in civil litigation, Fourth Amendment jurisprudence will likely play a role in determining whether civil liability exists in a subsequent suit alleging invasion of privacy based on questionable surveillance tactics used in a prior personal injury suit.

State privacy law

The state privacy law, G. L. c. 214, § 1B, provides:

> A person shall have a right against unreasonable, substantial or serious interference with his privacy. The Superior Court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages.

The Superior Court decision in *DiGirolamo v. D.P. Anderson & Associates, Inc.*,[4] illustrates the risks that surveillance presents and sheds light on the permissible scope of surveillance activities in the context of G. L. c. 214, § 1B. In *DiGirolamo*, the plaintiff filed suit against a private investigative agency for invasion of privacy pursuant to G. L. c. 214 § 1B after the agency conducted surveillance of the plaintiff in connection with a workers' compensation claim. The agency had been retained to conduct surveillance of the plaintiff to determine the extent of her mobility and physical activity after she had suffered a broken leg during the course of her employment with the Metropolitan District Commission.

The plaintiff lived in a fourth-floor apartment that included a three-panel sliding glass door that led to a small balcony, and both the glass door and balcony were visible from the street. During surveillance of the plaintiff, investigators watched the plaintiff's apartment from a vehicle parked on the adjacent public street and photographed and videotaped the plaintiff at various times when the opportunity arose. After the plaintiff learned of the surveillance at a Department of Industrial Accidents hearing, the plaintiff filed suit against the agency, pursuant to G. L. c. 214, § 1B, for invasion of privacy.[5]

In considering the investigative agency's motion for summary judgment, the court first clarified the misleading language of the privacy statute,[6] and noted that a violation only occurs where the plaintiff has proven interference with his privacy that was "unreasonable *and* either substantial or serious."[7] The court next noted that because of the "breadth" and "inherent uncertainty" as to the meaning of these terms, courts must define the scope of the right to privacy "on a case-by-case basis, by balancing relevant factors, . . . and by considering prevailing societal values and the ability to enter orders which are practical and capable of reasonable enforcement."[8]

The court noted at the outset that investigators may generally observe, photograph or videotape subjects in *public* places, and that such surveillance violates no right to privacy.[9] The court stressed, however, that a gray area arises when subjects leave the public realm and enter the "privacy" of their own homes.

The precise issues the court framed were whether a private investigator violates a subject's statutory right to privacy under four different scenarios:

1. Where the investigator looks through the subject's window into her apartment with the naked eye;
2. Where the investigator looks at the subject with the naked eye when she walks out onto a balcony;
3. Where the investigator photographs, videotapes or looks at the subject with some degree of enhanced vision, such as a telescopic lens, when she walks out onto a balcony; and
4. Where the investigator photographs, videotapes or looks at the subject with some degree of enhanced vision while she remains inside her home.

After borrowing the logic from the criminal case law construing "reasonable expectation of privacy" in the Fourth Amendment context, the court concluded that only the fourth scenario above, *i.e.*, using enhanced vision to view the subject inside her home, would constitute an unreasonable and substantial or serious interference with the plaintiff's right to privacy in violation of G.L. c. 214, § 1B.[10]

In reaching this conclusion, the court adopted the United States Supreme Court's Fourth Amendment analysis from *Oliver v. United States*,[11] where the Court considered whether a government actor's observations of a person infringed upon the person's "reasonable expectation of privacy." In *Oliver*, the Court held that a reasonable expectation of privacy only exists when the person has an "actual expectation of privacy and the expectation is one that society recognizes as reasonable."[12] The *DiGirolamo* court also quoted the Second Circuit Court of Appeals' conclusion in *United States v. Taborda*,[13] the seminal case on enhanced visual surveillance, that:

> Observation of objects and activities inside a person's home by unenhanced vision from a location where the observer may properly be does not impair a legitimate expectation of privacy. However, any enhanced viewing of the interior of a home does impair a legitimate expectation of privacy.[14]

The court stated it was "both sensible and administrable" to apply this reasonable expectation of privacy analysis, which recognizes a distinction between unenhanced vision and enhanced vision, to its determination of when an interference with privacy is substantial or serious.

Applying this analysis to the case before it, the *DiGirolamo* court concluded that the investigators' observations of the plaintiff in her home, using their unenhanced vision and without trespassing, did not violate any reasonable expectation of privacy on the part of the plaintiff. The court concluded, however, that the use of enhanced vision in observing,

photographing or videotaping the plaintiff in her home, *i.e.*, through the use of binoculars or a telescopic lens, would violate the plaintiff's reasonable expectation of privacy and would thus constitute an unreasonable and substantial or serious interference with her privacy under G. L. c. 214, § 1B.[15]

With respect to the surveillance of the plaintiff when she exited her apartment to her balcony, which faced a parking lot and was clearly visible from the street, the court concluded that neither the investigators' unenhanced nor enhanced viewing of the plaintiff in this area violated any reasonable expectation of privacy on the plaintiff's part.[16] The court stated that "while standing on her balcony, [the plaintiff] enjoyed no greater right to be free from enhanced viewing than she did while standing on the street."[17] Thus, the court concluded that the investigators' observation and photographing of the plaintiff with enhanced vision while on the balcony did not constitute an unreasonable and substantial or serious interference with privacy under G. L. c. 214, § 1B.[18]

Right to privacy in the workplace

The *DiGirolamo* decision discusses the scope of the right to privacy in public places versus private residences. The decision does not, however, provide illumination as to when workplace surveillance impinged upon a subject's right to privacy. The recent Supreme Judicial Court decision in *Nelson v. Salem State College*[19] provides insight as to this aspect of the right to privacy in the surveillance and G. L. c. 214, § 1B context.

In *Nelson*, the plaintiff, a public employee of Salem State College, filed suit against her employer for invasion of privacy under G. L. c. 214, § 1B after learning she was secretly videotaped by her employer in an open area of her workplace while she changed clothing and applied sunburn medication to her upper chest area.[20] The plaintiff also asserted claims against the defendants under 42 U.S.C. § 1983, pursuant to the Fourth Amendment to the United States Constitution, alleging that the defendants' video surveillance of her workplace without a warrant violated her right to privacy.[21]

In *Nelson*, applying the same reasonable expectation of privacy analysis as that adopted in *DiGirolamo*, the court determined that the plaintiff had no reasonable expectation of privacy in the area of her workplace where she was secretly videotaped.[22] In reaching this conclusion, the court first noted that "[g]enerally speaking, business premises invite lesser privacy expectations than do residences."[23] However, the court further noted that "deeply rooted societal expectations foster some cognizable privacy interests in business premises."[24] Despite these deeply rooted societal expectations, the court stated that "persons cannot reasonably maintain an expectation of privacy in that which they display openly,"[25] and on the facts of the case, the court concluded that the plaintiff was videotaped in "an open work area" where there was no objectively reasonable expectation of privacy.[26]

In determining that the plaintiff's workplace was "open" and "public," and thus not subject to a reasonable expectation of privacy, the court focused on the open access to the workplace by the public and other workers, as well as the physical layout of the office. The court noted that the office where the plaintiff worked was open to the public throughout the day; patrons were not required to check in; and numerous volunteers and employees could access the office with keys in their possession. As to the physical layout of the office, the court noted that the office was located on a busy commercial street. The front window of the office encompassed the entire front wall and provided passersby a full view of the interior of the office, including the plaintiff's desk and other individuals in the office. The space was not enclosed, and could be entered at any time by anyone in the center, without prior notice. The court concluded that this office, by any reasonable interpretation, constituted an "open work area."[27] Based on the "open" and "public" nature of the plaintiff's workplace, the court concluded the employer's secret videotaping of the plaintiff did not infringe upon any reasonable expectation of privacy.

Combining the rationales of the *DiGirolamo* and *Nelson* decisions, it appears that investigators would be free to conduct surveillance of a subject while the subject was in his workplace if the workplace is deemed to be "an open workplace" or "public," as described in the *Nelson* case. In most cases, this determination should be reasonably easy to make and it will likely be readily apparent whether a particular workplace is "open" or "public." For example, a restaurant or department store where a subject was employed would clearly be deemed "open" and "public," as members of the public are free to enter such businesses at their will.

Audio recording

An additional statute that counsel must be cognizant of prior to commencing surveillance of a subject in civil litigation is G. L. c. 272, § 99, entitled "Eavesdropping, Wire Tapping, and other Interception of Communications." This statute unambiguously proscribes the recording of another's conversation without the consent of the person being recorded and imposes criminal punishments for violations.[28] In addition to potential criminal liability, the statute also provides a civil cause of action for any person whose oral communications were intercepted, used or disclosed against any person that intercepts, discloses or uses an intercepted oral communication. The statute specifically allows punitive damages, as well as an award of attorneys' fees, for violations. Under the statute, there is no requirement that the recording be made willfully to support a damages claim,[29] nor is the proscription limited to areas where the subject has a reasonable expectation of privacy.

Effect of prohibition on *ex parte* communications on surveillance

A related concern for counsel initiating surveillance is the need to remain compliant with the ethical rules relative to *ex parte* communications with represented persons. In most cases, the need for surveillance does not arise until after a claim has been asserted or a suit has commenced. In either situation, the claimant will likely be represented by counsel, thus inhibiting opposing counsel's ability, under the ethical rules, to communicate with the represented party.[30] Counsel's failure to comply with the ethical prohibitions in this regard may result in evidentiary sanctions,

such as the exclusion of any evidence obtained from the surveillance in contravention of the ethical rules. Counsel cannot make an end-run around the prohibitions of Rule 4.2 by hiring an investigator or some other agent to communicate with a represented party during surveillance.[31] Where counsel directs an agent to engage in activity that would be violative of the ethical rules if performed by counsel, the unethical conduct may be imputed to counsel and may result in evidentiary sanctions, in addition to potential professional discipline.[32]

Although there does not appear to be Massachusetts precedent involving the imposition of evidentiary sanctions resulting from an ethical violation committed in the context of surveillance, the case of *Midwest Motor Sports v. Arctic Cat Sales, Inc.*[33] provides insight into the possible implications of such a violation. In *Midwest Motor Sports*, during discovery the attorney for the defendant-franchisor hired a private investigator to visit the plaintiff-franchisee's showrooms to surreptitiously record conversations with the franchisee's employees in order to elicit damaging admissions from the employees for use at trial. Upon learning of these tactics, the plaintiff filed a motion seeking to disqualify opposing counsel and seeking sanctions. After considering the issue, the court found that counsel had violated ethical Rule 4.2 by causing the communication by his investigator with a represented party.[34] As a sanction, the court excluded from evidence the tape recordings, as well as any evidence obtained as a result of the recordings. It should be noted that the court's ruling was supported by the explicit finding that the defendant's attorney directed the investigator to communicate with and record the communications with the plaintiff's employees.[35]

Pretext interviews

Counsel utilizing surveillance must also be cautious of authorizing investigators to engage in conduct that violates G. L. c. 175I, § 3, which prohibits the use of "pretext interviews" in certain circumstances in the insurance context. This consideration applies whether or not the claimant is represented by counsel. "Pretext interviews" are statutorily defined as an interview by a person who attempts to obtain information about a person and who: (1) pretends to be someone he is not; (2) pretends to represent a person he is not in fact representing; (3) misrepresents the true purpose of the interview; or (4) refuses to identify himself upon request.[36]

The statute permits insurance support organizations[37] to use pretext interviews to obtain information regarding an individual where there is a "reasonable basis for suspecting criminal activity, fraud or material misrepresentation in connection with the claim," and where there is "specific information available for review by the [insurance] commissioner" to support the pretext interview.[38] Thus, a private investigator hired by an insurance defense firm or insurance company to obtain information about a person may not engage in fishing expeditions through the use of pretext interviews without a foundation for suspecting fraud or material misrepresentation. It should be noted that the statute absolutely proscribes the use of pretext interviews to obtain information about a person from another person or institution that has a generally or statutorily recognized privileged relationship with the subject.[39] Generally or statutorily recognized privileged relationships include the relationship between attorney and client, husband and wife, priest and penitent, patient and psychotherapist, etc.[40]

The statute does not create a private right of action for a violation of G. L. c. 175I, § 3. However, if a pretext interview is used by an investigator to obtain personal or privileged information about a person, in violation of § 3, and that information is subsequently disclosed to the insurance company or counsel that hired the investigator, it would appear that the person about whom the information was obtained could seek monetary damages under G. L. c. 175I, § 20.[41]

Discovery and pretrial disclosure of surveillance

There is no definitive authority in Massachusetts as to whether surveillance must be disclosed prior to trial, and if so, when the disclosure must be made. Several considerations must be taken into account in determining whether and when disclosure must be made.

It is clear that surveillance of personal injury plaintiffs falls within the privilege afforded by the work product doctrine under Mass. R. Civ. P. 26(b)(3). Both the federal rules and the Massachusetts rules of procedure provide a qualified privilege for "documents and tangible things" that are prepared in anticipation of litigation or for trial by the opposing party.[42] The work product protection is limited to "documents and tangible things" and does not prohibit the discovery of underlying facts. Thus, as the District Court for the District of Massachusetts has recognized, observations of a defendant's investigators, as well as relevant information with respect to the mechanics of surveillance, are proper subjects of discovery.[43]

The work product privilege can be overcome by a showing that the party seeking the discovery has a substantial need of the materials in the preparation of that party's case, and is unable without undue hardship to obtain the substantial equivalent of the material by other means.[44] The federal rules require that a party seeking to withhold materials pursuant to the work product doctrine fully identify the materials withheld.[45] The purpose of the disclosure requirement under the federal rules is to enable the opposing party to assess the applicability of the privilege.[46] The text of the Massachusetts rule does not include this requirement, though trial courts generally impose this requirement in response to discovery motions seeking to flesh out the basis for the claim of privilege.[47]

Plaintiffs seek to overcome the work product privilege by demonstrating that there is a "substantial need" for the material and that the plaintiff is unable to obtain the substantial equivalent without undue hardship.[48] The second prong of this test is readily satisfied, as the videotape is actually unavailable through any other means regardless of the hardship. The first prong is much less obviously in favor of disclosure, and a strong argument can be advanced that plaintiffs should not be entitled to obtain the impeaching evidence on the grounds that it is necessary to prepare the plaintiff's testimony. Stated another way, it is clear that the "substantial need" prong cannot be satisfied by the need for plaintiff's counsel to be aware of the discrepancies between his client's testimony and actions in order to tailor his testimony to avoid damaging cross-

examination.[49] Rather, the "substantial need" arises, if at all, from the need to examine the accuracy and integrity of the photographer and the photographs.[50] Plaintiffs also argue that the disclosure is necessary in order to prepare rebuttal evidence.[51] Weighing these considerations, many courts in other jurisdictions have determined that surveillance videotapes are discoverable.[52]

Several courts have determined that video surveillance tapes are not merely impeachment evidence, thus bolstering the argument in favor of pre-trial disclosure. In compelling the disclosure of surveillance tapes, the 5th Circuit Court of Appeals in *Chiasson v. Zapata Gulf Marine Corp.*[53] explained that "impeachment evidence" is that evidence that is offered to "discredit a witness … to reduce the effectiveness of his testimony by bringing forth evidence which explains why the jury should not put faith in his testimony, while substantive evidence is "that which is offered to establish the truth of a matter to be determined by the trier of fact." The *Chiasson* court noted that films that tend to show a plaintiff's physical condition are highly relevant and may in fact establish the most important facts in the entire case.[54] Accordingly, the substantive evidence could not be withheld as "impeachment" evidence. Courts in other jurisdictions have also required the disclosure of surveillance tapes in some cases in which the videotape is proffered solely for impeachment purposes.[55]

Timing of disclosure

Defense lawyers may understandably seek to withhold surveillance evidence until the time of trial in an attempt to maximize the effect on cross-examination by impeaching a plaintiff with videotape of the plaintiff that he has never seen. This tactic theoretically does not permit the plaintiff to tailor his testimony at trial to minimize the impact of surveillance. Once again, the rules provide no clear guidance as to the timing of disclosure, though a generally followed approach of requiring the plaintiff to submit to a deposition prior to disclosure emerges from a review of the case law from other jurisdictions.

Under the federal court rules, a party must identify "each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment …" at the outset of the case without waiting for a discovery request.[56] While the Massachusetts rules do not include the automatic disclosure provisions of the federal rules, the Massachusetts rules require parties to supplement responses with respect to any question directly addressed to the "identity and location of persons having knowledge of discoverable matters" in a "seasonable" fashion.[57] These disclosure requirements are subject to the claims of privilege noted above.

Both the state and federal rules have additional disclosure provisions that must be considered at the point of time the case is set for trial. The federal rules require parties to file a disclosure statement 30 days in advance of trial, identifying each witness whom the party "may call" other than those witnesses used "solely for impeachment."[58] The Massachusetts Superior Court Standing Order requires parties to list the names and addresses of each trial witness, other than rebuttal witnesses, in the pre-trial memorandum that is submitted to the court at the final pre-trial conference. "Rebuttal witnesses" are narrowly defined as those witnesses that cannot reasonably be anticipated prior to trial.[59] This caveat leaves the question open as to whether disclosure is required, or whether investigators may be called as rebuttal witness to refute the claims made by the plaintiff on the witness stand as to the extent of his disability. There appears to be no clear answer to this question.

While the consensus of authority from other jurisdictions indicates that surveillance materials should be disclosed, trial courts ordering the production of surveillance materials have fashioned discovery orders that balance the competing interests of the parties. Courts requiring disclosure have generally recognized the importance of requiring the plaintiff to submit to a deposition *before* the disclosure of the surveillance video.[60] For instance, in *Snead*,[61] the trial court ordered that the defendant did not need to answer interrogatories inquiring whether the defendant had obtained video revealing the true nature and extent of the plaintiff's injuries until the plaintiff's testimony was memorialized in deposition. Further, the court ordered that the disclosure "should take place as close to the time of trial as possible, but before the final pre-trial conference."

Conclusion

Practitioners should be familiar with the myriad potential pitfalls in connection with the use of surveillance. While surveillance can certainly be a powerful tool in the defense of personal injury actions, caution must be taken to ensure compliance with the applicable rules and statutes. Such caution is necessary in order to avoid the risk of exclusion of favorable evidence at trial, as well as the various other potentially adverse consequences discussed in this article.

End notes

1. 59 F.R.D. 148 (E.D. Pa. 1973).
2. *Id.* at 150.
3. *Commonwealth v. Leone*, 386 Mass. 329, 333 (1982) (evidence discovered and seized by private parties admissible without regard to the methods used, unless state officials have instigated or participated in the search); *District Attorney for the Plymouth Dist.* v. *Coffey*, 386 Mass. 218, 221 (1982) ("evidence illegally obtained by private parties and turned over to the police is not a violation of the Fourth Amendment [to the United States Constitution]"); *Commonwealth* v. *Richmond*, 379 Mass. 557, 561-562 & n.2 (1980) (mother intercepted defendant's incriminating letter to daughter and turned letter over to police; suppression not required even if interception were held unlawful); *Commonwealth* v. *McCambridge*, 44 Mass. App. Ct. 285, 289 (1998) (no violation of State or Federal Constitution "when evidence is seized by private parties who are not acting as agents of the police and subsequently turned over to the police"); *Commonwealth* v. *Storella*, 6 Mass. App. Ct. 310, 313 (1978) (same).
4. 10 Mass. L. Rep. 137 (1999).
5. *Id.* at *1-2 & n2.
6. The statute provides that "[a] person shall have a right against unreasonable, substantial or serious interference with his privacy." G. L. c. 214, § 1B. Although the language appears to proscribe interference that is "unreasonable *or* substantial *or* serious, the Supreme Judicial Court has made it clear that the plaintiff must show that the interference was unreasonable *and* either substantial or serious." *DiGirolamo*, 10 Mass. L. Rep. at *5; *Schlesinger* v. *Merrill*

Lynch, Pierce, Fenner & Smith, Inc., 409 Mass. 514, 517-519 (1991); O'Connor v. Police Comm'r of Boston, 408 Mass. 324, 330 (1990).

