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# section review

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Volume 9 • Number 2 2007

# section review

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*"Racial and Ethnic Health Disparities" illustration by David Grotrian*

# Section Review

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*Section Review* (ISSN 1524-7295)


The Massachusetts Bar Association
20 West St., Boston, MA 02111
(617) 338-0500

e-mail: *communications@massbar.org*
online: www.MassBar.org

# "HOT SHOCK" AND MOTOR VEHICLE ACCIDENT RECONSTRUCTION

*By Jennifer S. Bunce*

The fact question of whether a motor vehicle taillight was illuminated at the time of an accident may have a significant impact on the outcome of a case. The answer to this question can be proven by evidence of or the absence of evidence of "hot shock." A fundamental understanding of the science of hot shock can be very useful in challenging expert testimony.

## Incandescent light bulbs

Incandescent light bulbs are essentially equivalent to the everyday household light bulb. Inside the glass casing of a light bulb, one or more tightly coiled wires called the filament are stretched between two support posts. The filament is made out of tungsten, which is a hard material. When an electrical current runs through the filament, the temperature rises to approximately 4,000 degrees Fahrenheit inside the light bulb, causing it to glow. This state is called incandescence. The filament remains lit without burning or oxidizing because air has been removed from the light bulb and replaced with an inert, or unmoving, gas. As the temperature rises in the light bulb, the tungsten begins to evaporate. The evaporated tungsten collects on the cool surface of the glass causing the light bulb to darken with age. The filament softens as the tungsten evaporates. However, if the tungsten is exposed to air while in the state of incandescence, it will oxidize quickly.

*Jennifer S. Bunce is an associate in the Boston office of Morrison Mahoney LLP. Bunce's practice has concentrated in the areas of transportation law, employment law, premises liability and product liability.*

## Halogen light bulbs

Halogen light bulbs function in a similar manner as incandescent light bulbs. Air is sucked out of the bulb and replaced with halogen, which allows the bulb to pressurize four to eight times that of the atmosphere. Although the tungsten evaporates in a halogen bulb, it combines with the other gases (halogen bulbs may also contain iodine, bromine or chloride) and recirculates toward the filament where it is broken down into atoms.

## Hot shock defined

In order for hot shock to occur, the filament must be hot but not necessarily in a state of incandescence. When the glass of a light bulb is broken, the filament is exposed to air and will oxidize. However, if the light bulb is broken in a sudden accident, the filament will stretch, uncoil, tangle or break. This condition is what is known as hot shock. Specifically, in a motor vehicle accident, the light bulb must be close to the direct impact for hot shock to occur. Even if the light was not activated and therefore not in a state of incandescence at the time the bulb breaks, the filament may still show some distortion. Although a light bulb has been turned off, it will take some time to cool, and if the accident occurs during this time, hot shock may still occur. Specifically, the filament in a blinking light bulb that has blinked off when it is exposed to air will retain enough heat to oxidize for up to one half of a second after the light bulb initially blinked off. The filament must remain at a temperature above 1,250 degrees to oxidize. Mild deformations will also occur, such as irregular spacing between coils, if the lamp was in a state of incandescence four seconds prior to the accident.

In addition, a light bulb provides further evidence as to whether it was on at the time of an accident. As the tungsten oxidizes, the stages of oxidation are shown through different colors. The first color of oxidation is pale yellow, which changes to green, purple and eventually to black. White smoke is also produced as the tungsten oxidizes. This smoke may leave a white dust or powder on nearby surfaces.

Another indication of hot shock is fused glass particles. When a light bulb shatters, the heat of the tungsten will fuse the broken glass particles to the filament. The fusion of glass particles can be seen under magnification as glass droplets or a fine dust in the form of whiskers on the filament.

In most instances, if there is no change in the appearance of the filament, the light was not on at the time the bulb was broken. But even if the filament appears normal, the light nevertheless may have been illuminated at the time the bulb was broken. In this case, the

light bulb did not receive enough change in velocity to alter the filament.

Hot shock only occurs if there is enough force present. For deformation, the acceleration rate necessary is 400 to 900 times the acceleration rate of gravity. This is also the equivalent of acceleration from zero to 20 miles per hour over one quarter of an inch. These calculations should not be confused with the impact speeds or acceleration changes for an entire vehicle, which are calculated during accident reconstruction. The slight acceleration force imparted on the small area of impact between two vehicles does not necessarily equal a high speed at the time of the collision. Low impact speeds can be sufficient to cause hot shock if the impact is within a close proximity to the light bulb.

Evidence of the opposite of hot shock, cold shock, ensures that the light bulb was not lit at the time of the accident. If a filament has a clean break in an undamaged bulb, cold shock occurred. Cold shock also occurs when the bulb is broken, and the filament is deformed from handling and/or environmental conditions. A greater force is necessary to produce cold shock than is necessary to produce hot shock. The light bulb needs to be directly involved in the impact to produce evidence of cold shock.