7. *Nelson* v. *Salem State College*, 446 Mass. 525, 536 (2006), citing *Schlesinger*, 409 Mass. at 517-519. The plaintiff must also show that there was a "gathering and dissemination of private information." *Nelson*, 446 Mass. at 536. In the surveillance context, this requirement is easily met where the investigator hands the products of the surveillance, *i.e.*, photographs, videotape, etc., over to the counsel or insurance company who hired the investigator. See *id.*; *Schlesinger*, 409 Mass. at 517, and cases cited.
8. *DiGirolamo*, 10 Mass. L. Rep. at *5, quoting *Schlesinger*, 409 Mass. at 519.
9. *DiGirolamo*, 10 Mass. L. Rep. at *6; *Cefalu* v. *Globe Newspaper Co.*, 8 Mass. App. Ct. 71, 77 (1979) ("The appearance of a person in a public place necessarily involves doffing the cloak of privacy which the law protects.").
10. *DiGirolamo*, 10 Mass. L. Rep. at *6-8; *Vega-Rodriguez* v. *Puerto Rico Telephone Co.*, 110 F.3d 174, 178 (1st Cir. 1997); *Smith* v. *Maryland*, 442 U.S. 735, 740 (1979); *Katz* v. *United States*, 389 U.S. 347, 361 (1967).
11. 466 U.S. 170 (1984).
12. *DiGirolamo*, 10 Mass. L. Rep. at *8; *Oliver* v. *United States*, 466 U.S. at 177; *Smith*, 442 U.S. at 740; *Vega-Rodriguez*, 110 F.3d at 178.
13. 635 F.2d 131 (2d Cir. 1980) (involving visual surveillance conducted into activities of one apartment through telescope located in another apartment).
14. *Id.* at 139.
15. *DiGirolamo*, 10 Mass. L. Rep. at *11-17.
16. *Id.* at *15-17.
17. *Id.* at *16; *see United States* v. *Kim*, 415 F. Supp. 1252, 1257 (D.Haw. 1976). The court noted, however, that the privacy analysis regarding the plaintiff's balcony was fact specific, and that there could be other balconies that, "because of their isolation or their height, [are] not readily seen from the street and may warrant a different privacy analysis. *DiGirolamo*, 10 Mass. L. Rep. at *16 n.7.
18. *DiGirolamo*, 10 Mass. L. Rep. at 16-17.
19. 446 Mass. at 525.
20. *Id.* at 526. The plaintiff alleged that the defendants' making, use, possession or viewing of the videotapes of the plaintiff violated her right to privacy under G. L. c. 214, § 1B.
21. *Id.* The plaintiff also alleged that the college and the commonwealth were negligent in training and supervising the individual defendants by permitting the installation and operation of the video camera in her workplace. *Id.* This claim is of no relevance for the purposes of this article and therefore is not discussed.
22. *Id.* at 534.
23. *Id.* at 534, quoting *Vega-Rodriguez*, 110 F.3d at 178.
24. *Id.* at 534, quoting *Vega-Rodriguez*, 110 F.3d at 178-179.
25. *Id.* at 534, quoting *Vega-Rodriguez*, 110 F.3d at 181.
26. *Id.* at 534-535.
27. *Id.*
28. *Commonwealth* v. *Hyde*, 434 Mass. 594, 598-599 (2001). In *Hyde*, the Supreme Judicial Court discussed the strict nature of the statute and the broad limitations on its application. *Id.* The court noted that the Massachusetts Eavesdropping Statute is much stricter that its counterpart in other states or the federal equivalent which focus upon the speaker's expectation of privacy. *Id.* Criminal law cases decided under the statute have stressed that an individual may only make an audio recording of someone's speech with their explicit or implicit consent. *See id.* 602-604; *Commonwealth* v. *Jackson*, 370 Mass. 502, 505-507 (1976). The *Hyde* Court explicitly concluded that secret communications that are prohibited by the statute are not limited to "situations where an individual has a reasonable expectation of privacy. *Hyde*, 434 Mass. at 601, citing *Jackson*, 370 Mass. at 506. It is evident from the court's strict reading of the statute that an audio surveillance of someone would require the other party's consent before such recording may take place without regard to whether the recording took place in public. *Hyde*, 434 Mass. at 601.
29. *See Birbiglia* v. *St. Vincent Hospital*, 427 Mass. 80, 87 (1998).
30. Rule 4.2 of the Massachusetts Rules of Professional Conduct states that:

    In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

31. *See, e.g.*, *Holdren* v. GMC, 13 F. Supp. 2d 1192, 1194-1195 (D.Ks. 1998) (finding violation of the Kansas version of Rule 4.2). In *Holden*, the court noted that although there was no allegation or evidence that plaintiff's counsel directly contacted any GM employees, Rule 8.4(a) of the Model Rules of Professional Conduct prohibited a lawyer from violating or attempting to violate the rules of professional conduct "through the acts of another." *Id.* Thus, since plaintiff's counsel was barred under Rule 4.2 from communicating with certain GM employees, he could not circumvent Rule 4.2 by directing his client to contact these employees. *Id.*
32. Rule 8.4(a) of the Massachusetts Rules of Professional Conduct states:

    It is professional misconduct for a lawyer to:

    (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

33. 347 F.3d 693 (8th Cir. 2003).
34. *Id.* 698-699. The court also found a violation of South Dakota's ethical Rule 8.4(c), which prohibited "conduct involving dishonesty, fraud, deceit or misrepresentation." *Id.*
35. *Id* at 698.
36. G. L. c. 175I, § 2.
37. G. L. c. 175I, § 2. The definition of insurance support organization includes:

    Any person who regularly engages, in whole or in part, in the practice of assembling or collecting information about natural persons for the primary purpose of providing the information to an insurance institution or insurance representative for insurance transactions.

38. G. L. c. 175I, § 3.
39. *Id.* The statutes provides in full:

    No insurance institution, insurance representative, or insurance-support organization shall use or authorize the use of pretext interviews to obtain information in connection with an insurance transaction; provided, however, that a pretext interview may be undertaken to obtain information from a person or institution that does not have a generally or statutorily recognized privileged relationship with the person about whom the information relates for the purpose of investigating a claim where, based upon specific information available for review by the commissioner, there is a reasonable basis for suspecting criminal activity, fraud or material misrepresentation in connection with the claim.

40. *See In re Pappas*, 358 Mass. 604, 607 & n.4 (1971).
41. *See* G. L. c. 175I, §§ 13, 20.
42. Rule 26(b)(3) provides:

    Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

43. *Papadakis v. CSX Transportation, Inc.*, 233 F.R.D. 227, 228 (D.Mass. 2006).
44. *See* Fed. R. Civ. P. 26(b)(3); Mass. R. Civ. P. 26(b)(3).
45. *See* Fed. R. Civ. P. 26(b)(5); which provides:

    Claims of Privilege of Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation materials, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to asses the applicability of the privilege or protection.

46. *Id.*
47. *See, e.g.*, *Abraham v. Massad*, 2006 Mass. Super. LEXIS 70 (2006); *G.E. Capital Corp. v. MHPG, Inc.*, 2005 Mass. Super. LEXIS 562 (2006); *St. Paul Mercury Ins. Co. v. Dick Corp.*, 2005 Mass. Super. LEXIS 451 (2005); *Allmerica Fin. Corp. v. Certain Underwriters of Lloyd's London*, 17 Mass. L. Rep. 665 (2004).
48. *Id.*
49. *See Snead*, 59 F.R.D. at 148.
50. *Id.*
51. *Id.*
52. *Evan v. Estell*, 203 F.R.D. 172, 175 (2001); *Papadakis*, 233 F.R.D. at 228, citing *Chiasson* v. *Zapata Gulf Marine Corp.*, 988 F.2d 513, 517-18 (5th Cir. 1993); *Martin* v. *Long Island R.R. Co.*, 63 F.R.D. 53, 54 (E.D.N.Y. 1974); *Blyther* v. *Northern Lines, Inc.*, 61 F.R.D. 610, 612 (E.D. Pa. 1973). See also *DiMichel* v. *South Buffalo Ry. Co.*, 80 N.Y.2d 184, 196-198 (N.Y. 1992); *Cabral* v. *Arruda*, 556 A.2d 47, 49-50 (R.I. 1989); *Dodson* v. *Persell*, 390 So.2d 704, 707-708 (Fla. 1980); *Seaha* v. *Abdow Corp.*, Civil Action No. 96-30055-MAP (Mem. and Order Mar. 12, 1997). It is sometimes argued that the content of a surveillance video is privileged as trial preparation materials and therefore excluded from discovery under Fed. R. Civ. P. 26(b)(3). This privilege, however, has its exceptions. Rule 26(b)(3) allows discovery where a party can show that there is a "substantial need" for the material and the party is unable, without undue hardship, to obtain the "substantial equivalent of the materials" by other means. Most courts in deciding this issue have determined that surveillance videos are discoverable because of their nature, and the fact that a party would not be able to obtain equivalent materials, since, the surveillance video itself was taken at a particular time and place that can never be replicated.
53. *Chiasson* v. *Zapata Gulf Marine Corp.*, 988 F.2d at 517.
54. *See Snead*, 59 F.R.D. at 148.
55. See *Evan*, 203 F.R.D. at 175.
56. Fed. R. Civ. P. 26(a)(1)(A).
57. Mass. R. Civ. P. 26(e).
58. Fed. R. Civ. P. 26(a)(3).
59. *See* Superior Court Standing Order 1-88.
60. *See, e.g.*, *Snead*, 59 F.R.D. at 148; *Evan*, 203 F.R.D. at 175; *Gibson* v. *National Railroad Passenger Corp.*, 170 F.R.D. 408, 410-411 (1997).
61. 59 F.R.D. at 151.

THE *AHLBORN* CASE AND ITS IMPLICATIONS FOR MEDICAID RECOVERIES IN MASSACHUSETTS

ARKANSAS DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL. V. AHLBORN, 126 S. CT. 1752 (2006)

By Charlotte E. Glinka, Esq. and David W. White-Lief, Esq.

In what may cautiously be considered a landmark victory for injured plaintiffs, a unanimous United States Supreme Court ruled on May 1, 2006, that any Medicaid claim for reimbursement from a personal injury settlement is limited to that portion of the settlement allocated for past medical expenses. *Arkansas Department of Health and Human Services, et al. v. Ahlborn*, 126 S. Ct. 1752 (2006). Before this decision, the state courts had been split on whether Medicaid could assert a lien against the entirety of any third party recovery, regardless of the type of claim or the damages alleged. With *Ahlborn*, the Supreme Court has definitively ruled on this issue, lending clarification to a previously murky issue. While we should be heartened by the Court's decision in favor of injury victims, it would be prudent to proceed carefully when applying the *Ahlborn* ruling to future settlements here in Massachusetts.

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The case

Heidi Ahlborn was a 19-year-old college student in Arkansas who suffered severe brain damage and other serious injuries in a car accident in 1996. Because she did not have assets sufficient to cover her medical costs, she applied for and received medical assistance benefits from the state's Medicaid program through the Arkansas Department of Human Services (ADHS). The cost of her medical expenses under the Medicaid program totaled about $215,000.00. Ahlborn subsequently filed a personal injury action in state court to recover for her injuries and other damages arising from the motor vehicle accident, including her permanent physical injuries and impairments, pain and suffering, mental anguish, past and future medical costs, and past and future lost earnings.

Medicaid asserted a right to recover the amounts it had expended for her medical expenses from any subsequent recovery Heidi Ahlborn might receive in the tort action, and periodically notified Ahlborn's attorney of its claim. Arkansas state law required that before reaching any settlement, Medicaid was to be given "notice and a reasonable opportunity to establish its interest" in the expected proceeds. State law also mandated that as a condition to receiving Medicaid benefits, the individual was required to assign his or her right to recover the full amount of those expenses from any responsible third party.[1] Although not named as a party in the original suit, Arkansas' Medicaid department subsequently intervened in the lawsuit with respect to its lien.

In 2002, Ahlborn settled her lawsuit against the tortfeasors for the sum of $550,000.[2] There was no allocation of this sum among the various categories of damages, and the state's Medicaid department had not participated in the settlement negotiations. After the settlement, Ahlborn filed a declaratory judgment in federal District Court action seeking to establish that full repayment of the state's Medicaid's lien would be a violation of federal Medicaid law, since it would require repayment to Medicaid from amounts that were intended to compensate her for damages other than medical expenses. As part of the declaratory judgment action, it was determined and stipulated that the reasonable value of Ahlborn's damages was in excess of $3 million, or nearly six times the settlement figure. It was also stipulated that the portion of the settlement amount that constituted medical costs in the settlement was a pro rata one-sixth share of the Medicaid expenses, or $35,581. Ahlborn argued that, under federal law, it was only this portion of the settlement proceeds that was subject to repayment to Medicaid. The District Court found that Medicaid was entitled to be repaid the full amount of its medical expenditures. The decision was reversed by the 8th Circuit Court of Appeals, which held that Medicaid was entitled only to the reduced pro rata amount.[3] The Supreme Court then unanimously affirmed the judgment of the 8th Circuit.

The decision

The issue before the Court was whether Arkansas law, which ADHS argued allowed a lien for the entirety of the Medicaid benefits paid, was enforceable under federal law. The Court looked to the federal "anti-lien statute," which prohibits the placement of a lien on "the property of any individual prior to his death on account of medical assistance paid . . . on his behalf under the state plan." 42 U.S.C. § 1396p(a)(1). The Arkansas Medicaid department attempted to argue, however, that Ahlborn's settlement was, in effect, the property of the state to the extent of its lien. The Court rejected this argument and ruled that the anti-lien statute precludes a state from attaching or encumbering any portions of a settlement from third party liability claims that are not designated as medical payments. In doing so, the Court focused on the explicit language of the statute, which states that Medicaid was entitled only to recovery of payments for medical care. 42 U.S.C. § 1396a(25)(H); 42 U.S.C. §1396k (a). The Supreme Court thus found that a state may have an assignment of rights only to the extent that a portion of the settlement proceeds is actually allocated as payment for medical expenses. Any payment beyond that amount from the recipient's pain and suffering or lost earnings damages would violate the anti-lien provision of the Medicaid Act.

Significantly, the Supreme Court seems to have rejected the presumption that the state may be entitled to any greater priority in the division of settlement proceeds than the injured plaintiff; monies allocated to other aspects of an injured party's damages are to be given the same consideration.

The Court also dealt with the issue raised by the state of Arkansas that any ruling that would limit the state's right to recover the full amount of its lien would potentially lead to "settlement manipulation," that is, the risk that parties could construct a settlement that would "allocate away" the state's interest. The Court said that this scenario can easily be avoided by securing the state's agreement to any proposed settlement in advance, or by submitting the proposal to the local court for a determination of an appropriate division of the settlement assets. The Court reasoned that the risk of underestimating the value of the medical damages was counter-balanced by the risk that allowing "absolute priority" to the state may inhibit the settlement of cases or unfairly compensate injured victim in others.

The Massachusetts Medicaid lien statute

While *Ahlborn* is a significant decision affecting the rights of injured plaintiffs, the implications of the decision in Massachusetts are still being tested. On the one hand, it would seem that the decision may encourage earlier settlements of cases involving Medicaid liens, because the settlement amounts can be allocated among various items of damages with only a portion of the total amount designated for medical costs. On the other hand, it may prove difficult to arrive at an agreement on a division of the settlement proceeds in cases involving substantial Medicaid payments. Either way, it will be important to involve the commonwealth in the process as early on as possible, and to keep it apprised of developments in the case as it moves forward.

The state's Medicaid statute provides, in part, that:

> When any claimant receives payment from a liability or workers' compensation insurer or any other third party, the claimant shall repay to the department and the division of medical assistance the total of all public assistance benefits, both financial and medical, provided by said agencies on or after the date of the loss to or on behalf of the claimant, the claimant's spouse or children, and any other individual the claimant is required by law to support; provided, however, that on the date of the loss the claimant was already eligible for medical assistance benefits, the claimant shall repay only medical assistance required and any increase in financial assistance that occurred as a result of the accident, illness, injury or other incident.
>
> Any person receiving public assistance benefits recoverable under this section shall assign to the commonwealth an amount equal to the benefits so provided from the proceeds of any such claim against the third party.
>
> The commonwealth shall be subrogated to a claimant's entire cause of action or right to proceed against any third party and to a claimant's claim for monies to the extent of assistance provided . . . .

G.L. c. 18, § 5G.

The Medicaid statute also provides that the state may have "a separate and independent cause of action to recover from any third party" the benefits it has paid on behalf of a recipient or may intervene in any civil action brought by a claimant.

Guidance for the plaintiffs' personal injury attorney

In any case in which Medicaid has made or will be making payments for medical expenses, consider the following strategies:

- Promptly notify the commonwealth, in writing, as required by G.L. c. 18, § 5G, "upon commencement of a civil action or other proceeding to establish the liability

of any third party . . . ."

- Request a complete itemization of the commonwealth's lien at the outset of the case, and if treatment is continuing, update your lien information periodically.

- If liability is contested, or there is limited insurance, and the ultimate settlement will likely be less than the full value of the case for the claimant, inform the state that any reimbursement from the settlement proceeds for medical expenses will need to be apportioned based on the holding in *Ahlborn*.

- Begin a dialog with the commonwealth as soon as practical before entering into any settlement discussions, and continue to confer with the commonwealth throughout the negotiation process. To the extent you can reach an agreement over the division or apportionment of any settlement proceeds early in the process, the more likely it is that you will reach a compromise that is satisfactory to all parties. In addition, this allows the commonwealth the opportunity to understand and appreciate the factors that go into any settlement – i.e., the strengths and/or weaknesses of liability, comparative negligence, if any, the extent of the plaintiff's non-medical damages and other factors.

- To the extent an agreement as to the equitable allocation of the settlement cannot be reached, consider seeking the intervention of the court to approve a division of the settlement proceeds, much in the same way third-party settlement petitions are routinely handled in cases of workers' compensation liens. Although this is still an untested option, certainly notice should be given to the commonwealth's Casualty Recovery Unit, and it should have an opportunity to be heard.

The Casualty Recovery Unit is in the process of developing guidelines and forms for consideration of *Ahlborn* requests. Keep in mind that successful negotiations under the *Ahlborn* decision will require reasonableness and candor. One should expect to provide detailed information on special damages, detailed descriptions of injuries, fair analysis of liability, and full disclosure of available insurance coverages and other assets. One cannot expect to arbitrarily allocate a disproportionately small portion of the settlement to medical expenses in an attempt to avoid the reimbursement of the Medicaid lien. A fair allocation should mirror the pro rata share of what one might reasonably expect in a full-value settlement or jury verdict. Also, unlike the state in *Ahlborn*, it is unlikely the commonwealth will readily stipulate to the value of your case, which is why you should be prepared to justify what you feel is a fair full value of the case.

Understand that the commonwealth will owe the federal government reimbursement for the federal portion of Medicaid pay-out if there is a recovery, and any reduction in that reimbursement has to be justified. Offering a solid basis for a reduction of the lien will be the key to prompt and reasonable compromise.

Further application of *Ahlborn*

The Medicare program affords the government similar liens pursuant to 42 U.S.C. § 1395y, the Secondary Medicare Payer Program. Although it does not appear that any case has yet tested the application of *Ahlborn* to Medicare, Medicare liens may also be limited when the claimant is not made whole by the settlement of the case. *Ahlborn* will not have any effect on liens by insurers or hospitals on personal injury claims under the Massachusetts lien statute, G.L. c. 111, § 70 et seq. It is clear, after the decision in *Pierce v. Christmas Tree Shops, Inc.,* 429 Mass. 21 (1999), that the ability to force an insurer or hospital to contribute to attorney's fees or to accept an equitable reduction in the lien will have to await legislative action.

Conclusion

In Massachusetts, resolution of liens under *Ahlborn* is still largely untested. Every circumstance will vary, and questionable liability and inadequate insurance will complicate resolution of Medicaid liens. The decision in *Ahlborn,* however, clearly provides relief for litigants when full recovery cannot be achieved, and it is the duty of every practitioner resolving such a case to seek an appropriate reduction in the Medicaid lien.

Additional resources

Center for Medicare and Medicaid Services, www.cms.hhs.gov/home/medicaid.asp

National Association of State Medicaid Directors, www.nasmd.org

End notes

1. Ark. Code Ann. §20-77-307 (a).
2. The case was settled for a compromised amount because of Ahlborn's own contributory negligence.
3. *Ahlborn v. Arkansas Department of Human Services*, 397 F.3d 620 (8th Cir. 2005).

Disclosure of medical adverse events: A study of the University of Michigan Health System model

By M. Kate Welti, Esq.

Disclosure of medical adverse events by health care institutions is a relatively new development in the effort to improve patient safety and contain escalating medical liability costs. A notable example of this approach was implemented by the University of Michigan Health System ("UMHS") starting in 2001, with significant positive results.[1]

The UMHS model has garnered widespread attention by the media as well as the health care community, and offers a complement or alternative to statutory tort reform. The UMHS chief risk officer, Richard Boothman, recently testified before the U.S. Senate in a hearing held to examine medical malpractice reforms. He also advised Sens. Hillary Rodham Clinton and Barack Obama in the creation of their 2006 MEDiC Act, a bill promoting disclosure of medical adverse events.[2]

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Given the demonstrated benefits of the UMHS approach, it is likely that similar efforts will increasingly be made by Massachusetts health care institutions, with significant implications for the local health care, insurance and legal communities.

In 2001, UMHS was experiencing the challenges that health care systems nationwide continue to face today with respect to medical liability and safety issues. In general, malpractice litigation was costly and too often displayed only a tenuous relationship to actual incidences of negligence.[3]

At the same time, there was a gathering movement to improve patient safety. A 1999 Institute of Medicine study reported that up to 98,000 deaths result annually from medical errors, with 90 percent of those deaths arising from failed systems and procedures.[4] Health policy analysts recognized that reporting and analyzing adverse events permitted more effective ways to reduce error, yet disclosure was often avoided by providers due to fears of malpractice lawsuits.[5] Ironically, several studies show that a significant reason why patients sue physicians or hospitals is anger over a sense of stonewalling, with a lawsuit seen as a means to obtain more information about their care.[6] Thus, the non-disclosure mentality had the opposite of its intended effect; injured patients seeking accountability and answers often had no alternative but to hire a lawyer.

UMHS did have the benefit of tort reform measures, which were enacted by the state of Michigan in 1994. Among other provisions, the statutes instituted a pre-suit notice requirement. The requirement created a six-month "cooling off period" in which the patient provided notice that they intended to file a lawsuit. Tort reform, however, had little effect on the UMHS claims numbers and even less impact on the way in which it responded to claims. The six-month notice period was not utilized to respond to claims in an attempt to head off litigation, or even to prepare for litigation. The reforms also failed to prompt any initiation of systems that would allow UMHS to learn how to improve patient safety from the adverse events.

As of August 2001, UMHS had 262 open claims, which included pre-suit notices and active litigation. The portfolio for reserves was valued at more than $70 million. Annual litigation costs were approximately $3 million. The average time to resolution of claims and lawsuits was 20.3 months. At that time, UMHS created and implemented a disclosure policy of medical adverse events. The results were startling. By August 2005, the number of claims had decreased to 114. Total reserves on medical malpractice claims dropped by more than two-thirds. Annual litigation costs were down to $1 million. The average time to resolution of claims was 9.5 months.

The UMHS disclosure policy is based on three principles, which were publicized at the outset to UMHS staff, plaintiff and defense counsel in southeastern Michigan, and the courts. The first is that UMHS will compensate quickly and fairly when inappropriate medical care causes injury. Second, UMHS will defend medically appropriate care vigorously. Finally, UMHS will reduce patient injuries (and therefore claims) by learning

from mistakes.

According to Boothman, the key to implementing the disclosure policy principles is first understanding the difference between reasonable and unreasonable care, and then determining whether, and to what extent, the patient's outcome was adversely affected. The pre-suit notice window is crucial to that process. In 2001, UMHS began to utilize that period by creating a claims analysis infrastructure and system that uses that time to make a determination as to whether the care was reasonable or not, and accordingly, to decide whether to proceed to litigation or settlement.

After UMHS learns of a concern, claim or a potential claim, the following process takes place, with some variation. First, if risk management learns of an adverse event near or at the time of the occurrence, they will contact the patient or family in order to meet with them about the incident. The lines of communication are open at this point to assist the patient or family in responding to the adverse event. If risk management learns of the adverse event by way of notice of a claim, there may or may not be an initial contact with the patient. Risk management then undertakes an initial legal triage and assessment of the claim.

Following the initial assessment, there is a more in-depth legal/risk management investigation, and analysis of risk and value of the claim. Expert opinions are obtained to assist in the determinations of the reasonableness of the care, and the matter is reviewed by a medical committee. At the conclusion of the process, UMHS makes a determination of the reasonableness of the care. It engages in a dialogue with the patient, and, if the patient is represented, with the patient's lawyer. Expert opinions are exchanged, and the decision is made among the parties whether to litigate the claim, settle it or agree that there is no valid claim.

The UMHS policy also reflects the view that injured patients are seeking answers and assurances that the event will not happen to another patient rather than the financial windfall that a lawsuit judgment may bring. Quality improvement mechanisms are accordingly prominent in the model. When a claim is referred to the medical committee during the pre-suit investigation, the incident is reviewed from a patient safety perspective, to determine whether any systemic changes could be implemented to decrease the likelihood of re-occurrence. Peer review may also be undertaken at this juncture.

When the policy was first initiated, the disclosure process was only triggered by the threat of a claim. Over time, the quality improvement component has expanded so that any time risk management is made aware of an event that may have patient safety, quality improvement or peer review implications, they will route the event through the same system as potential claims in order to make improvements in their care.

The UMHS model goes against the grain of conventional wisdom in several respects. One of the most obvious is disclosing its findings and expert opinions on the reasonableness of care prior to the commencement of suit. The UMHS view is that if it concluded that the care was unreasonable, it would be moving to resolve the claim. It is not clear, based on available information, what effect disclosure of these negative views has in litigation if the patient refuses to settle, or whether it would increase the settlement figure. On the other hand, if UMHS finds that the care was reasonable, disclosure of those findings would not prejudice them if the patient pursued litigation after the disclosure.

The apparent successes of the UMHS approach are many. As set forth above, claims and transaction costs have significantly declined. There may also be other advantages that may be harder to quantify, such as reduction in medical errors due to clinical quality improvement measures.

The model has also received positive reviews from two usually disparate camps: medical faculty and plaintiff attorneys. According to a 2006 survey of UMHS faculty physicians, 98 percent fully approved of the UMHS approach to malpractice claims. A survey of the Southeastern Michigan plaintiffs' bar at the same time showed that 81 percent said they had changed their approach in response to the new UMHS model, and the same percentage said that their costs were lower. Eighty-six percent of attorneys agreed that UMHS transparency allowed them to make better decisions about the claims they chose to pursue, and 57 percent admitted that they declined to pursue cases after 2001 that they believed they would have pursued before the changes were employed. Finally, 71 percent admitted that when they settled cases with UMHS, the settlement amount was less than anticipated.

In spite of the benefits UMHS has reaped from its model, it remains an open question as to whether it can be successfully applied in Massachusetts. Tort reforms enacted by the state of Michigan, particularly the pre-notice period for claims, were essential to the initial effort. The pre-notice period continues to provide valuable lead-time for investigating adverse events and offering settlement outside of a lawsuit. Although a disclosure policy may be applied locally without difficulty if the patient is engaged before they file a claim, if the institution first learns of the adverse event through the filing of a lawsuit, it becomes more problematic. Settlements of civil claims on behalf of a physician are reported and publicly available on the board of Registration in Medicine Web site.

Massachusetts physicians would thus be understandably nervous about disclosure and would be likely to exert pressure on their affiliated hospitals to avoid adopting policies that involve disclosure after a suit has been filed. These differences are not insurmountable, however, as at least one Massachusetts facility, Fallon Clinic, has instituted a disclosure policy.[7] It appears likely that more health care systems will follow suit with some form of a disclosure policy, even if not as extensive as the UMHS model.

End notes

1. The information in this article regarding the UMHS disclosure policy is taken from the following materials: "Medical Justice: Making the System Work Better for Patients and Doctors," Testimony of Richard C. Boothman, Chief Risk Officer, University of Michigan Health System before the United States Senate, Committee on Health, Education, Labor and Pensions, Thursday, June 22, 2006; Materials from a presentation at Fallon Clinic on September 27, 2006, featuring Richard Boothman, entitled Disclosure of Medical Adverse Events; and correspondence from Richard Boothman, dated October 30, 2006, responding to questions of the author. The information is used and reprinted with permission of Richard Boothman.
2. National Medical Error Disclosure and Compensation (MEDiC) Bill (S. 1784). The bill is currently in committee.
3. Sage, William M., Medical Liability and Patient Safety, Health Affairs, 22, No. 4 (2003): 26-36. See also, Mariner, Wendy K., Miller, Frances H., Medical Error Reporting: Professional Tensions Between Confidentiality and Liability. Issue Brief. Boston: Massachusetts Health Policy Forum, Nov. 6, 2001: 1-35. A Harvard Medical Practice study published in 1991 showed that fewer than 0.2 percent of patients injured by negligence actually filed a claim.
4. Clinton, Hillary R., Obama, Barack, Making Patient Safety the Centerpiece of Medical Liability Reform, N.Engl.J.Med. 2006; 354:2205-2208.
5. Mariner, Wendy K., Miller, Frances H., Medical Error Reporting: Professional Tensions Between Confidentiality and Liability. Issue Brief. Boston: Massachusetts Health Policy Forum, November 6, 2001: 1-35.
6. *Id.* at 13.
7. Based upon conversation with Risk Management Department of Fallon Clinic on October 30, 2006. The policy went into effect on October 1, 2006.

Comments from the Civil Litigation Section chair

By Jeffrey Catalano

Jeffrey Catalano is a partner at Todd and Weld in Boston. His practice consists of representing victims of catastrophic injuries in the areas of medical negligence, product liability, class action, and other personal injury cases.

One of the keys to a successful committee is providing opportunities for members to be engaged in meaningful projects that are substantial and rewarding.

In that regard, our section council has wasted no time in getting off the ground this year. Our main projects in the works include: writing several articles for this *Section Review*; composing a major amicus brief on behalf of the MBA; planning volunteer opportunities such as assisting the legal needs of the homeless; arranging several CLE events, including an upcoming brown bag lunch and the Health Law Conference; assisting in the creation of an updated publication on judicial preferences; and forming a subcommittee to address debtor/creditor rights.

The only reason we are able to accomplish this is because we have a council that consists of 15 very dedicated, hardworking members. However, let's face it, we all have jobs (and lives) outside the MBA and our council could use help with each of the above projects.

Therefore, I reach out to all of the members of the MBA who are part of the Civil Litigation Section and ask you to contact us if one or more of the above projects sound interesting to you. We could really use your help. There are approximately 5,000 of you — the largest section within the MBA. While I don't want all of you rushing the MBA office at once, if just 1 percent of this group sought to get involved, we could tackle all of these projects (and more) with ease.

If you are interested, please contact me at jcatalano@toddweld.com or (617) 720-2626, or Section Administrator Marc D'Antonio at dantonio@massbar.org or (617) 338-0650.

Limited assistance representation in the Probate and Family Court

By John G. Dugan

Litigants in the Suffolk and Hampden Probate & Family courts will be able to retain attorneys for "limited-scope representation" under a plan being launched in Boston and Springfield on Nov. 1 … The chief justice [Margaret H. Marshall] trumpeted the unbundling plan as a "win-win" — both for clients of modest means who might otherwise not be able to afford the fees of attorneys in protracted cases and for lawyers who might have had to forego compensation in any amount by clients choosing to represent themselves... Overall, there is little doubt that this is a program worth trying.

Excerpt from *Massachusetts Lawyers Weekly* editorial, 35 MLW 526, Oct. 23, 2006.

John G. Dugan is a principal at Doherty, Ciechanowski, Dugan & Cannon in Franklin. Dugan's practice is concentrated in probate and family law. He has served as chair of the MBA's Probate Section Council, and co-chair of the Expanding Justice Working Group, an adjunct to the SJC Steering Committee on Unrepresented Litigants.

The volume of *pro se* appearances in domestic relations matters has exploded in recent years, often resulting in ineffective pleadings and delays in providing financial, protective and parental scheduling orders for the parties. Many states have implemented new programs to address the reality of self-represented litigants, case backlogs and overcrowded courtrooms. In Massachusetts, a committee led by Justice Elaine Moriarty and, more recently, the Supreme Judicial Court's Steering Committee on Self-Represented Litigants, studied and reported on a number of possible solutions. One of those solutions is limited assistance representation ("LAR"), which allows clients to engage an attorney for only a portion of a legal matter, making representation more affordable and allowing the party to appear *pro se* in the less complex aspects of the case.

Pilot programs

The SJC has issued a Standing Order that creates LAR pilot programs in the Suffolk and Hampden Divisions of the Probate and Family Court. For full text of the Standing Order, see 35MLW 473, Oct. 23, 2006. Judges, registers and other court personnel have received education, forms and training on limited representation. Many private and public sector attorneys have attended training sessions, which are required for participation in the programs. Additional training sessions will be scheduled. An advisory committee will monitor and evaluate the pilots, measure clients' use of LAR and address participants' concerns and suggestions.

The Standing Order permits a participating attorney to file a Notice of Limited Appearance in any probate or domestic relations matter in the Hampden or Suffolk Division. The notice must identify precisely the events and/or issues for which the attorney will appear. Upon completion of the limited representation, the attorney must file a Notice of Withdrawal. The important distinction is that the operative instrument is a notice, not a motion to withdraw. The Notice of Withdrawal terminates the attorney's appearance, and is binding on the court and opposing party/counsel. Copies of the Notices of Appearance and Withdrawal must be properly and timely served upon the client and opposing party/counsel. When a party is represented in only limited portions of a case, service of pleadings by the opponent must be made upon the party and upon counsel for those matters included in the limited appearance. For matters not included in the limited appearance, service is made only on the *pro se* party.

The Standing Order specifically allows "ghostwriting," which is the practice of assisting a client in preparing a pleading, motion or other document to be filed in court. In that case, the attorney must insert the notation "prepared with assistance of counsel" on the ghostwritten instrument. The attorney is not identified, and the required notation does not constitute an appearance by the attorney.

Practice, ethical standards and professional liability insurance

The standards of competence required in limited and full representation are identical: The lawyer will be held to the prevailing standard of practice of an attorney reasonably qualified in the particular field of practice.

Similarly, Rules of Professional Conduct

apply equally to limited and full representation: The attorney must practice with requisite competence, promptness and skill; keep the client reasonably and timely informed of developments; avoid any conflict of interest; advocate zealously; and maintain confidentiality.

Limited representation has been allowed and actively practiced in non-litigation circumstances in Massachusetts for many years. See Massachusetts Rules of Professional Conduct, Rule 1.2. For example, a lawyer may consult with a client about a pending proceeding or review a mediated agreement and charge a fee for the consultation without further representing the client in the proceeding. Professional liability insurance provides coverage for lawyers in limited scope tasks to the same extent as in full representation.

In summary, standards of competence, liability coverage and professional conduct apply consistently, whether the attorney is engaged in full or limited legal representation.

Potential pitfalls and best practices

The Standing Order provides: "A qualified attorney may limit the scope of his or her representation if the limitation is reasonable under the circumstances and the client gives informed consent." The "reasonable" standard means that the attorney must assess the client's situation and determine whether limited representation is appropriate in the particular circumstances. The "informed consent" standard means that the attorney must ensure that the client understands the proceeding as a whole, what services the attorney will and will not do, and which portions of the case will be the sole responsibility of the client. There are three steps in this process:

1. The limitation must be reasonable. For example, a client may want an attorney to prepare, file and serve a complaint for divorce and appear only on motions for temporary orders. That should be a workable and reasonable arrangement. It may be unreasonable for an attorney to appear only to make oral argument on a motion for summary judgment prepared by the client on custody or other complex issues. In that case, the attorney could be unreasonably restricted by pleadings filed by the client that may not correctly identify or address the issues. The attorney must assess the client's case and proposed limitations on representation, and decide whether limited representation is appropriate under the circumstances.

2. There is a requirement of "informed consent." The attorney must define the overall procedural and substantive aspects of the case and identify those tasks that the attorney will and will not undertake. The LAR training materials contain flow charts, checklists, sample legal services agreements and closing letters that explain allocation of tasks in detail. The materials will be helpful for the attorney to ensure that the client and attorney have a mutual and consistent understanding about division of responsibilities.

3. The attorney should document the nature and scope of limited representation. The checklists, legal services agreement, Notice of Limited Appearance and Notice of Withdrawal should provide a clear definition of what the attorney will and will not do in the pending case. After completion of representation, the attorney should send a closing letter to the client to emphasize that representation has terminated. Good documentation will eliminate or minimize misunderstandings between attorney and client.

Practice tips

- Attorneys who ghostwrite pleadings should open a file for each client and keep copies of all pleadings as drafted by the attorney. Ideally, the client should sign the file copies, or the attorney should file the original pleadings in court, to ensure that no changes are inserted by the client that would later be attributed to the drafting attorney.

- If a client wishes to extend or revise the scope of limited representation while the case is in progress, the attorney should file a Notice of Withdrawal as contemplated by the original limited appearance, execute an amended legal services agreement and file a new Notice of Limited Representation that reflects the amended agreement. There is no restriction on the number of limited appearances that an attorney may file.

- Do not ask the court for approval or input regarding withdrawal. When the time has come for termination of representation as defined by the limited appearance, file a Notice of Withdrawal and exit the case. The court will not intervene in attorney-client disputes about limited representation.

- The advisory committee is assembling a list of mentor attorneys who will be available by voice or e-mail to discuss and advise on questions about limited representation. If there is some doubt about any aspect of limited representation, contact a mentor.

- Both pilot courts have designated a liaison to coordinate LAR proceedings in the respective courts. The Suffolk liaison is Anthony Carnevale, administrative deputy assistant register, at (617) 788-8353. The Hampden liaison is Lori A. Landers, family law facilitator, at (413) 735-6043. The liaisons may be contacted for information on training sessions, pilot participation and LAR forms.

Limited representation is working well in many states. It makes legal representation available to more people, allows legal services providers to represent more clients, and results in more professionally prepared pleadings in the courts. LAR can be a highly efficient part of any attorney's practice. We hope and expect that the pilots will succeed and serve as models for LAR throughout Massachusetts.

Comments from the Family Law Section Chair

By Fern L. Frolin

Family Law in Massachusetts continues its rapid evolution. Same-sex marriage and de facto parent rights opened doors for some spouses and parents in Massachusetts, but we are still learning — and debating — how far the law should go and under what circumstances.

In *Charron v. Amaral, et al.,* now pending at the Supreme Judicial Court, the plaintiff seeks the right to sue for loss of consortium where the cause of action accrued before the plaintiff and her spouse were permitted to marry. The couple exchanged rings in a commitment ceremony, executed reciprocal estate plans and other documents, and adopted a child together before the cause of action

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accrued. They married immediately after the *Goodridge* decision permitted them to do so. One spouse died, allegedly as a result of medical malpractice that occurred after the couple's commitment ceremony and co-adoption of their daughter but before the marriage. Under principles of loss of consortium law, the survivor's claim for loss of consortium would be barred. The issue to be decided here is whether equitable principles may trump tort law in this plaintiff's favor.

The Supreme Judicial Court also recently decided in *A.H. v. M.P.*, a de facto parent case in which the Court sought amicus filings on the issue of expanding de facto parent rights to include custody. The trial court denied de facto parent status to the former partner of the biological mother, citing (among other factors) an American Law Institute *Principle of Family Law* that would require the non-biological or non-adoptive parent to have lived with the child for at least two years. The parents in this case were in an unmarried same sex relationship. So, one issue in the case was the usefulness of the de facto parent doctrine to would-be parents who have neither adopted the child nor married the legal parent.

The SJC did not reach the two-year ALI rule. Instead, the Court held that the partner who had failed to adopt would not later be treated as a de facto parent, where no caretaking bond had developed between the plaintiff and the child while they lived in the same household.

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Substantive family law is not static, and neither is procedure. As this *Section Review* goes to press, two Probate and Family Court venues, Hampden and Suffolk counties, have begun 18-month trial programs with Limited Assistance Representation. LAR offers clients the opportunity to hire counsel for just a single important aspect or event in the client's case, without the expense of assuming an ongoing attorney-client relationship. Lawyers may offer assistance and expertise without preliminary concern that the client may not be able to pay the legal bills through completion of the case. The idea is that it is much easier to commit to pro bono undertakings if lawyers know in advance the limit of the obligation. But there are risks and concerns for LAR counsel and clients and these risks must be addressed and evaluated.

Massachusetts is among the early jurisdictions to test LAR. Endlessly energetic retired Judge Edward M. Ginsburg and attorneys John G. Dugan and Ned Notis-McConarty and others have been working with a task force of the Supreme Judicial Court, literally for years, to develop parameters for this pilot. Probate and family cases are ideal for the program. Dozens of family law attorneys have been trained to represent LAR clients. Some of those lawyers received their training at the MBA's recent 2006 Family Law Conference. John Dugan's article in this issue of *Section Review* explains the new LAR procedures and the pitfalls.

As section chair this year, one of my goals is to encourage and stimulate dialogue about the principles and practice of family law. We are fortunate to work in a developing field in a cutting edge jurisdiction. I hope that our section members find much to think and talk about in our publications and meetings and I urge each member to join the conversation.

THE FRONTIERS OF MEDICAL NEGLIGENCE LAW AT THE OPPOSITE ENDS OF THE HUMAN LIFE CYCLE

By Anthony V. Agudelo

Although patients injured by health care providers' errors have pursued lawsuits in Massachusetts since the 19th century, medical negligence law has not been stagnant. Advancements in medical science prompt the assertion of novel theories of liability and damages, which can both set boundaries in medical negligence law and pioneer into new legal frontiers. One interesting recent case involving medical negligence at the beginning of the human life cycle brushed up against the limits of Massachusetts law, while another current case arising out of alleged medical errors at the opposite end of the cycle may explore new frontiers in the law. These two cases also illustrate how current medical negligence law can create daunting obstacles to plaintiffs harmed by errors committed at the forefront of medicine, but can also be sufficiently flexible to permit plaintiffs to maintain innovative claims.

Anthony V. Agudelo is a partner at Sugarman, Rogers, Barshak & Cohen PC. He concentrates his practice in civil litigation with an emphasis on representing plaintiffs in medical malpractice cases and defendants in products liability and personal injury cases.