At this point, the method discussed can be used on incandescent or halogen light bulbs. However, taillight design has recently developed the use of light emitting diodes. These lights are clear and have a more intense color. Light emitting diodes used in watches and on portable computer screens have the same structure as those found in the new taillights. Light emitting diodes are significantly different from incandescent and halogen light bulbs, and a method has not been found to determine the functioning of these light bulbs at the time of an accident.

## Key points

Four factors determine how much a filament will distort in an accident: 1) the severity of the impact; 2) filament age; 3) size of the filament; and 4) temperature of the filament. The speed of the vehicle as well as the distance of the light bulb from the direct impact determines the severity of the impact. A light bulb that is positioned more than several inches away from the direct impact is unlikely to show distortion. As a light bulb burns, the tungsten evaporates, creating a weakened filament. This weakened filament oxidizes quicker when exposed to the atmosphere. A larger filament shows greater distortion if incandescent at the time of impact. And a filament heated to a higher temperature will also show a greater distortion.

The critical point of light bulb examination is that it is examined in the state it is in immediately after the accident. The simple act of flipping a switch to see if the light bulb was on prior to the accident will destroy valuable evidence. Because experts usually are not called in to examine the light bulb until days or weeks after an accident, there are certain steps that must be followed in order to preserve the evidence.

First, note the position of the light bulbs. This positioning can later be compared to the position of a similar unharmed product to determine the function or the wiring schematics. For motor vehicles, the positioning determines what light the light bulb was used for.

Next, the light bulbs may be removed. Removal of the light bulbs must be handled with care because the filaments are fragile. Therefore, the entire light bulb housing may need to be removed.

Finally, photographs of the light bulb are taken. Throughout this procedure, the chain of custody must be documented and maintained.

## Application of hot shock

The theory of hot shock has not been applied in any Massachusetts cases and has only been applied outside the commonwealth in criminal cases on a few occasions. Most recently, in a New Hampshire Supreme Court decision, the theory of hot shock was used in convicting a defendant of negligent homicide in a boating accident because the illumination of the light on the stern of the boat indicated whether the defendant should have observed the oncoming boat and avoided the collision. *New Hampshire v. Littlefield*, 152 N.H. 331, 876 A.2d 712 (2005). Similarly, in a Delaware case, hot shock was used to show that the defendant could have avoided colliding with an oncoming bus. *Delaware v. Knight*, 2000 Del. Super. LEXIS 30 (2000). Hot shock was also used to prove that the defendant's lights were not illuminated, causing a car to crash into the defendant. *Gibbs v. Indiana*, 677 N.E.2d 1106, 1997 Ind. App. LEXIS 253 (1997). Although the theory of hot shock has only been implemented in a few published cases, it is still a useful tool in accident reconstruction and determining liability.

# THE NEW FEDERAL RULES OF CIVIL PROCEDURE ON ELECTRONIC DISCOVERY: AN ARGUMENT FOR ADOPTION BY THE MASSACHUSETTS STATE COURTS

*By Daniel K. Gelb*

The discovery of electronic evidence has become central to litigators as businesses and individuals routinely communicate by e-mail, voicemail, electronic facsimiles, cell phones, PDAs and many other mediums that have the ability to retain electronically stored information ("ESI"). During the last several years, lawyers have been guided by case law, most notably the *Zubulake* line of cases, which addresses areas of cost-shifting, preservation and production obligations.[1] A major area of peril regarding electronic evidence is spoliation, which can be fatal to a litigant's case.[2] Effective Dec. 1, 2006, the federal courts have responded to the growing demands and complexities of electronic discovery ("E-Discovery") through amendments to the following Federal Rules of Civil Procedure ("FRCP"): Rule 16 (Pre-Trial Conferences; Scheduling; Management); Rule 26[3] (General Provisions Governing Discovery; Duty of Disclosure); Rule 33 (Interrogatories to Parties); Rule 34 (Production of Documents, ESI and Things and Entry Upon Land for Inspection and Other Purposes); Rule 37 (Failure to Make Disclosures or Cooperate in Discovery; Sanctions); and Rule 45 (Subpoenas).[4] According to the U.S. Supreme Court, the recent amendments "…govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending."[5]

*Daniel K. Gelb, Esq., is a former Norfolk County assistant district attorney and is an associate with Gelb & Gelb LLP in Boston, where he handles federal and state court litigation in the areas of business, securities and criminal law. Gelb is a member of the Massachusetts Bar Association's Civil Litigation Section Council and chairs its newly formed Electronic Discovery Practice Group.*

On the state level, the Massachusetts Supreme Judicial Court is addressing e-discovery by directing the courts and counsel to The National Center for State Courts' *Guidelines for State Trial Courts Regarding Discovery of Electronically Stored Information* ("guidelines"), approved by the Conference of Chief Justices ("CCJ") in August 2006. The guidelines are a product of the national Conference of Chief Justices, which formed an e-discovery working group in 2004, naming Supreme Judicial Court Chief Justice Margaret H. Marshall as its chair.[6] The guidelines are instructive and reflect great effort and insight. They address essentially the same issues that are the subject of the FRCP amendments, such as definitions of ESI, preservation of ESI, agreements by counsel and discovery plans, the forms and costs of ESI production, inadvertent production, and spoliation and sanctions. However, the guidelines specifically state that "[t]he guidelines should not be treated as model rules that can simply be plugged into a state procedural scheme."[7] The guidelines are intended to assist state court trial judges faced with e-discovery disputes by identifying issues and determining the decision-making factors to be applied.[8] Therefore, state court judges may consult the guidelines, but they are not mandated to follow them.

This article does not focus on a side-by-side comparison of the FRCP amendments and the guidelines, nor does it opine as to which approach is better with respect to particular discovery issues.[9] However, since there are no e-discovery rule proposals before the SJC as of yet, this article discusses whether a mandated set of rules would better serve the bench and bar in the area of e-discovery in the Massachusetts state courts.[10]

In drafting the guidelines, as reflected in their comments, the CCJ relied upon a variety of sources in addition to the FRCP amendments which were pending at the times the guidelines were promulgated, and there are differences between the FRCP and the guidelines. For example, as amended, FRCP 34

states that unless the parties otherwise agree, or the court otherwise orders, if a request does not specify the form(s) of production for ESI, a responding party must produce the information in the form(s) it is ordinarily maintained or in form(s) that are reasonably usable. Guideline 6 of the guidelines states "[i]n the absence of agreement among the parties, a judge should ordinarily require ESI to be produced in no more than one format and should select the form of production in which the information is ordinarily maintained or in a form that is reasonably usable." Therefore, this guideline appears to instruct the court to select the form of production.

The CCJ issued the guidelines to assist judges in the decision-making process by having the benefit of the CCJ's collective knowledge until each state addresses the subject of rule changes on their own. More certainty in proceeding with e-discovery issues can be achieved through customizing and requiring the use of the guidelines in state court, or amending the Massachusetts Rules of Civil Procedure ("MRCP"). The following reasons support an argument that the Massachusetts judiciary should amend the MRCP by adopting the FRCP e-discovery amendments.

The FRCP has greater force than the guidelines because the handling of e-discovery is integrated into the entire rules scheme. Therefore, counsel is clearly informed as to how to proceed and the court is guided when counsel does not act accordingly. Additionally, the adoption process through which the FRCP was amended, and the comments to the rules provide a comprehensive legislative history and analysis that is instructive to the bench and bar. Legal scholars have addressed the wisdom of adopting the FRCP amendments, and it is expected they will further comment on their effectiveness.

The MRCP to a great degree parallels the FRCP. Therefore, litigators who practice in both state and federal courts are afforded consistency of approaches. In the e-discovery area, such consistency will aid in the development of best practices. Also, adoption of the FRCP e-discovery amendments into the MRCP will guide courts and counsel when interpreting the rules as a nationwide body of law develops. Moreover, counsel must rely upon the support of experts familiar with electronic discovery issues, including computer technology used by companies and individuals. Digital forensics experts have gained important knowledge of protocols through involvement with federal court complex cases. The Massachusetts courts and counsel will benefit if experts can apply their knowledge and skills in the same manner at the state level.

Furthermore, as e-discovery expands in conjunction with the development of new technologies, the FRCP may be further amended. If the FRCP and MRCP mirror each other, state court practice will have the benefit of e-discovery developments that occur at the federal level nationwide.

Finally, litigants make decisions based upon their assessments of the predictability of case outcomes and the costs of proceedings. E-discovery is a significant concern for the business community because it is burdensome, expensive, and potentially perilous if there are missteps. Adoption of the FRCP amendments by the Massachusetts courts would likely be welcomed by the business community, especially companies that are parties to federal litigation nationwide and seek a consistency of approach.

Therefore, although the guidelines will greatly advance e-discovery practice in the Massachusetts state courts, there are compelling reasons for amending the MRCP to incorporate those changes made in the FRCP. However, if the MRCP are amended, a side-by-side comparison of the FRCP and guidelines would be prudent as there may be certain issues which the Massachusetts judiciary concludes are better addressed in the guidelines, and therefore, should be reflected in amendments to the MRCP.