Medical negligence at the beginning of the life cycle

Prenatal testing is becoming more commonplace as medical technology and knowledge advance and women bear children later in life. Unfortunately, with increased maternal age comes heightened risks for having a child with certain birth defects and genetic abnormalities, some of which can often be detected in the relatively early stages of pregnancy.

On Sept. 15, 2002, a Massachusetts woman, whose name has been withheld for confidentiality reasons, gave birth to a girl with Trisomy 21 (Down syndrome), a chromosomal abnormality that causes a wide spectrum of physical and cognitive impairments. This was not an unusual occurrence, as approximately one out of every 730 babies born in the United States is diagnosed with Down syndrome. A medical error committed prior to the birth, however, was unusual.

When the woman was three months pregnant, she underwent a fetal ultrasound as part of her prenatal screening. Abnormalities detected by the ultrasound suggested a need for both further testing and genetic counseling. But, for approximately four months, the woman's obstetrician, who had requested the fetal ultrasound, neither ordered further testing nor communicated the report's recommendations to her. By that time, an abortion was no longer a legal option.

The woman retained attorneys Sidney Gorovitz and Max Borten, M.D. and brought a lawsuit against the obstetrician. In the suit, the woman contended that had the obstetrician timely advised her of the results of the ultrasound or ordered further testing, then the chromosomal abnormality would have been discovered in sufficient time for her to have a choice whether to proceed with the pregnancy or to undergo an abortion.

After researching current Massachusetts law on recoverable damages in analogous cases, Gorovitz and Borten concluded that it would not be enough to prove that their client had lost *the choice* of whether to birth or abort the child. Instead, they would have to prove that she would have terminated the pregnancy because the law did not permit recovery for the mere loss of the choice. Since Gorovitz and Borten believed their client would have undergone an abortion, they set out to prove that fact rather than to challenge the limits of the law.

When questioned directly at their depositions, both parents testified that if they had known about the chromosomal abnormality in sufficient time to terminate the pregnancy, then they would have chosen to do so. To convince the defendant and his insurance carrier of the veracity of the parents' testimony, Gorovitz and Borten highlighted the fact that the woman had previously elected to terminate three pregnancies, thus she was not averse to the idea of abortion. Additionally, when she first discovered she was pregnant, the woman had requested that she have a tubal ligation at the time of delivery, which helped to prove that she did not want any more children. Gorovitz and Borten were persuasive, as evidenced by the $800,000 settlement obtained for their client.

Parents bringing claims against health care providers for negligence occurring prior to the birth of their children have not always achieved success. In fact, from 1884 to 1960, Massachusetts courts unwaveringly denied recovery for prenatal injuries, often premising their denials upon the lack of reliable medical evidence that negligence had caused the injury. In judges' eyes, medical science simply was not sufficiently advanced to permit plaintiffs to bear their burden of proving their new theories of liability and damages.

Then, in 1960, the Supreme Judicial Court first permitted an action seeking recovery for a prenatal tort. *Keyes v. Construction Serv., Inc.,* 340 Mass. 633 (1960). Yet, even after it took that monumental step forward, the SJC waffled on cases involving in utero injuries. For example, in *Torigian v. Watertown News Co., Inc.,* 352 Mass. 446 (1967), the Court allowed a wrongful death claim to reach the jury where an infant died several hours after birth due to prenatal injuries, but in another case, *Leccese v. McDonough*, 361 Mass. 64 (1972), the Court denied recovery to the estate of an infant who was stillborn.

A decade after the *Leccese* decision, a well-known class-action lawsuit, *Payton v. Abbott Labs,* 386 Mass. 540 (1982), also yielded mixed results for plaintiffs raising novel theories. There, the SJC answered certified questions of law concerning the viability of claims brought by women whose mothers had ingested the prescription drug diethylstilbestrol (DES) while the plaintiffs were in utero. Although the SJC did recognize a right of action for injury to a plaintiff in utero resulting from her mother's ingestion of a drug, it also held that if that plaintiff probably would not have been born except for the mother's ingestion of the drug, then that plaintiff would be barred from recovery.

The SJC then grappled with a pair of preconception tort cases that presented other issues of first impression. *Burke v. Rivo*, 406 Mass. 764 (1990) and *Viccaro v. Milunsky*, 406 Mass. 777 (1990). *Burke* involved a physician who performed an ineffective sterilization procedure that led to the birth of a "normal" but unwanted child. There, the SJC ruled in favor of the parents and rejected the defendant's argument that because the birth of a child is for all parents at all times a net benefit, no damages could be recoverable. The Court also rejected the defendant's suggestion that damages were limited because the parents had the options of aborting the fetus or placing the child up for adoption.

The *Viccaro* case was another "wrongful birth" case, but the SJC described this term and the term "wrongful life" as "not instructive" and abstained from using them in reporting its analysis. The SJC rejected this terminology, stating that the wrongfulness lay not in the life, the birth, the conception or the pregnancy, but in the negligence of the physician. In the case, claims were brought by both a genetically abnormal child and his parents against the physician who provided preconception genetic counseling to the parents. The Court held that the parents possessed a cause of action because the impaired child would not have been conceived if proper genetic counseling had been provided. But, the Court also held that Massachusetts does not recognize a cause of action by the impaired child. The Court reasoned that if the genetic counselor had not been negligent, then the child would not have been born, and there would be a fundamental problem of logic if the child were allowed to recover damages when otherwise he never would have lived. Thus, like *Payton*, *Viccaro* not only chartered new territory in medical negligence law, but it also erected new boundaries in it.

The SJC, however, did leave open the question of whether a child born with a defect could recover the extraordinary expenses expected to be incurred to care for himself if his parents were unable to bear those costs and he would otherwise become a public charge. *Rosen v. Katz,* 1994 WL 879466 (Mass. Super. Ct. 1994) presented this very issue. There, a child born with multiple impairments and whose parents had surrendered him to the Department of Social Services successfully pushed a pathway through to another new frontier as the Superior Court permitted him to maintain a claim seeking the extraordinary expenses associated with his care although he would not have been born had the defendant not been negligent.

Cases such as *Keyes*, *Torigian*, *Burke* and *Viccaro* provided Gorovitz and Borten the strong foundation upon which to maintain their client's claim. But, had those attorneys been unable to establish that their client would have chosen to have an abortion, they would have had to argue for a change in or expansion of the law, which would have been a daunting task. This is what Hector Pineiro, another Massachusetts attorney, is arguably doing in a currently pending case at the opposite end of the life cycle.

Medical negligence at the end of the human life cycle

Pineiro represents the widow and four children of Nelson Gonzalez, a man who died after receiving a liver transplanted from a 29-year-old who had died from a rare brain cancer. In the wrongful death lawsuit styled *Gonzalez v. Katz, et al,* currently pending in the Worcester Superior Court, the Gonzalez family alleges that the defendants, including the organ procurement organization that harvested the organs and the health care providers who assisted with the transplant, knew or should have known that the donor's liver was potentially diseased with cancerous cells and that transplantation would pose a significant risk to Gonzalez that he would contract cancer. The family further claims that the defendants are liable under the common law for negligence and failure to obtain informed consent. The defendants deny any wrongful conduct, and Pamela Gilman, the attorney who represents several of them, asserts that many lives are saved each year by transplanting organs from donors who had brain tumors.

Pineiro believes that the issue of whether an organ recipient can bring a suit alleging common law negligence against an organ procurement organization and health care providers assisting in the transplant process is one of "national first impression." Gilman disagrees, frames the issue somewhat differently, and argues that the SJC already decided the issue in favor of the defendants in a very recent SJC decision discussed below. Before discussing this potentially novel legal issue, a summary of the scant Massachusetts organ donation law will provide helpful context.

In 1968, Congress promulgated the Federal Uniform Anatomical Gift Act ("UAGA")

in order to promote organ donation for transplantation, therapy, research and education. Congress sought to achieve this goal by providing uniformity across the country in organ donor laws and eliminating uncertainty as to the legal liability of those authorizing and receiving anatomical gifts. Legislatures in all 50 states and the District of Columbia have since enacted some form of the UAGA.

In Massachusetts, the UAGA was codified at M.G.L. Ch. 113, §§ 7-13 as part of the Promotion of Anatomical Science Act ("PASA"). PASA sets forth the methods for making an organ donation, the procedure for obtaining consent of persons authorized to make the donation, the categories of persons who may become donees, and the circumstances under which such a donation is to be considered null and void. Most significant to this article, PASA also contains a provision barring civil damages against persons who act in good faith in accordance with the terms of the statute. This has been called the "good faith immunity provision."

Parties in suits arising out of allegedly improper organ harvests, donations or transplants face a cloud of uncertainty because there is only one Massachusetts appellate decision interpreting the statute, *Carey v. New England Organ Bank*, 446 Mass. 270 (2006), and a dearth of Massachusetts legislative history explaining the intent behind its enactment.

In *Carey*, the family of an organ donor sued the New England Organ Bank ("NEOB"), a charitable organ procurement organization, and others alleging that the defendants negligently and with bad faith removed the donor's organs knowing that they were unsuitable for transplantation. The defendants moved for and were granted summary judgment on the grounds that they were entitled to the statutory good faith immunity. As explained by Superior Court Judge David Lowy in his written decision, without the protection from liability provided by the good faith defense, procurement organizations could likely hesitate to seek needed organ donations that could later prove invaluable, and if courts were to construe the good faith immunity provision narrowly, then they would only inhibit the successful recovery of anatomical gifts. *Carey v. New England Organ Bank*, 2004 WL 875623 (Mass. Super. Ct. 2004). The SJC affirmed Lowy's ruling and held that it was the plaintiff's burden to prove the defendants' lack of good faith, rather than the converse. The SJC also noted that the good faith immunity provision was designed for situations where an organ is removed without genuine consent simply because of confusion.

Although the NEOB is also a defendant in the *Gonzalez* case, because *Gonzalez* does not involve an alleged failure to obtain the proper consent from the donor's family, it is questionable whether the NEOB is entitled to rely upon the good faith statutory defense in *Gonzalez*.

According to Pineiro, the NEOB acquired the donor's liver, kidneys, lungs, heart and other organs and tissues. Those organs and tissues were transplanted into five people, including Gonzalez. Gonzalez did not know prior to the transplant that the donor had died from brain cancer and that there was a chance that the cancer had spread to his liver. In fact, the cancer had infected the donor's liver, and Gonzalez died a year after receiving the diseased liver. Sadly, three of the four other recipients of the donor's organs have also since died of cancer.

This tragic event recalls Jesica Santillan whose story garnered significant media attention in 2003. Santillan was a teenager who received a heart-lung transplant at Duke University Hospital, but died shortly thereafter because the donor had an incompatible blood type. Duke and the Santillan family reached a settlement before any lawsuit was filed, and Duke also established a $4 million perpetual fund for Latino pediatric patients to honor Jesica. Because no lawsuit had been pursued, however, no court was presented with the good-faith-immunity issue now presented in the *Gonzalez* case.

In *Gonzalez*, the NEOB and two transplant coordinators filed a motion to dismiss, arguing that PASA immunized them from liability specifically because the plaintiff failed to aver any facts supporting a claim that the defendants were not acting in good faith when they procured the organ donor's liver. Pineiro argued in opposition to the motion that the plaintiff has no obligation to allege or prove that the defendants acted in bad faith, claiming that the immunity provision is inapplicable when determining the rights of donees vis-à-vis an organ procurement organization which distributes organs knowing that they are potentially tainted with cancer. He further contended that the statute explicitly recognizes that testing of donor organs before transplantation is not only imperative, but also the hallmark of good medical practice. As stated earlier, Pineiro's opposing counsel, Gilman, framed the issue somewhat differently. She described the legal issue as whether organ procurement organizations have a statutory immunity that trumps the common law if they act in good faith when conducting donation activities. And this issue, she argued, was already decided by the SJC in *Carey*.

Judge Peter Agnes Jr. of the Superior Court agreed with Pineiro and the plaintiffs, finding that PASA did not extend into the realm of donees who receive disease-riddled organs, and therefore, the good faith immunity provision was inapplicable and could not be asserted as a defense. Agnes described PASA and the UAGA as "donor driven laws which provide little insight as to the donee" and reasoned that there was "nothing in the language of [the statute] or its history to suggest that its purpose was to supersede common-law theories of tort liability with respect to the consequences of medical decisions made about whether particular organs which have been donated are suitable for transplantation." Agnes also opined that "the Legislature did not intend to create an immunity to protect organ professionals when they recklessly or negligently procure or distribute deadly organs." In so doing, he recognized that the case presents new issues, writing in his opinion that "Massachusetts' courts have not yet grappled with death from allegedly deadly organ transplantation."

The defendants, dissatisfied with Agnes' ruling, petitioned for relief from a single justice of the Appeals Court. Their efforts were unavailing. Justice William I. Cowin denied the petition, stating that a single justice did not have the authority to grant the defendants the relief they sought, namely an order directing that Agnes reverse his decision and terminate the case against the moving defendants. Undeterred, the defendants have now asked Agnes to reconsider his ruling or to

report the matter to the full panel of the Appeals Court, and claim that the ruling "casts a shadow of uncertainty over the scope of the good faith immunity provision for those persons involved in the procurement of potentially life-saving organs and tissues not only in Massachusetts, but possibly across the country as well." They further assert that the issue "is one of vital importance to those involved in the time-sensitive procurement of potentially life-saving organs and tissues."

If Pineiro and Agnes are correct that the case presents the novel legal issue of whether an organ procurement organization can be held liable for negligently transplanting a diseased organ into an uninformed recipient, and Gilman is correct that the case has vital importance and may have impact across the country, then it is highly likely that the SJC will once again be presented with a case pushing against the frontiers of medical negligence law.

As an interesting aside, the family of Pamela Collins, the woman who died after receiving the donor's kidney, has also filed a lawsuit in the Worcester Superior Court. Attorneys Andrew C. Meyer Jr. and William J. Thompson represent Collins' family, which claims that prior to the procedure, the transplant surgeon told Collins that the donor was "healthy" and that the kidney "looked good and healthy." Meyer has commented that Collins was expecting a life-saving procedure, but instead was handed a death sentence by her doctors. For reasons not made public, Meyer and Thompson chose not to name the NEOB as a defendant in their case, and none of the defendants have filed a motion to dismiss contending that the good faith statutory defense bars the claim.

While we do not know how the *Gonzalez* case will change Massachusetts medical negligence law, if at all, or how the law will develop in the future, we do know that the law will be significantly impacted by the ways in which the field of medicine evolves. And one point remains true regardless of what the future of medicine holds, which is that human life at both ends of the life cycle necessitates great levels of protection, both medically and legally.

Much ado about nothing: the labor board's new definitions regarding who is a supervisor

By Robert A. Fisher

A recent decision of the National Labor Relations Board regarding who is a supervisor under federal labor law, *Oakwood Healthcare, Inc.*,[1] has labor unions in an uproar. Both the AFL-CIO and Change to Win, the two major labor federations, have blasted the decision as depriving millions of American workers of their rights under the National Labor Relations Act.[2] Labor unions are so upset that the AFL-CIO has filed a complaint with the International Labor Organization of the United Nations claiming that *Oakwood* violates international labor law principles.[3] The fear, as articulated by the dissent in *Oakwood*, is that employees will lose their rights under the National Labor Relations Act

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simply by being labeled as supervisors by their employers.[4] But lost in all of the rhetoric is what the majority of the board actually said in *Oakwood* about who is a supervisor. In no way can the majority's decision be characterized as giving employers *carte blanche* to reclassify employees as supervisors. Rather, under *Oakwood*, the individual's actual functions and the degree to which he or she exercises independent judgment in performing those functions determines supervisory status.

A starting point for understanding the board's decision in *Oakwood* is the statute itself. The National Labor Relations Act defines a "supervisor" as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.[5]

While labor unions are deriding the board for its interpretation of this definition in *Oakwood*, the real battle was decided by the U.S. Supreme Court five years ago. In *NLRB v. Kentucky River*, the Supreme Court was asked to review the board's determination that six registered nurses were not supervisors.[6] In doing so, the Court articulated a three-part test for determining who is a supervisor based upon the statutory definition: (1) the individual holds authority to exercise any one of the 12 supervisory functions listed in the statutory definition; (2) the exercise of that authority requires the use of independent judgment; and (3) the individual's authority is held in the interest of the employer.[7] Applying this test to the registered nurses at issue, the Court chastised the board for its conclusion that they were not supervisors. Although the nurses directed other employees, the board had determined that they did not exercise independent judgment in doing so but instead utilized what the board characterized as "ordinary technical or professional judgment." The Court rejected this formulation as creating a distinction not borne out by the statutory language.[8]

Oakwood represents the board's first attempt at revisiting these issues after *Kentucky River*. At issue in the case was a union's effort to organize the employer's 181 registered nurses. Twelve of those nurses permanently served as "charge nurses." Charge nurses were responsible for overseeing their patient care units and assigned other nurses and employees to particular patients. In addition to the permanent charge nurses, other nurses took turns serving in this capacity. The frequency and regularity that one of these nurses acted as a "rotating" charge nurse depended upon the particular patient care unit and the number of nurses in that unit.[9] The regional director determined that neither the permanent charge nurses nor the rotating charge nurses were supervisors and the employer petitioned the board to review that determination.

In its decision, the board attempted to explain two of the supervisory functions listed in the statute — "assign" and "responsibly to direct" — in light of the Supreme Court's decision in *Kentucky River*. Relying on the dictionary definition of the word, the board explained that "to assign" refers to "the act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e. tasks, to an employee."[10] As to the function "responsibly to direct," the board relied on appellate court precedent to hold that "for direction to be 'responsible,' the person directing and performing the oversight must be accountable for the performance of the task by the other, such that adverse consequences may befall the one providing the oversight if the tasks performed by the employee are not performed properly."[11]

The board also explained what constitutes the exercise of independent judgment. Relying again on the dictionary definitions of the words, the board stated that "an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data."[12] However, the board emphasized that this is a matter of degree, which will vary based upon the particular circumstances.[13] Finally, the board held that an individual is not a supervisor if he or she does not spend a substantial and regular portion of his or her time performing supervisory functions.[14]

None of these definitions reflects an unnatural reading of the statutory language, and the board's application of these terms demonstrates that the tests are results-neutral. In *Oakwood*, the board concluded that the 12 permanent charge nurses were supervisors because they assigned employees using independent judgment. However, the board held that the remaining nurses who acted as rotating charge nurses were not supervisors because they did not spend a substantial and regular part of their time performing supervisory functions. And in two companion cases, *Croft Metals, Inc.*[15] and *Golden Crest Healthcare Center*,[16] the board held that none of the individuals at issue were supervisors. In *Croft Metals*, the board concluded that certain lead persons had the authority "responsibly to direct" other employees but did so only in a routine or clerical fashion.[17] Likewise, in *Golden Crest*, the board found that the employer's nurses, including charge nurses, did not "assign" employees because they could only request but not require other employees to work past the end of their shifts or come in from home.[18] Nor did they have the authority to direct other employees, because the employer failed to prove that the nurses were accountable for the work performance of subordinates.[19] Taken together, only 12 of the employees at issue in these three cases were found to be actual supervisors.

Thus, while critics have implied that the board has single-handedly reclassified millions of employees as supervisors, *Oakwood* and its companion cases do not bear out that conclusion. Instead, the decisions make clear that whether an individual is a statutory supervisor will be decided on a case-by-case basis. Although the "permanent" charge nurses in *Oakwood* were found to be supervisors, the board reached the opposite conclusion regarding the charge nurses at issue in *Golden Crest*, demonstrating that specific facts regarding an individual's actual duties, not job titles, will be controlling. The worst that can be said about the decisions is that they provide a roadmap regarding what facts will establish supervisory status. However, clarity in the law in this regard should be viewed as a positive development for both employers and employees alike.

End notes

1. 348 NLRB No. 37 (Sept. 29, 2006).
2. *See* www.aflcio.org/joinaunion/kyriver.cfm; www.changetowin.org/for-the-media/press-releases-and-statements/change-to-win-blasts-decision-in-Kentucky-river-cases.html.
3. *See* www.aflcio.org/joinaunion/voiceatwork/upload/ilo_complaint.pdf.
4. *See Oakwood*, 348 NLRB No. 37 at 15 (dissenting opinion) ("Today's decision threatens to create a new class of workers under Federal labor law: workers who have neither the genuine prerogatives of management, nor the statutory rights of employees.").
5. 29 U.S.C. § 152(11).
6. 532 U.S. 706 (2001).
7. 532 U.S. at 712-13.
8. *Id.* at 715.
9. 348 NLRB No. 37 at p. 2.
10. *Id.* at p. 4.
11. *Id.* at 6.
12. *Id.* at 8.
13. *Id.*
14. *Id.* at p. 9.
15. 348 NLRB No. 38 (Sept. 29, 2006).
16. 348 NLRB No. 39 (Sept. 29, 2006).
17. 348 NLRB No. 38 at p. 4.
18. 348 NLRB No. 39, p. 3.
19. *Id.* at 5.