## End notes

1. *Zubulake v. UBS Warburg LLC* (Zubulake I"), 217 F.R.D. 309 (S.D.N.Y., May 13, 2003) (addressing the legal standard for determining the cost allocation for producing e-mails contained on backup tapes); *Zubulake v. UBS Warburg LLC* ("Zubulake II"), 2003 WL 21087136 (S.D.N.Y., May 13, 2003) (concerning issue not involving E-Discovery); *Zubulake v. UBS Warburg LLC* ("Zubulake III"), 216 F.R.D. 280 (S.D.N.Y., July 24, 2003) (allocating backup tape restoration costs between plaintiff and defendant); *Zubulake v. UBS Warburg LLC* ("Zubulake IV"), 220 F.R.D. 212 (S.D.N.Y., Oct. 22, 2003) (ordering sanctions against defendant for violating its duty to preserve evidence); and *Zubulake v. UBS Warburg LLC* ("Zubulake V"), 2004 WL 1620866 (S.D.N.Y., July 20, 2004) (explaining, among other issues, counsel's duty to effectively communicate to her client its discovery obligations to ensure information is discovered, retained, and produced).
2. *See Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. Inc.*, 2005 WL 679071 (Fla. Cir. Ct. Mar. 1, 2005) rev'd on other grounds sub nom. *Morgan Stanley & Co., Inc. v. Coleman (Parent) Holdings, Inc.*, ---So.2d ---, 2007 WL 837221 (Fla. App. 4 Dist. March 21, 2007); *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co. Inc.*, 2005 WL 674885 (Fla. Cir. Ct. Mar. 23, 2005).
3. Form 35 (Report of Parties' Planning Meeting) amends the discovery plan to include the handling of the disclosure or discovery of ESI and claims of assertion of privilege or protection as trial-preparation material after production.
4. *See* Federal Rule Making: Pending Amendments www.uscourts.gov/rules/newrules6.html (last visited April 3, 2007).
5. *See* Amendments to the Federal Rules of Civil Procedure, www.supremecourtus.gov/orders/courtorders/frcv06p.pdf (last visited April 3, 2007).
6. *See* Barbara Rabinovitz, "State's trial courts to offer guidelines on e-discovery," *Massachusetts Lawyers Weekly*. Vol. 35, Issue No. 18 (Dec. 25, 2006). To review the guidelines in their entirety, consult the guidelines for State Trial

Courts Regarding Discovery of Electronically Stored Information reported by Richard Van Duizend. The guidelines, www.ncsconline.org/WC/Publications/CS_ElDiscCCJGuidelines.pdf (last visited April 3, 2007).

7. *See* the guidelines at vii.
8. *Id.*
9. It is noted that The National Conference of Commissioners On Uniform State Laws (authors of several uniform laws such as the Uniform Commercial Code) has also established a Drafting Committee On Uniform Rules Relating to the Discovery of Electronically-Stored Information.
10. *See* Barbara Rabinovitz, "State's trial courts to offer guidelines on e-discovery," *Massachusetts Lawyers Weekly.*

# INSPECTING VICTIM TREATMENT RECORDS

*By Peter T. Elikann*

It is unlikely that anywhere else in law there is a more stark contrast between two legitimate competing interests that are so difficult to reconcile than those that are the subjects of the so-called "Bishop/Fuller" motions. Here, a defendant's due process right of access to potential exculpatory evidence in order to have a fair trial appears to directly conflict with a sexual assault victim's need for private personal counseling or therapy records to remain privileged and confidential.

The "Bishop/Fuller" protocol is the lengthy multi-step procedure featuring a series of motions that a defendant embarks upon in order to attempt to gain access to a victim's statutorily privileged counseling or treatment records.

The evolving law surrounding Bishop/Fuller motions has been a troubling battleground for years. Even after the Supreme Judicial Court, in the 2004 case of *Commonwealth v. Pelosi*, 805 N.E.2d 1 (Mass. 2004), announced the formation of a committee to study and present to the court alternatives to the Bishop/Fuller protocol, the committee could not reach a consensus.

*Peter T. Elikann is an author, Court TV Network commentator and a member of the MBA House of Delegates.*

On the one hand, one side views it as repugnant that a search through a victim's therapy or rape crisis counseling records would be allowed. They view this as having the potential of creating a second victimization, where the victim's most private confidences to a mental health professional can be tramped through and exposed to all. It might have a chilling effect, preventing sex abuse victims who are desperately in need of therapy from seeking help because they fear that these records could be used against them. As it is, only a small percentage of actual sexual assault victims are believed to report the crime to the authorities at all.

On the other hand, advocates for those accused of sex offenses say that it is incontrovertible that false accusations do, in fact, occur, and it would be a cataclysmic injustice if the truly innocent are convicted and incarcerated when access to this information could vindicate them. In this particular instance, it doesn't help to create a new victim — an innocent law-abiding convicted citizen — who would be created where none had existed. An innocent person could be convicted while, just outside his reach, there might exist, for example, records showing a lengthy history of false accusations against numerous others by the alleged victim; or major inconsistencies with what the same victim had reported to the police or other authorities; or an admission that this particular crime had never taken place. Defense counsel have long complained that, under the Bishop/Fuller protocol, they were being required to try to scale an unconstitutionally high burden that made exculpatory evidence unavailable, therefore depriving defendants of the right to a fair trial.

Defense counsel claimed that two barriers in particular seemed almost insurmountable. They were that:

**A.** Under the protocol, if the defendant demonstrated a sufficient basis, a judge could view the sought-after records in camera to determine whether they are relevant. However, if the judge did an inadequate job (particularly in light of the fact that the judge is not an advocate and may not be familiar enough with the case prior to trial), defense counsel could never challenge whether the defendant had been deprived of access to important information because the defendant's counsel never actually saw this information.

**B.** A catch-22 existed in that one would have to very specifically know what was inside the sought-after records before asking to inspect them in order to assure the court that those records were relevant and provided a sufficient basis for in camera review and that defense counsel was not just going on a generalized "fishing expedition." In other words, the defendant, absurdly, would have to know what the records specifically contained before looking at them … in order to be allowed to look at them.

So here is the dilemma — how does one protect a true victim from having a defendant possibly go on a fishing expedition to expose and trash that legitimate vulnerable victim's shared private innermost feelings and thoughts while, at the same time, allowing accused citizens access to records that might prove their innocence?

The Supreme Judicial Court attempted to create a mechanism for this balancing act through the 1993 decision, *Commonwealth v. Bishop*, 617 N.E.2d 990 (Mass. 1993) and in its 1996 decision, *Commonwealth v. Fuller*, 667 N.E.2d 847 (Mass. 1996).

Most recently, the standards governing the issuance of subpoenas for the pretrial production of materials held by third parties not under the commonwealth's control were further clarified in the 2004 case of *Commonwealth v. Lampron*, 806 N.E.2d 72 (Mass.

2004), which stated that the moving party must establish good cause by satisfying a showing: (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial, and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general fishing expedition.

This process of a series of motions, typically over a period of many months, has satisfied almost no one. To be sure, it is extremely rare that a defendant is ever successful in gaining access to those confidential records. This is because the SJC recently admitted in *Commonwealth v. Dwyer*, 859 N.E.2d 400 (Mass. 2006), a rigorous "court-imposed requirement all but impossible to satisfy." The Court also acknowledged that "the stringent balance struck in *Fuller* … has given rise to continuing difficulties."

In *Dwyer*, a defendant convicted of rape claimed that he was deprived of a viable defense because the victim's counseling records directly contradicted the victim's testimony at trial.

The conviction in *Dwyer* was overturned on numerous bases. But concerning the issue of the viewing of victims' records, the Court went beyond a mere reversal and ordered that an entire new protocol be introduced for all future cases that have not yet been tried.

## The court stated that this was necessary because:

**A.** The Bishop/Fuller protocol embroiled the courts in highly contentious conflicts concerning whether documents were actually privileged.

**B.** "Experience has also confirmed that trial judges cannot effectively assume the role of advocate when examining records. Requiring judges to take on the perspective of an advocate is contrary to the judge's proper role as neutral arbiter." The court additionally quoted *Dennis v. United States*, 384 U.S. 855, 875 (1966) in stating that "In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate.'" It then went on to state that:

> "Despite their best intentions and dedication, trial judges examining records, before a trial lack complete information about the facts of a case or a defense to an indictment, and are all too often unable to recognize the significance, or insignificance, of a particular document to a defense."

## The key tenets of the new protocol are:

1. All third party records should be regarded as privileged unless the holder of the privilege makes a waiver.
2. Non-privileged records can be shared by counsel with the defendant, but not with the public.
3. Only counsel of record for the defendant who summonsed the privileged records will be able to review them. Counsel must first sign and file a protective order containing stringent nondisclosure provisions.
4. Counsel for the defendant may not copy or share these privileged records with either the defendant or the defendant's investigator or expert unless the court grants a motion for a specific need-based modification of the protective order. Although counsel must explain with specificity the reason this is necessary, counsel may not put anything into the affidavit to this modification motion that reveals this presumptively privileged record.
5. Counsel who copies or shares the privileged records with the defendant or anyone else without first having obtained the court's permission is subject to mandatory reporting of this violation to the Board of Bar Overseers.
6. The initial protective order would also bar the prosecution from looking at the records being reviewed by the defendant's counsel.
7. The initial protective order would not allow the defendant's counsel to copy the privileged records even though counsel is permitted to read them.
8. The new protocol will be applied to cases tried only after the issuance of the rescript of the *Dwyer* case.

## The new protocol is as follows:

1. *Filing and service of a motion.* Whenever the defendant seeks records from a third party, a motion and affidavit must be filed describing the extraordinary circumstances in which he can proceed *ex parte*. The commonwealth will forward notification of the hearing to consider the motion to the third party and record holder; the hearing will proceed even if either is absent; and it will be the third party's only opportunity to address the court.
2. *The hearing and findings.* At the hearing, all parties, the record holder and third party may be heard on whether the records sought are relevant or statutorily privileged. The judge will then rule on (a) whether the defendant seeking the records has satisfied the requirements of the rule and (b) that the records sought are not presumptively privileged.
3. *Summons and notice to record holder.* If requirements have been met and the records are found not to be privileged, then the judge will summons the record. If the records have been determined to be privileged, then the judge shall order the record holder to produce such records to be sealed in an envelope or box marked "privileged" at the clerk's office. Such records will not be available for public inspection unless and until introduced at trial.
4. *Inspection of records.* Counsel for the defendant may inspect and copy all records that are not presumptively privileged. It is within the judge's discretion whether or not to allow the commonwealth to inspect and copy these records. However, the presumptively privileged records may be inspected (but not copied) by defense counsel only after the required

protective order has been submitted to the court. Any violation of these terms must mandatorily be reported to the Board of Bar Overseers by anyone aware of this violation.