Labor and Employment

Taxing emotional distress damages is declared unconstitutional

By Nina Joan Kimball

Perhaps it is not true that the only things you can count on are death and taxes. The U.S. Court of Appeals for the District of Columbia Circuit has just declared that taxing emotional distress damages is unconstitutional. In *Murphy* v. *IRS,* 2006 U.S. App. LEXIS 21401 (D.C. Cir. Aug. 22, 2006), the D.C. Circuit held that damages received in compensation for mental distress and harm to reputation are akin to compensation for personal injuries, which have long been understood not to be "income" within the meaning of the 16th Amendment to the Constitution, and therefore not taxable.

This decision could have far-reaching consequences. Although *Murphy* involved a claim brought by a federal employee suing her employer for retaliation under various whistle-blower statutes, the reasoning of the decision would apply to awards of emotional distress damages under any statute or common law claim. Coming out of the D.C. Circuit, one of the most respected appellate courts in the country, in an opinion authored by a Reagan appointee, Chief Judge Douglas Ginsberg, this decision will likely be followed in other jurisdictions.

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Editor's note:

After the publication deadline had passed for this issue of the *Section Review*, the D.C. Circuit vacated its decision on this case and scheduled an *en banc* hearing. Watch the D.C. Circuit for further developments in the upcoming months.

The case arose when Marrita Murphy claimed that her employer, the Air National Guard, had blacklisted her and provided unfavorable references after she complained to state authorities about environmental hazards. She filed a claim with the Department of Labor.

An administrative law judge awarded her $45,000 for "emotional distress or mental anguish" and $25,000 for "injury to professional reputation" on her discrimination and retaliation claims. After paying taxes of $20,665 on the $70,000 award, Murphy sought a refund of the $20,665 tax, claiming the money was not taxable "income" based on two theories: (1) it was not "income" as defined by the Internal Revenue Code (IRC) Section 104(a)(2) because it was damages received for a "personal injury or sickness" which are not included within the statutory definition of income; and (2) it was not "income" within the meaning of the 16th Amendment to the Constitution.

The D.C. Circuit rejected her first theory, finding that she was not compensated for a physical injury. Even though she had evidence that she suffered physical symptoms, such as teeth grinding, anxiety attacks, shortness of breath and dizziness — the court concluded that the damages she was awarded were not to compensate her for the *physical* symptoms, but rather compensated her for the underlying *emotional* harm. Consequently, the money on which she paid a tax was compensation for an emotional injury, not a physical injury. Hence, it did not fall within the statutory exception. *Murphy,* at **9-13.

However, the court agreed with Murphy's second argument, that taxing the emotional distress damages was unconstitutional because the award did not constitute taxable "income" within the meaning of the 16th Amendment. The issue before the court was whether the compensation Murphy received for her injuries was income. Congress derived its power to tax income from the 16th Amendment, ratified in 1913, which provides: "The Congress shall have the power to lay and collect taxes on income from whatever source derived." However, as the court recognized, Congress's power to tax is limited to the power to tax "income," and not all money persons receive is income.

To determine whether Murphy's emotional distress award was "income" as defined in the 16th Amendment, the court looked to Congressional accounts and early Supreme Court decisions interpreting the Internal Revenue Code's income tax provisions, enacted within a few years of the 16th Amendment. The court pointed out that the Supreme Court interpreted "gross income" in the statute to extend only to "gains" or "accessions to wealth," but not to a "restoration of capital" since that is simply restoring something lost. Murphy argued, and the court agreed, "a damage award for personal injuries — including non-physical injuries — is not income but simply a return of capital — human capital," and therefore was not income. *Id.* at **16, 30.

The court also looked at the issue by asking the question "in lieu of what were the damages awarded?" *Id.* at *25 (quoting *Raytheon* v. *Prod Corp.* v. *Commissioner,* 144 F.2d 110, 113 (1st Cir. 1944)). As the court explained, "the taxpayer's award of compensatory damages is a 'substitute for a normally untaxed personal . . . quality, good, or 'asset.' . . . Accordingly, we join our sister circuits by asking: 'In lieu of what were the damages awarded?' Here, if the $70,000 Murphy received was 'in lieu of' something normally untaxed, then her compensation is not income under the 16th Amendment; it is neither a 'gain' nor an 'accession to wealth.'" *Murphy*, at *25 (internal quotations omitted). The court answered the question thus: "As compensation for the loss of a personal attribute, such as well-being or a good reputation, the damages are not received in lieu of income." *Id.* at *30. Hence, the damages are not income, and taxing them violated the 16th Amendment.

The reasoning of Murphy can apply here in Massachusetts to any claims that provide emotional distress damages. The decision will benefit employees and employers alike as the net effect is that in settling cases and paying judgments, the employee will get more money in her pocket at no greater cost to the employer. The decision returns taxation of emotional distress damages to what it was a decade ago, prior to Congress's 1996 amendment to Section 104(a), which exempted damages for physical injuries from taxation, but specifically allowed taxation of damage for emotional injuries. As a practical matter, what the attorney should do when settling claims is to carve out the emotional distress damages from damages for back pay and attorneys' fees. Each of these elements of damages has a different tax consequence. The employer must issue a W-2 on the back pay (the only damages subject to FICA), and should issue 1099s on the emotional distress damages and on the attorneys' fees (which, since 2004, can be deducted from income on the employee's tax return). Then it will be up to the employee-taxpayer to decide whether to pay the tax. The prudent approach is to do what Murphy did here: pay the tax and seek a refund of the tax relying upon the *Murphy* decision.

Now you see it, now you don't: Evidence and the spoliation thereof in employment law cases

By Paul H. Merry, Esq.

Introduction

Employment lawyers, defense as well as plaintiff-side, acknowledge one distinguishing feature of employment law disputes: All or nearly all the cards (that is, the evidence) are usually in the hands of employers.

This is generally true of witnesses, few of whom, if still employed, are willing to risk jeopardizing their employment by testifying voluntarily on behalf of a fired co-worker. The rule applies to an even greater degree with respect to records and other documents, the great majority of which are usually under the firm control of the employer. Indeed, this employer-control of the bulk of evidence challenges employees and their advocates as to how to develop sufficient evidence to get the matter before a jury.

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This problem for plaintiffs has been complicated by the increasing reliance on electronic media by employers. Communications and documents bearing on the employment relationship are often maintained solely in electronic form,[1] whether as electronic mail, electronic drafts of memoranda, letters, rules, policies, employee handbooks and personnel manuals (many of which are available to employees today only on a proprietary, secure Web site.)

Plaintiff-side employment lawyers must be prepared to litigate to compel production of this "soft-copy" evidence, and also be in a position to assure that such material continues to be available. Precious evidence in the form of electronic mail messages, draft memoranda, sales and other performance data are routinely destroyed by employers who believe they are doing nothing wrong by merely following an established record retention policy. Indeed, most businesses have policies of routinely destroying electronic materials as their usefulness declines, usually after a year or less.

In vigorously contested employment cases, preservation of records relating to plaintiff-employee performance, as well as to defendant-employer grounds for its adverse action, become crucial. Proving discrimination requires a showing that non-protected-class employees were treated better than protected-class employees. This can be a heavy evidentiary burden that plaintiffs often cannot bear in the absence of documents controlled exclusively by the employer, because it requires access not only to the plaintiff-employee's own records but to comparator co-worker records as well.

Sales personnel offer a particularly clear example. Organizations that engage in sales usually evaluate staff on the basis of volume of sales and gross margin, or proportion of sales revenue over company cost. This information, particularly as it relates to comparator personnel, is available only from the organization itself.

Given the crucial importance of such evidence, the temptation can be strong to place it beyond the reach of an adversary. This can occur indirectly, by means of data re-organization or changes in data handling, or by adopting record destruction policies that assure swift destruction of potentially damaging records. Or it can happen more overtly simply by destroying (or the electronic equivalent, deleting) the materials.

Because employers possess the power of exclusive possession of evidence combined with the power of easy destruction of electronic data, employee advocates must be prepared to respond appropriately when records they anticipate will be available from the employer suddenly disappear. The doctrine of spoliation offers a tool for advocates to address such a disappearance.

Spoliation

Spoliation is the destruction of records or other evidence that is or may be relevant to a dispute that may result in litigation, or to a government investigation or an audit. Spoliation occurs whenever documents or objects which may assist the court in reaching an informed, just result are rendered unusable or beyond the ability of the court to use them. *See*, e.g., *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age,* Guideline 3.

Early cases of spoliation arose in admiralty law and involved the destruction of cargo and shipping manifests necessary to resolve disputes over shipping of cargoes and the loss of goods. *See The Amiable Isabella*, 19 U.S. 1; 5 L. Ed. 191; 1821 U.S. LEXIS 380; 6 Wheat. 1, February 22, 1821. In Massachusetts, some cases have involved the destruction of furniture alleged to have caused serious injury, or the destruction of an ambulance involved in a traffic accident. *See Kippenhan v. Chaulk Services,* 428 Mass. 124 (1998)*; Townsend v. American Insulated Panel Company, Inc.*, 174 F.R.D. 1 (D.Mass 1997).

Courts have differed as to the level of intent required before sanctions will be warranted. The doctrine of spoliation has formed the basis for substantial sanctions even where a spoliator appeared to have acted with good intentions. In that case, an investment brokerage house was accused of unfair practices based on representations made in a promotional brochure. The defendant destroyed all copies of the offending brochure ostensibly to prevent further instances of the unfair and deceptive practice being repeated. Despite this apparently innocent motivation, the court imposed a $1 million cash sanction on the defendant, because the defendant's actions had left the plaintiff in an untenable position in the complete absence of any examples of the deceptive statements. *See In Re: Prudential Ins. Co. Sales Practices Litigation*, 169 F.R.D. 598 (D.N.J. 1997).

Courts have often taken a particularly severe approach to spoliation of evidence because they see it as a direct threat to their ability to dispense justice. *See*, e.g., *In Re: Prudential Ins. Co. Sales Practices Litigation*, 169 F.R.D. 598 (D.N.J. 1997); *Kippenhan v. Chaulk Services,* 428 Mass. 124 (1998); *Townsend v. American Insulated Panel Co.*, 174 F.R.D. 1 (D.Mass. 1997).[2]

It is well recognized that the existence of a legal dispute imposes a duty on parties to safeguard materials that might be of assistance to the court in resolving the issues. Recent decisions in the 4th and other circuits reiterate this doctrine. *See Silvestri v. General Motors Corp.,* 271 F. 3rd 583 (4th Cir. 2001). A leading case, *Zubulake v. UBS Warburg, LLC*, 382 F. Supp. 2d 536, 2005 WL 627638 (SDNY March 19, 2005), states not only that evidence must be preserved, but that it is counsel's duty to assure its preservation.

Law in the 1st and other circuits appears to be quite broad with respect to the obligation of parties to preserve evidence. When the evidence indicates that a party is aware of circumstances that are likely to give rise to future litigation and yet destroys potentially relevant records without particularized inquiry, a fact finder may reasonably infer that the party probably did so because the records would harm its case. *See Blinzler v. Marriott International, Inc.*, 81 F.3d 1148 (1st Cir. 1996); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995); *Partington v. Broyhill Furn. Indus., Inc.*, 999 F.2d 269, 272 (7th Cir. 1993); *Nation-Wide Check Corp., Inc. v. Forest Hills Dist., Inc.*, 692 F.2d 214, 219 (1st Cir. 1982).

The court in *Blinzler v. Marriott International, Inc.*, 81 F.3d 1148 (1st Cir. 1996) upheld an inference permitted by the trial court that defendant was aware of the importance of a document that it destroyed, and that it was liable to sanctions even though litigation had not begun. "Although no suit had yet been begun when the defendant destroyed the document, it knew of both [plaintiff's decedent's] death and the plaintiff's persistent attempts . . . to discover [certain information thought to be contained in the document]." *Id.* at 1149. This knowledge gave the defendant ample reason to preserve the report in anticipation of a legal action.

The Massachusetts Superior Court has also adopted this position, holding that a litigant has a duty to preserve evidence. *See Franco Attardo v. Boston*, 12 Mass. L. Rep. 321, 2000 Mass. Super. LEXIS 437, 96-3690B (July 27, 2000), *citing Townsend v. American Insulated Panel Co., Inc.*, 174 F.R.D. 1, 3 (D. Mass 1997). Massachusetts law also specifically requires the maintenance of personnel records by employers. *See* M.G.L. c. 149 § 52C.

In employment cases, countless varieties of spoliation arise, from routine overwriting of backup media to destruction of hard drives in the course of upgrading office computer systems. In one recent case, a defendant who had failed to produce evidence of sales productivity for comparator sales representatives to the plaintiff claimed it had upgraded its computer software system, which meant that the crucial months of sales data were destroyed or otherwise inaccessible. *See Cleary v. Sonepar*, Norfolk C.A. No. 03-01531. Larger organizations that employ outside contractors to maintain their backup materials may assert that a change of contractor has had the same effect.

Initial steps in combating spoliation

Under these circumstances, it is important for employment lawyers to take measures to prevent the destruction or loss of evidence. One prudent first step for those representing employees is to place the employer on notice, in the initial contact or demand letter, that litigation is likely and that all evidence relating to an employee's employment must accordingly be preserved. Expressly identifying electronic materials may make the job of the court easier should its intervention become necessary. The *Zubulake* court's instruction regarding the obligations of defense or employer counsel buttresses their traditional ethical duty in this regard.

Another way of putting protection in place is for counsel to demand (plaintiff-side) or advise (defense-side) the imposition of litigation holds on all materials bearing on the dispute. A litigation hold policy enables employers to preserve relevant internal materials. Beyond requesting a litigation hold in the initial demand letter, this policy should be requested as part of initial discovery, to further increase the likelihood that defendants take their obligations seriously and preserve all relevant communications and other documents.

In addition to a formal written demand for preservation of evidence, the complaining party may file a motion for a protective order, *ex parte*, at the same time the complaint is filed. Acting *ex parte* may avoid the danger of alerting the defendant regarding materials it may wish to destroy; and while the court may be reluctant to grant such orders without

hearing from the other party, the filing of such a motion will leave little doubt concerning notice once it is served.

Of course, the proposed order that should accompany such a motion should identify, with as much precision as possible, the specific records or other items for which protection is sought. While on the employee-side the plaintiff (depending on his or her job) should be in a position to assist with this, it is a situation where a quick deposition of the defendant's management information systems manager may also be advisable, budget permitting. Language ordering that all evidence, including documents relating to an employee's employment, must be preserved should be a reasonable starting point. The protective order should require the opposing party to take whatever steps are necessary, including litigation holds, to assure that no further destruction of backup media occurs, and that all existing media will be preserved so as to remain available.[3]

As with other kinds of discovery issues, courts usually prefer to see parties conferring and agreeing between themselves regarding necessary steps to assure the preservation of electronic evidence. In cases involving a larger organization, this may require discussing the restoration of backed-up electronic materials (in particular, e-mails), including sometimes special software; and agreeing on search terms to be used in their review.

Because of the huge volumes of material even smaller businesses accumulate, courts are often hesitant to require maintenance of global backups and it may be necessary to segregate material likely to be useful in proving the case. Both parties should be willing to permit database searches that are focused on retrieving materials of this kind. For plaintiff counsel, the best source for productive search terms is likely to be the plaintiff, who may have been exposed to the e-mail and other electronic documents most likely to be helpful. But defense counsel will also want to locate and preserve exculpatory materials. Again, the client is often the best person to assist in developing such search processes.

Sanctions

Because of the seriousness of the threat to the judicial process that spoliation poses, courts have been inclined, as noted, to award significant sanctions against spoliators. A jury instruction on spoliation represents one means of effectuating such a sanction. In this step, the court instructs the jury that it may infer from the destruction of the evidence at issue that it would have supported the contention for which the plaintiff sought to use it; or was in some other way damaging to the defense. The jury may thus rely on it in making a decision concerning liability, damages or any other issue on which it bears. Appropriate relief may also consist of exclusion of testimony putatively arising from, or based in, the missing records.

In a Massachusetts case, *Linnen v. A.H. Robins Co., Inc.,* 11 Mass. Law Rptr. 189, 1999 WL 462015 (Mass. Superior Ct. June 16, 1999), the court issued a spoliation charge against a company for failing to preserve evidence in an injury case relating to pharmaceuticals. There, in the extensive litigation over the diet drugs fenfluramine and phentermine, plaintiffs had sought and won an initial *ex parte* order requiring the defendant drug manufacturers to retain extensive electronic communications, including electronic mail. The manufacturers thereafter succeeded in having the order lifted, in part on the basis of their representations that electronic materials would be preserved and provided. However, it later developed that materials had been nevertheless destroyed and the court, Brassard, J., ordered that the jury be given the spoliation instruction that it may infer that the evidence was disadvantageous to the defendants as part of the charge.

Alternatively, where missing evidence might raise a credibility question or be a basis for contradicting defense testimony, such defense, or the testimony on which it relies, may be barred from admissibility. In a case in which the plaintiff claimed to have been injured by a daybed which was later destroyed by the defendant, the injured party sought to bar from evidence photographs of the offending furniture. The plaintiff argued that unless it could examine for itself the actual daybed that caused injury, it would be prejudiced by the conclusions a jury could draw from the (potentially misleading) photographs. This theory represents an attempt to compensate for the damage done to the truth-finding process that the spoliation represented.

Finally, the court may apply the ultimate sanction of entry of default judgment against the spoliator; or dismissal of the spoliating party's case. As with other failures to make discovery, these sanctions are available to the court pursuant to Mass. R. Civ. P. 37(B)(2). But application of this sanction has been criticized, particularly where no finding of intent has been made.

In *Menz v. New Holland North America Inc., et al.*,[4] the Court of Appeals considered a district court decision sanctioning spoliation by dismissal of the case where the court omitted to inquire into motivation. Relying on Missouri law and federal decisions, the *Menz* court held that evidence of intent was necessary, writing,

> [w]e need not decide whether federal or state law governs in this diversity action because the result is the same under both - to warrant dismissal as a sanction for spoliation of evidence there must be a finding of intentional destruction indicating a desire to suppress the truth. . . . [A] finding of bad faith is necessary before giving an adverse inference instruction at trial against a plaintiff for the destruction of evidence. It would therefore be unreasonable to excuse a finding of bad faith when imposing a more severe sanction, the outright dismissal of a plaintiff's case."[5]

Sanctions can also be imposed in an exemplary manner, as a deterrent to future spoliation, as happened in the *Prudential* case noted above. Perhaps the simplest sanction is the entry of orders aimed at preventing the spoliating party from receiving an advantage as a result of its misconduct. For example, in employment cases, an order eliminating from the trial any testimony that's veracity cannot be tested against destroyed records may be one possibility. Such a position may have a hobbling effect on defenses sufficient to deter future spoliation. It may at the same time offer the approach most likely to place the court and the parties in the position closest to the one they would have occupied had the spoliation not occurred.

Conclusion

The advent of electronic documents has vastly increased the array of materials that should be discoverable from defendants in employment cases. At the same time, the fragility of electronic data means it may be more easily spoliated than hard copy materials. Steps taken in a timely manner, however, should aid in minimizing the risk of such spoliation occurring and the damage to the judicial process and the discovering party's case should it occur.

End notes

1. Researchers at the University of California, Berkeley, recently found that 93 percent of all information generated in 1999 was in digital, or electronic, form. Withers, *The Discovery of Electronic Evidence: What you Need to Know,* Association of the Bar of the City of New York, May 29, 2003, at 2.
2. One source of confusion is whether spoliation needs to be addressed solely within the underlying case, or whether a separate cause of action, in the nature of tort, is created by the destruction of evidence. The 1st Circuit addressed this issue in a recent Rhode Island matter, *Malinowski v. Documented Vehicle/Drivers Systems, Inc. et al.,* 66 Fed. Appx. 216; 2003 U.S. App. LEXIS 10812 (May 30, 2003), where the court wrote in a non-precedential opinion, "We agree with the magistrate judge and the district court that, even supposing the Rhode Island Supreme Court were to recognize a spoliation tort, [plaintiff] has not set forth specific facts making out such a hypothetical cause of action. . . . Perhaps most telling is the absence of a factual basis from which to conclude that [defendants] destroyed evidence so as to affect her ability to obtain a favorable judgment in the wrongful death action. . . . In the few states that recognize an independent tort for spoliation of evidence, courts have required, *inter alia*, that a party show a causal relationship between the act of spoliation and the inability of the complainant to prove her lawsuit." *See also*, *Oliver v. Stimson Lumber Co.*, 1999 MT 328, 993 P.2d 11, 297 Mont. 336 (Mont. 1999); *Torres v. El Paso Elec. Co.*, 1999 NMSC 29, 987 P.2d 386, 401, 127 N.M. 729 (N. Mex. 1999).
3. The questions of methods of production for electronic data and, more importantly, how the costs are to be allocated are large topics beyond the scope of this paper. It is, however, worth noting that costs are frequently divided and that courts encourage negotiation over such matters as media for production, search software and search terms between the parties.
4. 440 F.3d 1002; 2006 U.S. App. LEXIS 6385 (8th Cir. 2006).
5. *Id.* at 1006. *See also Stevenson v. Union Pac. R. R. Co.*, 354 F.3d 739, 746 (8th Cir. 2004); *Morris v. Union Pac. R.R.*, 373 F.3d 896, 901 (8th Cir. 2004) (noting under *Stevenson* that "a finding of intent is required to impose the sanction of an adverse inference instruction"); and *Brown v. Hamid*, 856 S.W.2d 51, 56-57 (Mo. 1993) ("The evidentiary spoliation doctrine applies when there is intentional destruction of evidence, indicating fraud and a desire to suppress the truth").