5. *Challenge to privilege designation.* If, on inspection of privileged records, counsel for the defendant believes that any record or portions thereof should not be privileged, counsel may file a motion to release these specified records or portions.
6. *Disclosure of presumptively privileged records.* If the defense counsel believes that copying or disclosure of the presumptively privileged records to other persons (such as the defendant, an investigator or expert) is necessary for trial preparation, counsel may file a motion. The motion must be accompanied by an affidavit stating with specificity the reason such copying or disclosure is necessary, but may not, in doing so, reveal the content of the presumptively privileged record.
7. *Use of presumptively privileged records at trial.* (a) A defendant seeking to introduce any of the presumptively privileged information at trial shall file a motion *in limine* prior to the final pretrial conference. (b) Counsel for the commonwealth may then review enough of the privileged records in order to respond to the motion *in limine*. (c) The judge may allow the motion only after making a finding on why the introduction of the privileged records are necessary for the moving defendant to have a fair trial. (d) Before permitting the introduction of the privileged records at trial, the judge must consider alternatives to introduction, including an agreed-to stipulation or introduction of redacted portions of the records.
8. *Preservation of records for appeal.* Records produced in response to the summons shall be retained by the clerk of the court until the conclusion of any direct appeal following a trial or dismissal of a case.

It is quite possible that this new protocol, which is grounded in Mass. R. Crim. P. 17 (a)(2) which governs pretrial access to records held by third parties not under the commonwealth's control, might not be the absolute final word on access to confidential records of the victims of sexual assault. Defense counsel generally believe that the *Dwyer* decision is, at minimum, a step in the right direction, since they have long argued that the pendulum had swung too far and was running roughshod over the rights of innocent accused citizens to properly defend themselves. However, many victims' advocates are, indeed, outraged at what they believe will discourage bona fide rape victims from either reporting their victimization or seeking counseling in its aftermath. Prosecutors are currently reviewing the ruling in *Dwyer* and others may ask the legislature to step in to tighten the rules concerning access to a victim's mental health records.

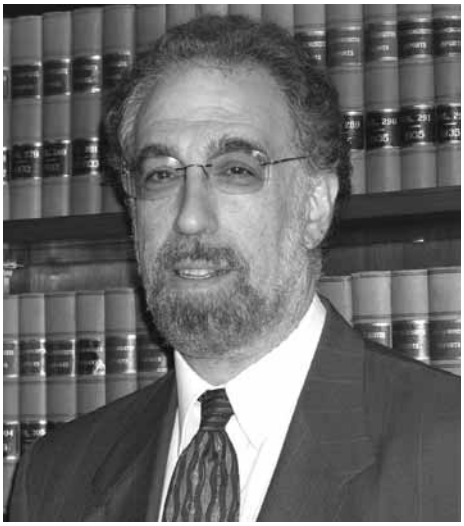
The ruling in *Dwyer* is an attempt to balance two very legitimate interests that have not been reconciled by previous attempts over a number of years, though they may have carried the best of intentions: the right of a victim to be protected from what they would consider further victimization by having the most vulnerable private part of their lives exposed, against the rights of accused citizens seeking access to possible exculpatory records that might give them a fair trial. Yet *Dwyer* could very well be just a way station in a fluid, evolving, living area of law.

# THE CONTINUING ENIGMA OF THE MARITAL CONVERSATION DISQUALIFICATION (PRIVILEGE?)

*By Jerome Aaron*

The exclusion of marital conversation evidence has arisen once again in *Miller v. Miller*, 448 Mass. 320 (2007), a case in which the lower court apparently relied upon marital conversation testimony in an affidavit in determining where a particular marriage broke down. The question why this judgment was affirmed when the judge relied upon incompetent evidence was indeed puzzling. As can be seen below, the rubric that the failure to object lets the evidence in, does not, in my view, solve the problem, which lies in the nature of this evidentiary construct.

The exclusion of testimony recounting private conversation of spouses embodied in Mass. Gen. Law ch. 233, sec. 20 (2004) dates back to 1851. It is apparently the adjunct of a rule originally barring all parties from testifying in suits between them, which was the law in Massachusetts until 1856.[1]



*Jerome Aaron is a lawyer practicing in Newton. He is presently a member of the Massachusetts Bar Association's Family Law Section Council.*

The exclusion of marital conversation has for many years been the subject of intense criticism from the bench and bar on policy grounds. Of the several reasons cited for its existence,[2] it has been said that these "have fallen in extreme disfavor among courts and commentators alike, and that the disqualification represents nothing more than "a statutory preservation of a remnant of an outdated common law concept."[3]

The policy arguments for exclusion of confidential marital conversation is especially weak in the divorce context. One major policy of the exclusion is that it promotes marital harmony, but it is difficult to understand what marital harmony there is to promote between divorcing spouses. The problems created by the disqualification are especially frustrating to counsel when critical evidence may be lost because of it, such as conversations between divorcing parties evidencing agreements relative to relocation, the use of marital assets, and the custody and parenting of their children. Note that the very same conversations are not excluded in actions involving custody and parenting of children born out of wedlock, the parties presumably having never been married.