Comments from the Labor and Employment Law Section chair

By Rosemary Pye

The 1,200 members of the Labor and Employment Law Section enjoy careers in a field that provides intellectual challenge, the satisfaction of having an impact on working lives, and colorful stories. The L&E Section Council wants to reach out to its members throughout the state to bring you services through the *Section Review*, our CLE programs, our review of pertinent legislation, and community outreach. We welcome your ideas and participation.

In this issue, Nina Kimball, Paul Merry and Robert Fisher lead the section's enhanced commitment to the *Section Review* as an ideal way to reach all of our members. Kimball introduces us to a recent case from the D.C. Circuit on the constitutionality of taxing damages for emotional distress. Although the decision was vacated by the D.C. Circuit after Kimball had submitted her article, the case will be heard en banc and is likely to have far-reaching consequences. While Merry notes the particular challenge of obtaining evidence in employment cases, the problem of the spoliation of evidence cuts across all legal specialties. Fisher has written on the National Labor Relations Board's new lead cases on the fundamental question of whether an individual is a supervisor or an employee, entitled to the protections of the act.

Rosemary Pye has been the regional director of the National Labor Relations Board's Boston office since 1989. She is responsible for the investigation and prosecution of unfair labor practice and representation cases in the states of Maine, New Hampshire, Vermont, Massachusetts and Rhode Island.

Editors Marilyn Zuckerman, Alicia Matos and Christina Montgomery would be happy to hear your suggestions and receive your articles. Do not miss the opportunity to educate and inspire other members of the bar.

Our luncheon roundtable program continues in Boston and has recently expanded to Springfield and Worcester. In Boston, we have had presentations on retaliation in the wake of the U.S. Supreme Court decision in *Burlington Northern*, the survival of MCAD claims, new litigation theories of workplace bullying, and religion in the workplace under the leadership of Ellen Messing, James Glickman and David Wilson. In January, Tani Sapirstein and Daniel Blake held a luncheon roundtable in Springfield on retaliation claims, while Nicholas Anastopoulos and Mark Hickernell began the Worcester roundtables with a program on the NLRB's lead cases on supervisory status. We want to bring the MBA to you.

The L&E Section features two practice groups, which meet at the MBA at 20 West St. in Boston. The Employment Law Practice Group for employment lawyers is chaired by Patrick Bannon, Elizabeth Neumeier and Christina Montgomery and meets the second Tuesday of the month at 4:30 p.m. The Labor Relations and Collective Bargaining Practice Group for labor lawyers is chaired by Bryan Decker, Catherine Reuben and Jay Siegel and meets the second Wednesday of the month at noon.

Because both are open to members and nonmembers for free, this is an ideal time to come and bring guests. Each meeting covers a specific topic or presents a particular speaker, and you are always welcome. In this small group setting, you can have an intensive discussion of cutting-edge issues with a cross-section of practitioners in your specialty. These groups have often included opportunities to speak informally with state and federal labor and employment law officials, such as MBA section council member and MCAD Commissioner Martin Ebel. Contact Section Administrator Marc D'Antonio at *dantonio@massbar.org* or (617) 338-0650 to sign up for the mailing list.

Section council leaders also promote our interests in community outreach, legislation, amicus curiae participation and outreach to the membership by the MBA. Pro Bono Coordinator Bryan Decker is starting a program to develop materials and train volunteer lawyers to educate employees on their rights and obligations in the workforce. While achieving a consensus on legislation among neutrals, management, plaintiff and union attorneys is difficult, Legislative Liaison Yvette Politis is tracking legislation of interest to the section's members. Monica Halas represents the section on the MBA's important Amicus Curiae Committee. Daniel Blake, the section's MBA Web site liaison, is responsible for making sure the newly designed Web site meets your needs. All four welcome your suggestions and participation.

The section sponsors two major conferences and at least one seminar each year. The

Annual NLRB-U.S. DOL Robert Fuchs Labor Law Conference, co-sponsored with the other New England state bar associations and the Boston Bar Association, is held in October and focuses on Washington federal officials. Our 28th Annual Spring Conference is already set for May 9 at the Sheraton Boston. Judge Nancy Gertner will give the keynote address. The panels will address the First Circuit's review of arbitration awards, the rights of undocumented workers, electronic discovery, and the comprehensive survey of employment law cases.

With respect to seminars, Jay Shepherd started our year with a seminar on non-compete agreements, headed by Judge Allan van Gestel, and other seminars are being planned. While much work has already been done on the CLE programs for the year, we invite your suggestions to allow us to respond to developing interests.

The section values its co-sponsorship with other MBA sections. Labor and employment law impacts many specialties, including business law, civil litigation, immigration law, tax law and individual rights and responsibilities. By joining with our colleagues in L&E and the MBA in general, we all sharpen our knowledge and skills, meet new people in our specialty and beyond, gain recognition for our expertise, and contribute to the community. Please contact any section council members or section leaders to participate.

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HELL'S GATES — ADOPT EFFECTIVE CLIENT COMMUNICATION METHODS TO AVOID BAR DISCIPLINE

By Alan E. Brown

At the mouth of the Kennebec River in Arrowsic, Maine, there is a section of water known as *Hell's Gates*. There, strong currents draw the unsuspecting boater into a whirlpool that even an old salt would struggle to escape. Avoiding trouble means steering clear of that section of the river altogether. Here in Massachusetts, wise lawyers heed similar advice when dealing with the BBO: They do not risk crossing its path. However, many lawyers unnecessarily invite scrutiny of their work and risk discipline by failing to adopt and follow effective client communication methods.

Alan E. Brown is an associate in the Boston office of Morrison Mahoney LLP, where he concentrates his practice in the areas of professional liability and general liability defense. Prior to joining the firm, he served for four years as an investigator in the Office of the Bar Counsel at the Massachusetts Board of Bar Overseers.

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Bar counsel's Attorney Consumer Assistance Program (ACAP) screens all complaints made to the BBO. Since its inception, ACAP has reported that more than 25 percent of its callers raise concerns about lawyer neglect, lack of diligence and communication problems.[1] As a former bar counsel investigator responsible for mediating these attorney-client disputes, I can personally attest to the large number of BBO inquiries generated by lawyers' lax communication. The BBO routinely hears clients say:

> "I keep calling and leaving messages at the lawyer's office and nobody calls back."
>
> "I think my lawyer pretends to be out when I call."
>
> "I have no idea what's happening with my case and can't get any information from my lawyer."
>
> "The lawyer's secretary keeps telling me nothing has happened, but I don't know if I believe it."

ACAP strives to resolve minor disputes between lawyers and their clients without a formal investigation. What many lawyers do not appreciate, however, is how easily a seemingly minor attorney-client communication problem can become the gateway to a broader investigation. This investigation includes intense scrutiny of the lawyer's work and, in some cases, discipline.

Take the client who calls ACAP because he does not know the status of his case. The client reports to the BBO that his lawyer has failed to respond to recent telephone calls and voicemails. While on its face this is nothing more than a simple communication problem, if not resolved immediately by the lawyer to the satisfaction of his client, bar counsel will advise the client to file a written complaint. A full investigation ensues. This investigation often includes a review of the entire case file by bar counsel since the allegations in the client's complaint do not limit the scope of bar counsel's inquiry. If client funds are involved, even remotely, a lawyer might receive requests for his IOLTA records, including the detailed check registers, client ledgers and account reconciliations required by the new version of Massachusetts Rule of Professional Conduct 1.15.

What starts out as a simple communication problem, therefore, can quickly develop into a far deeper inquiry. Every time a lawyer opens his records to bar counsel, he subjects his work to scrutiny and risks possible discipline. Of the 163 admonitions imposed by bar counsel between 2003 and 2005, 66, or 40 percent, of those cases included a violation of Mass. R. Prof. C. 1.4 (Communication).[2]

What can you do to minimize your exposure to bar discipline arising out of communication problems? First, review the applicable rule, Mass. R. Prof. C. 1.4, which states:

> 1.4 <u>COMMUNICATION</u>
>
> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

This rule sets the benchmark against which all communication methods should be judged: Does it keep the client *reasonably informed* and facilitate the lawyer's *prompt compliance* with *reasonable requests* for information?

Second, take a proactive approach to managing client communications. Instead of reacting to communication problems, set your clients' communication expectations. Other industries routinely manage consumers' expectations. Consider a bank customer: He can request his account balance by phone, complete some transactions at an ATM, or visit a branch location and speak personally with a teller. No customer shows up at a bank in the middle of the night expecting to speak with a teller. Why? Because the bank has managed the customer's expectations about when and how communication will take place, teaching him to expect only certain information at certain times. To avoid client headaches, including weekly or daily telephone calls, letters and, most importantly, reports to the BBO, educate your clients about how communication will function in the attorney-client relationship and consistently follow a communication plan.

Third, consider the following specific tips for improving client communications:

1. Return all phone calls within 24 hours

Clients want to know that their lawyers are working diligently on their behalf. Nothing comforts clients more than to hear their lawyers' voices on the phone. If you cannot return a call the same day, leave detailed information with your secretary or on your voicemail greeting indicating when you will be back in the office and available to take and return calls. Request that your clients leave in their voicemail messages the times when they will be available. Ask at the inception of the representation, as part of a standard intake form, the best time to reach the client, and the clients' preferred method of communication. Note that one of the first questions bar counsel will ask an upset client is when and how often the client called the lawyer, and when the lawyer last responded to these inquiries. You want the client's answer to be "within 24 hours of my call."

2. Send frequent written updates

Clients ask their lawyers to handle disputes that are very often emotionally charged. As a result, many clients benefit from written assurances that their lawyers have not forgotten about them.[3] Having something in writing also means that the client has a source besides the lawyer to consult when a questions arises. While certainly this will not address all clients' concerns, it does offer the client a second source, besides the lawyer, from which to obtain information about the case. At my firm, we strive to send something in writing to each client, even if just a quick e-mail, every 60 days.

Also provide the client with written notice of important information and developments in the case. Unlike a carpenter who can show his progress in building a home to his customer, lawyers have to exercise greater creativity in presenting case progress to clients. Clients will better appreciate the services provided if they receive regular notice of important events. Better appreciation means fewer calls to the BBO.

Note that a recent written communication from a lawyer to a client goes a long way in convincing bar counsel that the lawyer has *reasonably responded* to information requests, and often shifts the burden to the client to explain why this written update is insufficient.

3. Put office systems in place that foster communication

Client communication should not consist solely of firefighting. By taking control of client communication, you regain control of your practice and your time. Having systems in place, even if it is just a tickler that reminds you to reach out to your client at regular intervals, cuts down on client inquiries and allows you to respond on your own schedule. Make use of technology to facilitate this process. Many lawyers who answer BBO complaints stemming from communication problems lack a client communication system in their offices.

4. Set limits on what staff can and cannot say

Many offices rely heavily on support staff to communicate with clients. This can result from the lawyer's busy schedule or because the lawyer services a non-English speaking population and needs an assistant to translate information. While it is fine to have a secretary or paralegal communicate basic information to clients, it is not appropriate to delegate all client communications to support staff. The client hired and wants to hear from you, the lawyer. Bar discipline problems can emerge when the non-lawyer assistant evolves into a pseudo-attorney, giving legal advice. Additionally, many clients doubt information received from support staff when the lawyer seems evasive to speaking with the client. Many clients think the support staff is simply pacifying them. Take time to speak with clients before they call the BBO.

5. Create a standard letter for the "nuisance client"

We have all experienced situations where a client calls much more often than case developments occur. While it may not fully satisfy the client, it will go a long way towards satisfying the BBO if the lawyer sends a form letter to the client that very briefly (i.e., one sentence) describes the status of the case and informs the client that you will provide an update in 60 days or as appropriate. Keep this letter handy and have support staff prepare it for your signature. Documenting your *prompt compliance* and attempts to keep the client *reasonably informed* strongly evidences compliance with Mass. R. Prof. C. 1.4.

6. Bill regularly

Just like frequent written updates are critical to effective client communication, regular billing shows your clients the work you have invested on their behalf and the bill itself is a great communication tool. Regular billing

also lets clients know how much money you have spent on the case in fees and expenses. Surprise bills at the end of the case often result in calls to the BBO. Combining monthly billing with a short narrative status update is a great way to efficiently manage client communication. Some firms that take cases on a contingency keep internal time records to track their own efficiency. Consider sharing these "bills" with clients so they can appreciate your efforts.

Log the date and time of every call to a client, even if you just leave a voicemail message. If no substantive conversation takes place, bill these calls as "no charge." Aside from creating a record of your attempts to reach your clients, a useful record when facing disciplinary allegations of poor communication, clients love to see "no charge" entries on their invoices.

7. Provide a roadmap to the case

At the inception of the representation, provide the client with a roadmap outlining major events in a typical case (e.g., answering the complaint, written discovery, depositions), along with guidelines setting out how often the client should expect to hear from you. Tell clients in this roadmap that you will provide status updates whenever a major development occurs or every 60 days. Inform clients about the time a typical case takes to reach trial. Deal with any client's unreasonable expectations at this stage, and decline the case if you cannot come to an agreement. Better to turn down the case than take on a client who will become a communication nightmare. If you take the case, stick to the plan set out in the roadmap. Bar counsel will look favorably on any lawyer who shows such careful planning in communicating with his clients.

8. Recognize signs of a communication problem

If you regularly receive calls from clients asking for the status of their cases, you may have a client communication problem. If you regularly speak with clients only after they have left you multiple messages, you likely have a client communication problem. If you have received calls from ACAP or have had written complaints filed against you, you definitely have a communication problem.[4] In all cases, take a serious look at the communication methods now in existence in your office and make improvements. Failure to recognize and address communication issues means you will ultimately hear from the BBO.

Do not unnecessarily invite the BBO to scrutinize your work and risk possible discipline. Adopt effective communication methods and avoid getting stuck in the legal profession's version of *Hell's Gates*.

End notes

1. *See* Bar Counsel's Report to the Supreme Judicial Court: Fiscal Year 2005, *available at* www.mass.gov/obcbbo; Anne Kaufman, Five Years of ACAP (November 2004), *available at* www.mass.gov/obcbbo.
2. The author calculated this statistic by reviewing admonition summaries published by the BBO on its Web site. *See* Disciplinary Decisions Since 1999, *available at* www.mass.gov/obcbbo.
3. Of course, these communications are intended to be brief status updates, not detailed analyses or opinion letters.
4. Under no circumstances should you fail to reply to a call from ACAP within 24 hours or ask a support staff member to handle an ACAP inquiry. This only adds weight to an allegation of poor communication.

The end of "prohibition by condition": *Castle Hill Apartments Limited Partnership v. Planning Board of Holyoke*

By Mark W. Corner

It is a well settled proposition of land use law that site plan review is a valuable tool in the regulatory process, providing municipal planning boards and zoning boards with oversight over uses permitted as a matter of right under local zoning by-laws or ordinances. It is equally well settled that in the regulatory process, municipal land use authorities are authorized to impose reasonable conditions on projects subject to permitting, including under the site plan review process. There may, of course, be a substantial difference of opinion between a landowner and a municipality as to what constitutes a "reasonable" condition imposed on a use permitted as a matter of right undergoing site plan review.

Mark W. Corner, a partner in the Litigation Department at the Boston office of Riemer & Braunstein LLP, served as counsel to Castle Hill and Pilot Construction in the proceedings of the Land Court and the Appeals Court. His trial and appellate practice focuses on zoning, land use and other real estate related issues, as well as complex business disputes and insurance defense and coverage issues. He is a former chairman of the Zoning Board of Appeals of the Town of Wayland. Corner acknowledges his colleague, Robert C. Buckley, who represented Castle Hill in the Planning Board proceedings.

The right of property owners to rely upon uses permitted as of right in their developmental planning, and the limits on the authority of a municipality to impose conditions on such development in the context of site plan review, met on a collision course in *Castle Hill Apartments Limited Partnership v. Planning Board of Holyoke*.[1] The Appeals Court acknowledged the limits of the authority of a municipality to impose such conditions, recognizing that such authority, without limits, is tantamount to the authority to deny such permitted use.

Factual background

Castle Hill Apartments Limited Partnership ("Castle Hill") is the owner of real property located at 83 Mountain Park Road in Holyoke, Hampden County, Massachusetts, consisting of 17.4 acres (the "property"). On or about Nov. 16, 2001, Castle Hill, as owner of the property, and Pilot Construction Inc. as general contractor, submitted plans to the City of Holyoke Planning Board for five multifamily structures, containing a total of 125 residential units, on the property (the "project").

The project, comprising "multifamily dwellings," is a use permitted as a matter of right in the RM-20 zoning district in which the property is located, since it comprises multifamily dwellings with a density of less than 20 units per acre.[2] The project and associated structures, as proposed in Castle Hill's application, complied in all respects with the dimensional zoning requirements applicable to the RM-20 zoning district, including setbacks, height and lot coverage. Castle Hill is also the owner of 56 existing townhouse-style rental units located on the property, each having two means of access and egress to grade, which were designed and built circa the 1960s and 1970s. The proposed units in the new structure were designed as "garden-style" apartments, with access and egress from each unit to common areas within the building, and without direct access to grade.

Under the ordinance in effect at the time when Castle Hill applied for a building permit, as well as under the ordinance as amended as of Feb. 19, 2002, an applicant for a building permit for new construction of a multifamily structure or development required a special permit from the Planning Board, as well as site plan approval by the Planning Board for a multifamily development consisting of more than one building lot.[3] The Planning Board conducted public hearings in connection with Castle Hill's application for the project over eight sessions, running from Jan. 10, 2002 until July 9, 2002, at which point the Planning Board closed the public hearing and the record on Castle Hill's application.

Castle Hill's application was subject to vehement opposition from abutters and other community members. Opponents of the project referred to the design of the proposed

buildings as "barracks" style. Additionally, the mayor of Holyoke wrote the following to the city's planning director about the project:

> Anyone willing to support such a project does not have the best interests of the city at heart and cannot have my support and confidence. Therefore, *I regretfully have to ask for letters of resignation from any board member and the planning director who are inclined to favor this fatally flawed project* and not bring the full power of local zoning as well as Massachusetts General Law. [*Emphasis added.*]

During the course of the public hearing process, in response to concerns raised by the community and the Planning Board, Castle Hill reduced the number of units proposed for the project from 125 to 123.

On Oct. 3, 2002, the Planning Board voted unanimously, at a public meeting, to "approve" the plans submitted by Castle Hill. The Planning Board issued a Statement of Findings, dated Oct. 4, 2002, as well as a "Notice of Decision — Site Plan Review Approval with Conditions," which was filed with the Holyoke city clerk on Oct. 4, 2002. In its Statement of Findings, the Planning Board expressly found as follows:

- "The completed site plan application package submitted by the [plaintiffs] meets the requirements of the Site Plan Review Ordinance, Section 10.0, and is sufficient for board review."
- Castle Hill complied with the requirement that it submit to the Planning Board a "narrative giving details of the project. In addition to this narrative, we have asked for and received additional information."
- Castle Hill is "in compliance with the use and dimensional provisions of the Holyoke Zoning Ordinance, the General Laws of Massachusetts and applicable rules and regulations of state and federal agencies."
- Castle Hill is in compliance with the criteria "in regard to landscape and open space."
- The Planning Board identified no problems with the project with regard to utilities, drainage, circulation, services, infrastructure demands or outdoor storage.

Such approval was hardly an endorsement of the project by the Planning Board. Despite having determined that the project had satisfied the objective requirements set forth in the site plan review provisions of the ordinance, and despite its unanimous vote to "approve" the project, the Planning Board went on to observe that the project's

> building design is not compatible with the existing development with regard to architecture, building materials and entranceways. The proposed units are of "barracks" style design (two entranceways per building) using vinyl siding and facade brick, yet the existing buildings use clapboard and brick with separate front and rear entranceways for each unit. For these reasons, the proposal is not compatible with the existing development, and does not comply with Section 10.1.7.3 of the Holyoke zoning ordinance.