Quite aside from the policy arguments for or against the rule,[4] there is a serious inconsistency concerning its application; by this I mean an inconsistency between what the rule is meant to be and how it is actually applied. The relevant portion of the statute is as follows:

> Any person of sufficient understanding, although a party, may testify in any proceeding, civil or criminal, in court or before a person who has authority to receive evidence, except as follows: …. neither husband nor wife shall testify as to private conversations with the other.

The rule has always been expressed in the statute and discussed in the case law as a "disqualification of both spouses to testify … and not merely a privilege which must be appropriately claimed and may be waived." *Com. v. Gillis*, 358 Mass. 215, 216-17 (1970) [citation omitted.][5] "[T]he rule is one of disqualification, not of privilege, and the testimony [is] inadmissible even if both spouses wish the evidence to be received." *Kaye v. Newhall*, 249 N.E. 2d 583 (Mass. 1969) [citations omitted.] "The contents of private conversations are absolutely excluded..." *Gallagher v. Goldstein*, 402 Mass. 457, 459 (1988). So the question is, if the material in *Miller* was absolutely excluded and no objection to it needed to be made in order that it be excluded, why was it said that Miller waived his rights to exclude the material? The answer lies in the historical evolution of the case law, an evolution which is somewhat mysterious and not wholly satisfactory.

Despite the apparently absolute rule of exclusion announced in the above cases (and much earlier ones), there are more recent cases which, while continuing to note that the rule is a "disqualification" and not a mere "privilege," nevertheless hold that if there is no objection to the testimony of the private conversations, they will be admitted into evidence for their full probative value. *See*, e.g., *Bak v. Bak*, 24 Mass.App.Ct. 608, 611 n.3 (1987), *Com v. Azar*, 32 Mass.App.Ct. 290, 303-4 (1992), *Com. v. Sylvia*, 35 Mass.App.Ct. 310, 315 (1993), and most recently, *Miller v. Miller*, 448 Mass. 320 (2007).

The problem is with the pedigree of cases cited to by the more recent case law. This recent case law, when asserting that confidential marital conversation can be received in evidence in the absence of objection, cites to one seminal case, that being *MacDonald's Case*, 277 Mass. 418 (1931). *MacDonald's Case*, however, contains no discussion of the point, but only perfunctory treatment. On the issue of disqualification, its entire discussion is as follows:

> The testimony of the claimant in her direct examination that when her husband left the house he told her "he would have to try and get the rents" was a private conversation, and if objected to should have been excluded, Mass. Gen. Law ch. 233, sec. 20 (2004); *Sampson v. Sampson*, 223 Mass. 451, 458 (1916) but having been admitted without objection it was entitled to its probative force. *Commonwealth v. Wakelin*, 230 Mass. 567 (1918). *Diaz v. United States*, 223 U.S. 442, 450, 56 L. Ed. 500, 32 S. Ct. 250 (1912).

It is somewhat surprising that a case having so little discussion of an evidentiary question should become a seminal case. What is more surprising is that *MacDonald's Case* itself finds no support in the three cases it purports to rely upon for the proposition that a failure to object means the marital conversation is admissible. The first cited case, *Sampson*, held only that one may testify as to the fact that a conversation was had, as long as the content was not disclosed: "Proof of that fact is quite disconnected from any direct or indirect statement of the substance of the conversations." *Sampson*, 223 Mass. at 458.

*Diaz v. U.S.*, *supra*, had nothing whatever to do with marital conversations or any disqualification. In that case, the defendant was convicted of homicide. He had been convicted previously of assault and battery for the same incident, but when his victim died, he was tried for the greater crime. In arguing a defense of double jeopardy, he requested the admission at trial of documents from the first proceeding, which encompassed, in part, testimony of witnesses unfavorable to him. Unfortunately for Diaz, the court used that material to convict him the second time. After his conviction, he challenged the court's reliance on the very documents he sought to have admitted, on the grounds that they were hearsay and shouldn't have been considered. He also claimed that consideration of the prior testimony violated his right to cross-examine the witnesses at his latter trial.

The court affirmed the conviction, stating that though the matter admitted was hearsay, defendant's failure to object constituted a waiver of his right to have the impermissible material excluded. On the confrontation argument, the court found that the right was "in nature of a privilege extended to the accused … that he is free to assert it or to waive it, as to him may seem advantageous." On both counts, the citation to *Diaz* by the *MacDonald* court was misplaced. If *Diaz* stood for anything, it was that a privilege can be waived. *Diaz* did not speak to a disqualification, such as the marital conversation disqualification.

The final case relied upon by McDonald's Case is *Com. v. Wakelin* 230 Mass. 567 (1918). In *Wakelin*, a prisoner, while speaking to his wife in prison, was secretly overheard by a government employee who spied on them by use of a mechanical device. At trial, the employee was allowed to testify as to his notes of the marital conversation. The court said the testimony of the marital conversation was properly admitted because, "[t]here is no rule of law that third persons who hear a private conversation between a husband and wife shall be restrained from testifying what it was." *Id.* at 574. This case did not implicate the husband and wife disqualification, which only restricts a spouse from testifying.