The Planning Board purportedly conditioned its "approval" subject to, *inter alia,* the following condition subsequent ("Condition 8"):

> 8. Prior to the issuance of the building permit, *the applicant shall submit to the board for its approval, an amended design* that shall address the following:
>
> (a) The building design shall be in harmony with the existing structures.
>
> (b) The design shall incorporate the use of brick and clapboard construction materials consistent with the existing structures.
>
> (c) The proposed structures shall vary in size, style and detail consistent with the existing structures on the parcel.
>
> (d) Each unit must include a front and rear means of access/egress, specific to the existing dwelling units on the parcel.
>
> (e) The color of each unit shall be consistent with the color scheme of the existing development.

In effect, the Planning Board's "approval" of the project was expressly conditioned upon Castle Hill submitting, for the *subsequent* approval of the Planning Board, an *entirely new plan*, which would require the wholesale redesign of the "approved" plan. Indeed, the design changes associated with such a revised plan complying with the Planning Board's condition that each unit "include a front and rear means of access/egress" would result in the project being converted from a "garden-style" (or, more pejoratively, "barracks" style) design to "townhouse"-style. As a consequence of converting the project from garden- to townhouse-style within the footprint approved by the Planning Board, the number of units on the property would be reduced from the 123 units appearing on the "approved" site plan to 40 to 60 units — substantially fewer than the 348 units (including the 56 existing units on the property owned by Castle Hill) permitted on the 17.4-acre parcel at the permitted density of 20 units per acre.

Procedural history

In a classic case of being unable to "please all of the people all of the time," two appeals were generated from the Planning Board's decision. Castle Hill appealed to the Land Court from the Planning Board's decision, pursuant to G.L. c.40A, §17, contending that the imposition of Condition 8 was beyond the authority of the Planning Board. Castle Hill protested that the Planning Board exceeded its authority by requiring each unit to have two means of access and egress per unit, pursuant to Condition No. 8(d), noting that such a major design change would have resulted in the significant reduction of the number of units that could be constructed on the property within the approved footprint from the 123 units ostensibly "approved." Further, despite "approving" the plan, the board specifically required that Castle Hill submit a *new* plan in accordance with Condition 8, including the condition that each unit have two means of access and egress, for subsequent approval. Additionally, a number of abutters appealed from the decision in a separate action filed in Hampden Superior Court.

The Land Court held a hearing on Castle Hill's Motion for Summary Judgment on Nov. 24, 2003, at which the court consolidated Castle Hill's appeal with the abutters' appeal from the Planning Board's "approval" of the plan.[4] On April 9, 2004, the Land Court (Sands, J.) issued a Memorandum of Decision and Order.[5] The Land Court allowed Castle Hill's Motion for Summary Judgment, ruling that the Planning Board had exceeded its authority with respect to the imposition of Condition 8(d) to its decision, which required Castle Hill to submit a new plan with separate access and egress for each unit, finding that such condition was an effective denial of the plan.[6] The court remanded the matter to the Planning Board to make findings consistent with the summary judgment decision, and to issue a new decision within 90 days of the date of the Land Court's decision. Specifically, the Land Court ruled that:

> The Planning Board should be aware that *the decision shall not be revised so as to limit the number of units in the project below the number proposed by the plaintiffs*, particularly where the maximum number of units allowed on locus would be 348 and plaintiffs' evidence shows a current decrease in number to 40-60 units (one-seventh of the maximum number allowed). [*Emphasis added.*]

The Land Court retained jurisdiction on the matter for review of the Planning Board's revised decision. The Land Court also dismissed the abutters' appeal, finding that they lacked standing as "persons aggrieved" by the Planning Board's decision necessary to sustain an appeal under G.L. c. 93A, §17.

On June 23, 2004, the Planning Board conducted a subsequent hearing after remand by the Land Court. In connection with that hearing on remand, Castle Hill submitted a new plan, maintaining the garden-style units originally proposed, while addressing certain of the issues identified in the Planning Board's original decision, such as building materials, rooflines and other aesthetic issues. After the hearing, the Planning Board issued a new decision, dated July 2, 2004, pursuant to which Castle Hill's amended plan was "Approved under protest with conditions."

The Planning Board noted in its decision following remand from the Land Court that it "reluctantly approved" the revised plan, continuing to find that its design "is not compatible nor harmonious with the surrounding neighborhood" due to the absence of separate access and egress for each unit. In that decision, the Planning Board also noted in Finding 5:

> Landscaping plans are approved, however, the board is requiring a site visit to determine if the buffer is adequate to screen the adjacent single-family neighborhood.

Furthermore, among the conditions imposed by the Planning Board in Decision 2 were as follows:

> 8. Prior to the issuance of a Certificate of Occupancy, the proposed landscape buffer between the proposed development and Central Park Drive must be approved by the Planning Board as to the specific type, number and location of all plantings and materials.
>
> 9. Prior to the issuance of a Certificate of Occupancy and upon completion of the buildings, the planting will be done in accordance with the Landscape Plan and the Planning Board will have a site visit to determine if the plantings provide an adequate buffer to screen the abutting single family zoning district to the south.
>
> 10. After a site visit the Planning Board may require additional plantings and/or suitable screening materials to enhance the buffer.

Following the issuance of the decision following remand, the Land Court conducted a status conference on Sept. 7, 2004, at which time Castle Hill questioned Finding 5 and Conditions 8, 9 and 10 of the decision. The Land Court advised the parties to attempt to resolve these issues and stated that it would issue a judgment if the parties could not reach an agreement within 30 days — which they could not do.

The Land Court (Sands, J.) issued a subsequent order on Oct. 13, 2004, reciting that "[i]n their status report filed with this court on Sept. 3, 2004, [Castle Hill] proposed new language in the findings and conditions in which they agreed to add additional plantings not to exceed 5 percent of the cost of landscaping. In light of the foregoing discussion, this proposal seems reasonable, and the court incorporates such language into this order and into the summary judgment decision." The court accordingly entered final judgment on Oct. 13, 2004, modifying the decision after remand in accordance with its Oct. 13, 2004 order. The Planning Board filed a Notice of Appeal on Nov. 10, 2004, ironically appealing its own decision.[7]

The Appeals Court decision

By decision dated March 31, 2006, the Appeals Court affirmed the decision of the Land Court.[8] The Appeals Court upheld "the use of site plan approval as a permissible regulatory tool for controlling the aesthetics and environmental impacts of land,"[9] but held that "[w]here the proposed use is one permitted by right the Planning Board may only apply substantive criteria[10] … and may only impose reasonable terms and conditions on the proposed use, *but does not have the discretionary power to deny the use.*"

The Appeals Court acknowledged, however, that site plan review "is not without some teeth":

> A board … possesses discretion to impose reasonable conditions under a bylaw's requirements in connection with approval of the site plan, even if the conditions are objected to by the owner or are the cause of added expense to the owner… In some cases, the site plan, although proper in form, may be so intrusive on the interests of the public in one regulated aspect or another that rejection by the board would be tenable. This would typically be the case in which, despite best

efforts, no form of reasonable conditions could be devised to satisfy the problem with the plan and the judge conducting *de novo* review concurs in the conclusion. [Internal citations omitted].

The Appeals Court then went on to discuss what would constitute a "reasonable" condition imposed under site plan review to a use permitted as a matter of right.[11] While multi-family dwellings, such as those proposed by Castle Hill, constitute a use permitted as of right in the zoning district in which the property is located, additional zoning relief was required under the City of Holyoke Zoning Ordinance. Section 7.4.6 of the ordinance requires a special permit and site plan approval for multi-family developments consisting of more than one building for dwelling purposes per lot. Pursuant to Section 10.1.1 of the ordinance applicable to all new multifamily housing, the purpose of site plan review is to "protect the health, safety, convenience and general welfare of the city by providing a mechanism to review plans for proposed structures and to ensure that development is designed or expanded in a manner that reasonably protects visual and environmental qualities of the site and its immediate surroundings." Section 10.1.7(3) of the ordinance provides that "the architectural style shall be in harmony with the prevailing character and scale of buildings in the neighborhood through the use of appropriate building materials, screening, breaks in the roof or wall lines or other architectural techniques. Variations in detail, form and siting shall be used to provide visual interest and to avoid monotony. Proposed buildings shall relate harmoniously to each other with adequate light, air, circulation and separation between buildings."

Against this backdrop, the issue before the Appeals Court was whether imposing a condition of two entrances per individual unit is a "reasonable" condition "to protect the health, safety, convenience and general welfare of the city … and to ensure that [design] reasonably protects visual and environmental qualities of the site and its immediate surroundings," consistent with Section 10.1.1 of the ordinance. The Planning Board conceded that Castle Hill would have to completely reconfigure both the interior and exterior of each of the proposed buildings that it had "approved," and lose more than one-half of the proposed units to which it would otherwise be entitled as of right, but contended that reconfiguration of the project to "more appropriate building design" is "sensitive to the architectural structures" of the site and the abutting neighborhood, and "addresses the safety concerns the board had about access" and as such "was reasonable and appropriate under site plan review."

The Appeals Court noted that the record was silent as to any "health, safety or convenience concerns" in the Planning Board's decision, and particularly noted that "any evidence of safety issues arising from the use of two entrances for each building is conspicuously absent in the summary judgment record," leaving for review the impact of "visual and environmental qualities of the site and its immediate surroundings." The number of entrances is not an enumerated concern of site plan review, and the Appeals Court rejected the board's assertion that the number of entrances is an inherent part of the building's architecture or design in the context of site plan review. The Appeals Court expressly held that use of the catchall phrase of "other architectural techniques" as permitting the board to require a redesign of each building to provide multiple entrances was unrelated to the considerations of safety, health, environmental or aesthetic benefits to the neighbors. The court further noted that:

> Reasonable conditions aimed at controlling noise or other environmental or visual impacts associated with the use of the entrances by multiple users, or the architectural design of the entrances themselves, may have been permissible under Holyoke's site plan review criteria. Nonetheless, imposing a condition that requires Castle Hill to completely redesign the interior and exterior of each building to add multiple entrances to accommodate vague exterior aesthetic concerns is not reasonable, and exceeds the board's authority. In addition, we share the judge's concern about the impact of the conditions on the density of the project, which is not an enumerated consideration of the site plan review criteria.

The Appeals Court further noted that it "did not consider reasonable a condition imposed pursuant to site plan review that provides questionable aesthetic value and yet profoundly impacts the density of the project."

The court noted that "the condition's dramatic impact on the density of the project under the guise of harmonizing visual impacts is troubling," and that issues of density are not included in the site plan review's criteria because issues as to density, like issues related to the use itself, "were previously resolved in a legislative sense when the city enacted the ordinance permitting up to 20 units of multifamily residence per acre of a site in the RM zoning district." Accordingly, issues of density, as well as uses permitted as of right, cannot be restricted through the site plan review process. Conditions restricting permitted uses and allowed density are not properly restricted by conditions unrelated to the enumerated goals of site plan review under the applicable zoning regulation.[12] In that regard, the Appeals Court noted that:

> The proposition that two entryways per unit would contribute positively to the visual impacts of the buildings is dubious at best. Although the board's adoption of the label 'barrack' style to describe the proposed buildings connotes an unattractive, uninteresting and, perhaps, distasteful design, the actual site plan depicts colonial-like architectures with varied rooflines, shuttered windows, multiple decks, and attractive lighting and landscaping. The visual advantages achieved from adding multiple entrances to the proposed structures are not readily apparent from the record.

Conclusion

Several lessons may be drawn from the *Castle Hill* case. The Appeals Court acknowledged that the imposition of conditions on "as of right" use, through the mechanism of site plan review, is not "without teeth," and does not allow development *carte blanche*. Reasonable conditions may be imposed through the site plan review process, to implement the explicit goals of such process set forth in the community's extant site plan review regulations. The imposition of such reasonable conditions, however, must be tied to the authority of the board administering site plan review, and must be geared to achieve the goals identified in the by-law, such as the legitimate planning goals of safety, traffic control and the like. However, the imposition of such conditions cannot interfere with more specific rights and restrictions that have been legislatively imposed, such as density, dimensional and use restrictions in a zoning district that are authorized by the applicable zoning regulation. As noted by the Appeals Court, "[w]here the site plan involves a permitted use, the judge's proper role . . . [is] to inquire whether the public [may] be protected to a degree consistent with the reasonable use of the locus for the permitted use, consistent with the allowed density." A planning board, administering site plan review, only has authority to impact the density if the design flaw regulated by the condition was "so intrusive to the interests of the public in one regulated aspect or another that rejection by the board would be tenable" — a high standard indeed when dealing with uses permitted as of right.

Here, the Planning Board did not seek to regulate "health, safety, convenience or general welfare" through site plan review of the project — which was well within the density restrictions imposed by the Holyoke Zoning Ordinance. Instead, it sought to regulate the "visual and environmental qualities of the site and its immediate surroundings" — *i.e.*, it sought solely to regulate aesthetics. In doing so, it impermissibly affected the density of the project, reducing it to below the level permitted as of right under the ordinance, and thus overstepped its bounds.

In sum, while the site plan review process has "teeth," its regulatory appetite cannot exceed the limits and goals legislatively imposed through the site plan review regulations, or those regulations governing permitted uses and density.

End notes

1. 65 Mass. App. Ct. 840 (2006), *further app. rev. denied*, 447 Mass. 1101 (2006).
2. *See* City of Holyoke Zoning Ordinance (hereinafter "Ordinance"), §§ 3.1, 4.3 (Table of Principal Uses).
3. *See* Ordinance §6.2(f)(5) (in effect through February 19, 2002) and Ordinance §7.4.6 (effective as of February 19, 2002).
4. The abutters' appeal was transferred to the Land Court by interdepartmental transfer pursuant to G.L. c. 211B, § 9.
5. The Land Court decision contains an extensive discussion concerning its jurisdiction to consider the Planning Board's decision on site plan review at this state of the proceedings, noting that the Ordinance and the Decision itself submitted the decision to review pursuant to G.L. c. 40A, §17. The Land Court held that where a site plan for a use as a matter of right is denied, there is no need to first apply for a building permit, the denial of which would trigger an appeal under G.L. c. 40A, §§ 8 and 15, as a prerequisite to an appeal under G.L. c. 40A, §17. *Compare with St. Botolph Citizens Committee, Inc. v. Boston Redevelopment Auth'y.*, 429 Mass. 1 (1999) and *Quincy v. Planning Board of Tewksbury*, 39 Mass. App. Ct. 17 (1995).
6. 2004 WL 837208 (Mass. Land Ct. 2004).
7. The abutters also filed a Notice of Appeal, but did not prosecute the appeal, which was dismissed by the Appeals Court.
8. The Planning Board sought further appellate review, which was denied by the Supreme Judicial Court.
9. *YD Dugout, Inc. v. Board of Appeals of Canton*, 357 Mass. 25, 31 (1970); *Dufault v. Millenium Power Partners, L.P.*, 49 Mass. App. Ct. 137, 138-39 (2000)
10. *Prudential Insurance Co. v. Board of Appeals of Westwood*, 23 Mass. App. Ct. 278 (1986).
11. A caveat: the Appeals Court noted that "[b]ecause site plan review is created by local ordinance or bylaw and not State statute, we recognize that the term does not have one meaning nor is the review process uniform from municipality to municipality." *See St. Botolph Citizens Comm., Inc.*, 429 Mass. at 8 n.9.
12. The Land Court acknowledged that "while the Planning Board may not postpone a determination of a matter of substance as part of its decision, it may grant a permit and reserve to itself the right to review compliance with any conditions imposed." *See, e.g., Tebo v. Board of Appeals of Shrewsbury*, 22 Mass. App. Ct. 618 (1986); *Ranney v. Board of Appeals of Nantucket*, 11 Mass. App. Ct. 112 (1981). By remanding the matter back to the Planning Board, with instructions, it did not address directly whether the Board's original decision was defective for that reason. The Appeals Court did not reach, and did not address, that issue.

Source of confusion: The new Massachusetts and federal regulations on the sourcing of income from the exercise of nonqualified stock options

By Adam K. Desjean

In July, Massachusetts issued new regulations addressing the taxation of nonresidents of Massachusetts. Included in the regulations were new rules on the sourcing of nonresidents' income from the exercise of stock options that are not qualified stock options ("NSOs") under the Internal Revenue Code. In 2005, the Treasury Department similarly issued regulations addressing the sourcing of stock option gains of nonresidents of the United States. The "grant to exercise" sourcing rule Massachusetts announced in its regulations differs from the "grant to vest" sourcing rule that the federal government adopted in its 2005 regulations. As a result of these differing sourcing rules, a foreign person who is a nonresident of both Massachusetts and the United States will often recognize different NSO income amounts for Massachusetts and federal tax purposes when he or she exercises NSOs that were received in connection with Massachusetts employment.

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Residency and sourcing

The concept of residency differs for Massachusetts and federal tax purposes.[1] In general, for federal tax purposes, an individual is a resident of the United States if the taxpayer is a United States citizen or a green card holder, or if the individual is "substantially present" in the United States.[2] While the actual "substantial presence" test is more nuanced, many tax practitioners refer to the substantial presence test as the "183- day rule," as most otherwise nonresident individuals who are present in the U.S. for 183 days or more are residents under the substantial presence test.[3]

For Massachusetts tax purposes, a taxpayer who is domiciled in Massachusetts is a resident.[4] In addition, Massachusetts has its own 183-day rule for determining residency. Under Massachusetts' 183-day rule, a non-domiciliary who has a "permanent place of abode" in Massachusetts and who spends more than 183 days in the state during the taxable year is a resident of Massachusetts for state tax purposes.[5]

The consequences of residency/nonresidency are similar under both the federal and Massachusetts tax systems. For a taxpayer who is a resident of the United States, gross income includes income from all sources worldwide.[6] In contrast, nonresidents of the U.S. are federally taxable only on their U.S. source income.[7] As under the federal system, the gross income of a Massachusetts resident for Massachusetts tax purposes includes income from all sources worldwide.[8] Gross income of a nonresident of Massachusetts is analogous to gross income for a nonresident under the federal tax system in that it takes into account only gross income from sources within Massachusetts.[9]

Stock options rules

A nonqualified stock option is a stock option that fails to be a qualified stock option under § 422 or § 423 of the tax code.[10] Qualified stock options are treated favorably if certain holding period requirements are satisfied. The rules governing stock option qualification are quite detailed. Accordingly, only broad outlines of the rules for qualification under §§ 422 and 423 are presented here.

Section 422 delineates the requirements for "incentive stock options" ("ISOs"). In order for an option to be an ISO, the option must be granted pursuant to a plan of an employer that permits an employee to purchase shares of the employer, or shares of a parent or subsidiary of the employer.[11] In addition, the plan itself must be approved by the granting company's shareholders, the options must be granted within 10 years of the date of the plan's adoption,[12] and options granted under the plan must be exercisable within 10 years of the grant date of the option.[13] Finally, an option will not be a qualified option under § 422 if the option exercise price is less than the fair market value of the stock at the time that the option is granted.[14]

Section 423 contains the rules relating to options granted pursuant to employee stock purchase plans ("ESPPs"). ESPP options, like ISO options, must be granted pursuant to shareholder-approved plans and the options granted must be for the purchase of stock of the employer or a parent or subsidiary of the employer.[15] Unlike ISOs, however, ESPP options can be granted with a built-in "spread" between the option exercise price and the fair market value of the stock at the time of the option grant. The spread amount is limited to the lesser of 15 percent of the fair market value of the stock at the date of the option grant or 15 percent of the fair market value of the stock at the time the option is exercised.[16]

Tax consequences of disqualifying dispositions

As indicated above, options granted under both ISO and ESPP plans have holding period requirements for statutory treatment to obtain. In both instances, the employee must hold the stock for at least two years after the grant of the option, and the stock must also be held for at least one year after the option is exercised.[17] Dispositions of stock prior to the attainment of the holding period requirements are disqualifying dispositions.[18]

If the holding period and other requirements are met in the case of an ISO, then the employee recognizes no income on the grant or exercise of the option, unless the taxpayer becomes subject to the alternative minimum tax ("AMT"). The AMT income is generally the difference between the fair market value of the stock at the time of the exercise of the option and the amount paid for the stock plus any amount paid for the option.[19] If ISO stock is disposed of in a disqualifying disposition, then the gain on the sale of the stock obtained under the option is treated as compensation — that is, as ordinary income.[20]

For an ESPP option, if the holding period requirements are met, then the amount of the "spread" that will be treated as ordinary income will be the lesser of (1) the difference between the fair market value of the shares when sold and the option exercise price for the shares or (2) the difference between the option exercise price and the fair market value of the shares at the time of the grant of the option.[21] All of the option spread will be treated as ordinary income if ESPP stock is disposed of in a disqualifying disposition.[22]

Nonqualified stock options

If certain requirements are met, nonqualified stock options will be taxed as income upon grant,[23] but since these requirements are seldom met, option income is generally recognized with respect to NSOs only upon exercise of the option. The option income is the spread between the exercise price and fair market value of the stock at the time of the exercise of the option, and it is all ordinary income.[24] Subsequent sale of stock acquired through the exercise of an NSO results in capital gain, which is taxed at the applicable capital gains tax rates and sourced based on the sourcing rules for capital gains.

Federal sourcing of NSO "spread" income

Prior to 2004, little explicit guidance existed on the appropriate sourcing for federal tax purposes of the spread income component that results from the exercise of NSO options.[25] The rule generally used[26] for the sourcing of compensation from the performance of personal services is time-basis apportionment, under which the personal services income is sourced to the U.S. by multiplying the personal services income by the ratio computed by dividing a taxpayer's days worked in the U.S. over the total number of days worked.[27]

While prior to 2004 it was clear that the spread income resulting from the exercise of NSOs was compensation, the relevant period over which to apply time basis apportionment was not. Revenue Ruling 69-118 indicated that for ESPPs, disqualifying disposition gains were to be sourced based on where services were performed during the period from the option grant to the time of the exercise of the option.[28] Regulations issued under § 911, however, suggested that in the case of substantially nonvested property—which NSOs, as incentive compensation, invariably are—the appropriate period over which to apply the time basis of apportionment was the time between the grant of the NSO and the vesting of the NSO.[29] In practice, most grantors of NSOs sourced the NSO spread to the U.S. based on the place of performance of services during the grant to exercise period.[30]

In July 2005, the Treasury finalized temporary regulations that had been issued in 2004 addressing the proper sourcing of the NSO spread component. Under the new regulations, compensation from stock options will generally constitute a "multi-year compensation arrangement."[31] The regulations state that for multi-year compensation arrangements, "[t]he determination of the period to which such compensation is attributable, for the purposes of determining its source, is based upon the facts and circumstances of the particular case."[32] However, the new regulations further add that "[i]n the case of stock options, the facts and circumstances generally will be such that the applicable period to which the [option spread] is attributable is the period between the grant of an option and the date on which all employment-related conditions for its exercise have been satisfied (the vesting of the option)."[33]

Example of sourcing under new federal regulation:

NSO to purchase **100** shares at **$1**/share

Grant date:	Jan. 1, 2004
Vest date:	Dec. 31, 2005
U.S. resident:	Jan. 1, 2004 - Dec. 31, 2005 (assume 240 U.S. workdays in each year)
Option exercise date:	July 1, 2006, stock FMV of $3/share
Non-U.S. resident:	Jan. 1, 2006 - exercise date (July 1, 2006) (assume 120 non-U.S. workdays)
NSO income:	$200 ($300 FMV at exercise less $100 exercise price)
Sourcing:	All U.S. source income, as all workdays during grant to vest sourcing period are U.S. workdays.

Massachusetts sourcing of stock option income

Prior to this year, Massachusetts sourced *all* of the "spread" from an NSO to Massachusetts if the NSO was granted in connec-

tion with Massachusetts employment, regardless of where services were performed between the time that the NSO was granted and the time that income was recognized with respect to the NSO.[34] For its new sourcing rule, Massachusetts adopts a time-basis method of apportionment, with sourcing based on the number of days worked in Massachusetts.[35] As under the old Massachusetts sourcing rule for NSOs, a nonresident of Massachusetts must recognize income derived from NSOs that are "connected" to Massachusetts employment or to the conduct of a trade or business in Massachusetts.[36] In a departure from the federal sourcing rule, for Massachusetts purposes, the period over which the time-basis apportionment is to be applied is the period from the date of the option grant to the exercise of the option.[37]

The Massachusetts sourcing of income can be illustrated using the facts assumed in the illustration of the federal sourcing rule above. For this example, it should be assumed that the option was granted in connection with Massachusetts employment and that all of the workdays spent in the U.S. in 2004 and 2005 were worked in Massachusetts.

Total NSO income: $200

Workdays during grant to exercise period:
(Jan. 1, 2004 - July 1, 2006)

Massachusetts:	480 days
Non-Massachusetts:	120 days
Total Days	600 days

Mass. apportionment %: 80% (480/600)
Mass. source income: $160 ($200 x 80%)

While the new Massachusetts rule for sourcing the compensation component of NSO gains is more generous than the old rule, Massachusetts' new sourcing rule is apt to engender much confusion among individuals who are taxable as nonresidents of both the United States and of Massachusetts. The inevitable result of Massachusetts' adoption of a sourcing rule that differs from the new federal sourcing rule for the sourcing of the NSO spread will be that nonresidents (of both the U.S. and Massachusetts) whose only continuing source of U.S. income is from the exercise of nonqualified options will often have differing gross incomes for Massachusetts and federal tax purposes. Given that many taxpayers will likely be unaware of this difference in the starting point for the computation of tax, there seems to be the potential for significant, albeit unwitting, noncompliance with the new Massachusetts sourcing rule.

Apart from this potential for confusion, the distinction embodied in the new Massachusetts NSO sourcing rule would appear to suffer from a lack of raison d'etre. While the old Massachusetts NSO sourcing rule captured more income for Massachusetts than both the current and old federal sourcing rules, it is not at all clear that the new Massachusetts regulation will result in the sourcing of greater amounts of income to Massachusetts than would be sourced to the state if Massachusetts followed the federal rule contained in the 2005 federal regulations. Indeed, inasmuch as under the Massachusetts rule the option-holder has significant control over the sourcing of income — he or she, after all, decides when to exercise the option — it seems possible that the new Massachusetts rule will actually result in less tax revenue for the commonwealth than if the federal "grant to vest" rule had been adopted.

Conclusion

In conclusion, as a result of the new, differing state and federal sourcing rules, transnational taxpayers who have received NSOs in connection with Massachusetts employment will have to be particularly mindful of their respective gross income computations.

End notes

1. Given the divergence in the federal and Massachusetts residency rules, it is possible that the Massachusetts and federal tax treatments of NSO gains would differ purely as a consequence of the fact that a taxpayer is a resident of the United States for federal tax purposes and a nonresident of Massachusetts for Massachusetts tax purposes, or vice versa.
2. 26 U.S.C. §7701(b).
3. Under the Internal Revenue Code, an individual is substantially present in the United States during a tax year if the taxpayer is present in the U.S. for at least 31 days in the calendar year and, under a formula which treats a portion of prior years' days of presence as days of presence in the current tax year, the taxpayer's days of presence in the U.S. for the current tax year equals 183 or more days. *See* 26 U.S.C. § 7701(b)(3).
4. Mass. Gen. Laws ch. 62, § 1(f).
5. Mass. Gen. Laws ch. 62, § 1(f).
6. *See* 26 U.S.C. § 61.
7. 26 U.S.C. § 871(a)(1).
8. See Mass. Gen. Laws ch. 62 § 2.
9. Mass. Gen. Laws ch. 62 § 5A.
10. 26 U.S.C. § 421. Section 421 does not refer to "qualified stock options" but to qualifying transfers, which transfers can occur only with the options described in §§ 422 and 423.
11. 26 U.S.C. § 422(b).
12. 26 U.S.C. § 422(b)(2).
13. 26 U.S.C. § 422(b)(3).
14. 26 U.S.C. § 422(b)(4).
15. 26 U.S.C. § 423(b)(1).
16. 26 U.S.C. § 423(b)(6).
17. *See* 26 U.S.C. §§ 422(a)(1), 423(a)(1).
18. 26 U.S.C. § 421(b).
19. *See* 26 U.S.C. § 56(b)(3), § 83.
20. 26 U.S.C. § 422(c)(2).
21. 26 U.S.C. § 423(c).
22. *See* Treas. Reg. § 1.421-2(b)(1) and 26 U.S.C. § 83.
23. *See* Treas. Reg. § 1.83-7 and 26 U.S.C § 83. The primary reason that few NSOs are taxed as income upon grant is because NSOs must have a "readily ascertainable fair market value" in order to be taxed upon grant. Treas. Reg. § 1.83-7(a).
24. *See* Treas. Reg. § 1.83-7(a) and 26 U.S.C. § 83.
25. Bissell, 907-2nd T.M., *U.S. Income Taxation of Nonresident Alien Individuals*, A-65.
26. The regulations indicate that compensation should be sourced based on "the facts and circumstances of the particular case." Treas. Reg. § 1.861-4(b)(2)(i). However, the regulations also indicate that in many instances apportionment on a time basis is acceptable. Treas. Reg. § 1.861-4(b)(2)(i).
27. Treas. Reg. § 1.861-4(b)(2)(ii)(E).
28. Rev. Rul. 69-17. Revenue Ruling 69-17 addressed sourcing for the purpose of Internal Revenue Code § 911, which permits U.S. taxpayers to exclude from gross income certain foreign earned income. *See* 26 U.S.C. § 911.
29. *See* Treas. Reg. §§ 1.911-3(e)(4)(i) & (ii)(Example 3).
30. *See* Bissell, *supra* note 25, at A-65.
31. Treas. Reg. § 1.861-4(b)(2)(F).
32. Treas. Reg. § 1.861-4(b)(2)(F).
33. Treas. Reg. § 1.861-4(b)(2)(F).
34. MA Dept. of Revenue Directive 03-12.
35. *See* 830 CMR § 62.5A.1(3)(c)(2), § 62.5A.1(5).
36. 830 CMR § 62.5A.1(3)(c)(2); MA Dept. of Revenue Directive 03-12.
37. 830 CMR § 62.5A.1(3)(c)(2).

Provisions in the Pension Protection Act affecting private foundations and donor advised funds

By Lisa M. Rico

The Pension Protection Act of 2006, P.L. 109-280 (the "2006 Pension Act"), signed into law by the president on Aug. 17, 2006, has a number of provisions affecting private foundations and donor advised funds. This article provides an overview of several of the changes affecting private foundations and donor advised funds.

Increases to the penalties under the private foundation rules

Private foundations are defined under Section 509(a) of the Internal Revenue Code of 1986, as amended (the "code"), as Section 501(c)(3) organizations (organizations organized and operated for charitable, religious, educational, scientific or literary purposes, testing for public safety, to foster national or international amateur sports competition, or for the prevention of cruelty to children or animals) that are not public charities. Public charities are publicly supported organizations that receive a certain amount of their support from governmental units or contributions from the general public or organizations that provide support to a public charity (a "supporting organization"). Unlike public charities, private foundations usually receive their support from and are controlled by a limited number of contributors. Due to this nature of private foundations and the potential for abuse, Sections 4940-4945 of the code impose a number of anti-abuse rules and excise taxes on private foundations (the "private foundation rules") that are not applicable to public charities. The 2006 Pension Act has added more sting to the private foundation rules by increasing the amount of certain excise taxes effective for tax years beginning after Aug. 17, 2006.

Section 4941 of the code imposes an excise tax on each act of self-dealing on a disqualified person (which includes but is not limited to substantial contributors and foundation managers) who participated in the act. The initial tax on the self-dealer has been increased from 5 percent to 10 percent of the amount involved. If a tax is imposed on the self-dealer, a tax may also be imposed upon a foundation manager who knowingly and willfully participated in the act of self-dealing. The tax on the foundation managers for acts of self-dealing is increased from 2.5 percent to 5 percent of the amount involved and such tax is limited to $20,000 per act (up from $10,000 per act prior to the 2006 Pension Act).

Section 4942 of the code imposes a tax on a private foundation's undistributed income that has not been distributed before the first day of the second (or any succeeding) taxable year following the relevant taxable year. The tax on the amount of such undistributed income at the beginning of such second (or succeeding) taxable year has been increased from 15 percent to 30 percent.

Section 4943 of the code imposes an initial tax on a private foundation's excess business holdings of any functionally unrelated business enterprise during the taxable year. The initial tax on excess business holdings has been increased from 5 percent to 10 percent of the value of such holdings.

Section 4944 of the code imposes a tax on a private foundation if the foundation makes investments that jeopardize the organization's charitable purposes. The initial tax imposed on foundations for jeopardizing investments has been increased from 5 percent to 10 percent of the amount of the investment. A foundation manager who knowingly participates in the making of jeopardizing investments is also liable for a 10 percent (increased from 5 percent) tax on the amount of the investment. In addition, the dollar limitation on the initial tax on the foundation managers has increased from $5,000 to $10,000 per investment. While the additional tax on foundation managers has not been increased under the 2006 Pension Act, the 2006 Pension Act has increased the dollar limitation of the additional tax on a foundation manager from $10,000 to $20,000 per investment.

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Section 4945 of the code imposes a tax on certain taxable expenditures of private foundations. Under the 2006 Pension Act, the initial tax on the foundation for taxable expenditures has increased from 10 percent to 20 percent of the amount of the expenditure and the initial tax on the foundation manager is increased from 2.5 percent to 5 percent of the amount of the expenditure. The 2006 Pension Act also increases the dollar limitation on the initial tax on foundation managers from $5,000 to $10,000 as well as increases the dollar limitation on the additional tax on foundation managers from $10,000 to $20,000.

New taxes imposed on taxable distributions from donor advised funds

As an alternative to establishing a private foundation to reduce administrative costs, many individuals gift to donor advised funds. A donor advised fund is a fund where a donor contributes funds into an account with a sponsoring organization and pursuant to an agreement with the donee sponsoring organization, retains the right to recommend, but not direct, how contributions from the donor's account are to be distributed to charities. The agreement between the donor and the sponsoring organization may include the retained right in the donor or in the members of the donor's family. The donor advised fund's directors or trustees have final authority over how the funds in the account are ultimately distributed. Donor advised funds have been established by community foundations and commercial institutions. Generally, donor advised funds have qualified as public charities.

Prior to the 2006 Pension Act, there were no special rules for or excise taxes imposed with respect to donor advised funds. The 2006 Pension Act imposes excise taxes and anti-abuse rules for donor advised funds. Beginning with tax years after Aug. 17, 2006, new Section 4966 of the code imposes a 20 percent excise tax on the donor advised fund's sponsoring organization for each taxable distribution made from a donor advised fund. An additional tax equal to 5 percent of the amount of each taxable distribution is imposed on any fund manager that agreed to the making of a distribution knowing that it was a taxable distribution. The fund manager under Section 4966(d)(3) includes, among others, any officer, director or trustee of the sponsoring organization. A fund manager's liability as to any one taxable distribution is limited to $10,000. Section 4966(c) provides that a taxable distribution is any distribution from a donor advised fund to a natural person or to any other person if (1) the distribution is for any purpose other than religious, charitable, scientific, literary or educational, or to foster national or international amateur sports competition, or for the prevention of cruelty to children and animals, or (2) the sponsoring organization does not exercise expenditure responsibility for the distribution and conformity with the taxable expenditure rules under Section 4945(h) of the code. A taxable distribution does not include any distribution from a donor advised fund to (1) any public charity (including most supporting organizations), private operating foundation or conduit foundation, (2) the sponsoring organization of the donor advised fund, or (3) any other donor advised fund.

The new Section 4966 of the code also includes definitions for the terms donor advised fund and sponsoring organization. Under Section 4966(d)(2) of the code, a donor advised fund is a fund or account (hereinafter referred to collectively as an "account") (1) which is separately identified by a reference to contributions of a donor or donors, (2) which is owned and controlled by a sponsoring organization, and (3) as to which a donor (or the donor's designee) has, or reasonably expects to have, advisory privileges as to the distribution or investment of amounts held in the fund or account by reason of the donor's status as the donor. All three prongs of this test must be met for a fund to be treated as a donor advised fund.

A sponsoring organization, as defined by Section 4966(d)(1) of the code, is an organization (1) to which deductible charitable contributions may be made other than a code Section 170(c)(1) governmental entity and without regard to the code Section 170(c)(2)(A) requirement that the organization be organized in the United States, (2) which is not a private foundation, and (3) which maintains one or more donor advised funds.

The Joint Committee on Taxation Technical Explanation of the Provisions of the Pension Protection Act of 2006 (the "committee report") provides insight into the requirements necessary to be treated as a donor advised fund. The committee report indicates that the first prong of the test is not met unless the account refers to contributions of a specific donor, such as by naming the account after the donor or by accounting separately for such account on the books of the sponsoring organizations as funds contributed by a specific donor. A fund or account that pools contributions of multiple donors will generally not meet this prong of the test. With respect to the second prong of the donor advised fund test, the committee report indicates that if a donor or person other than the sponsoring organization controls the funds deposited into an account, such fund is not a donor advised fund. The third prong requirement of advisory privileges exists if both the donor (or the donor's designee) and the sponsoring organization have reason to believe that the donor (or the donor's designee) will provide advice and that the sponsoring organization generally will consider such advice. An actual provision requiring advisory privileges is not required. The committee report also indicates that the advisory privilege must be as result of the donor status as donor and not by reason of a donor's services to the organization.

Section 4966(d)(2)(B) of the code specifically excludes certain accounts from treatment as donor advised funds. A donor advised fund shall not include any account (1) which makes distributions only to a single identified organization or governmental entity, or (2) with respect to which the donor (or the donor's designee) advises as to which individuals receive grants for travel, study or other similar purposes, if (a) such person's advisory privileges are performed exclusively by such person in the person's capacity as a member of a committee, all of the members of which are appointed by the sponsoring organization, (b) no donor or donor's designee (or persons related to such persons) directly or indirectly control such committee, and (c) all grants from such

account are awarded on an objective and non-discriminatory basis pursuant to a procedure approved in advance by the board of directors of the sponsoring organization, and such procedure is designed to ensure that all such grants meet the requirements for individual grants under Section 4945(g)(1), (2), or (3) of the taxable expenditure rules.

In addition, the secretary may exempt any account not otherwise excluded from treatment as a donor advised fund (1) if the committee advising with respect to the distributions from such account is not directly or indirectly controlled by the donor or the donor's designee (or any related party), or (2) if such account benefits a single identified charitable purpose.

New taxes imposed on prohibited benefits from a donor advised fund

For tax years beginning after Aug. 17, 2006, the 2006 Pension Act also imposes new taxes on distributions from any donor advised fund which results in a donor, donor advisor or a related person (hereinafter referred to together as the "donor advisor") receiving directly or indirectly a more than incidental benefit as a result of such distribution. New Section 4967 of the code imposes a tax on any donor advisor equal to 125 percent of the amount of any benefit received by such donor advisor due to such donor advisor's advice to a sponsoring organization to make such distribution. There is also a tax equal to 10 percent of the amount of the benefit received by the donor advisor imposed on any fund manager who agrees to the making of such distribution knowing that the distribution would confer a benefit on a donor advisor. The tax on the fund manager is limited to $10,000 as to any one distribution. The committee report indicates that there is more than incidental benefit if, as a result of the distribution from a donor advised fund, a donor advisor as to the account receives a benefit that would have reduced, or eliminated, a charitable contribution deduction if the benefit was received as part of the contribution by the donor advisor to the sponsoring organization. If, however, a tax is imposed under the excess benefit transaction rules of Section 4958 of the code, as to any distribution, the tax under Section 4967 of the code will not be imposed. A donor advisor is any person who is the donor or any person appointed or designated by the donor who has, or reasonably expects to have, advisory privileges as to the distribution or investment of amounts held in the fund or account by reason of the donor's status as donor, or a member of the family of such donor or designee of the donor, or a 35 percent controlled entity of such person.

Extension of excise tax on excess business holdings to donor advised funds

The 2006 Pension Act extends the excise tax on private foundations' excess business holdings under Section 4943 of the code to donor advised funds by providing that for the purposes of this excise tax, a donor advised fund is treated as a private foundation. In applying the rules under Section 4943 of the code to any donor advised fund, the term "disqualified person" will include any person who is a donor advisor, who has, or reasonably expects to have, advisory privileges regarding the distribution or investment of amounts held in a donor advised fund by reason of such donor advisor's status as donor, a member of the donor's family, or a 35 percent controlled entity of any such person.

Donor advisors and investment advisors are disqualified persons for excess benefit transactions

The 2006 Pension Act adds two new categories to code Section 4958's definition of disqualified person for the purpose of the excess business benefits transaction tax. The first category provides that for any transaction that involves a donor advised fund, the donor advisor is treated as a disqualified person with respect to that donor advised fund. The second category is for any transaction which involves a sponsoring organization, any investment advisor, a member of the family of an investment advisor, or certain controlled entities of an investment advisor is treated as a disqualified person. An investment advisor is any person (other than an employee of the sponsoring organization) compensated by such organization for managing the investment of, or providing investment advice with respect to, assets maintained in donor advised funds owned by such organization.

Under new Section 4958(c)(2) an excess benefits transaction will include any grant, loan, compensation or other similar payment from an account to any donor advisor with respect to such account. In such a transaction, excess benefit includes the amount of any such grant, loan, compensation, or other similar payment.

The 2006 Pension Act now provides guidance as to what constitutes a donor advised fund while at the same time imposing stricter rules. In addition to the above changes regarding private foundations and donor advised funds, the 2006 Pension Act includes changes to supporting organization rules, disclosure rules for exempt organization returns and other rules affecting exempt organizations and charitable contributions. These rules should be considered when advising clients regarding their charitable giving alternatives.