Looking at the present law, as exemplified in the recent *Miller* case, *supra*, we see that the supposedly seminal case, to which the modern cases are now citing reflexively, is of questionable pedigree. The early cases stand almost uniformly in contrast. One Supreme Judicial Court statement that has captured some attention as reinforcing the notion that the disqualification can be waived, appears in *Wireless Specialty Apparatus Co. v. Priess*, 246 Mass. 274 (1923), where Justice Rugg, after holding that the particular conversations in issue were not private and therefore were admissible, went on to say *in dicta*: "Incompetent evidence, when introduced without objection, is entitled to its probative force." *Id.* at 279. The sole citation for this proposition is to *Commonwealth v. Wakelin* [citation omitted] and cases there collected. *Id.* at 279. As shown before, neither *Wakelin*, nor any cases cited in *Wakelin* support this theory. The only discussion in *Wakelin* concerning failure to object to evidence was the failure to object to the admission of the confession of a third party to the crime for which Wakelin was charged. That rule of evidence was a common law rule that could be waived. It was not the same as a statutory disqualification. *Wakelin*, *supra*, at 575-76 .

Opinions closer to the time of the original statute's passage do not discuss, as such, whether an objection must be made in order to assert the disqualification, but the opinions seem to imply that none is necessary. *See*, e.g., *Jacobs v. Hesler*, 113 Mass. 157 (1873); *Raynes v. Bennett*, 114 Mass. 424 (1874) (testimony as to marital conversations "inadmissible by the common law, and our statutes have not changed the law in this respect."), *Drew v. Tarbell*, 117 Mass. 90 (1875) ("The judge rightly refused to allow the husband to testify to a private conversation with his wife."); also the statement of Justice Holmes in *Com. v. Cleary*, 152 Mass. 491, 492 (1890):

> So far as it [husband's offer of proof] related to the effect of private conversations between the two, the only legal way of proving this was by proving the substance of the words spoken. As the defendant was not at liberty to prove the latter, he could not prove the former.

Despite the apparent conflict between the statute's pronouncement of a "disqualification," and the court's modern treatment of it as a privilege to be asserted or waived,[6] it is doubtful the Supreme Judicial Court will revisit the issue soon, for two reasons. First, the Court in *Gallagher v. Goldstein*, *supra*,

commented that since the matter is embodied in a statute, it would be more appropriate for the Legislature to make what changes it thought appropriate. *Id.* at 461. (Oddly enough, the opinion in that case states that the Court was declining to transform the rule from one of disqualification to one of privilege.) Second, judges appear to feel it inappropriate that they be gatekeepers, required to make evidentiary rulings where there has been no objection.[7] If the marital disqualification were actually treat-ed as a disqualification, trial judges could not hear and take account of the private conversations, whether or not an objection was lodged.

One attempt to clarify the disqualification was contained in Rule 504(b) of the Proposed Massachusetts Rules of Evidence, drafted in 1980 by an advisory committee appointed by the Supreme Judicial Court. The proposed rule would have broadened the disqualified matter to "confidential communications" between spouses, not just conversations. Also proposed were exceptions for dying declarations made to a spouse, proceedings involving Mass. Gen. Law ch. 273A (Uniform Reciprocal Enforcement of Support Act) and actions for nonsupport, desertion or neglect of parental duty. Specific mention of abusive or threatening language was omitted from the proposed rule, the drafters believing that there was no need, because such language should not be considered confidential. The Proposed Rules of Evidence were rejected in their entirety on Dec. 30, 1982.

On the one hand, it is generally opined that the disqualification is based on outmoded or faulty ideas about our society; in addition, the courts are not enforcing the statute procedurally as it was meant to be: namely, as a disqualification. Until the Legislature should act, we are left with the present statute and its interpretation, as unsatisfactory as that may seem. Having embarked on a historical journey that will not help practitioners in their everyday practice, in the interest of imparting some useful knowledge, I point out the following contours of the present law on the disqualification:

- A spouse may be asked and may properly respond to the question whether a conversation was had with a spouse and whether, as a result of the conversation, that spouse took any action. *Sampson v. Sampson*, 223 Mass. 451 (1916).
- The burden of proving that the conversation was private or confidential is on the person asserting the disqualification. *Com. v. Paszko*, 391 Mass. 164, 190 n.30 (1984).
- The disqualification may have constitutional dimensions in a criminal case if the marital conversation is the only way to bring before the jury exculpatory information. *See* the argument in *Com. v. McCreary*, 12 Mass.App.Ct. 690, 697 (1981).
- There is no *res gestae* exception to the rule if disqualification. Even if the conversation accompanied and explained the action of a spouse, which action was testified to, the contents of the conversation remains disqualified. *Fuller v. Fuller*, 177 Mass. 184 (1900).
- Statements "not reasonably to be regarded as "conversation," are not within the statutory prohibition. Thus threats, or abusive language are not confidential. *Com. v. Gillis*, 358 Mass. 215, 218 (1970).
- Communications made in the presence of children may or not be confidential. The circumstances of the conversation and the age of the children must be examined. *Com. v. Stokes*, 374 Mass. 583 (1978) (question whether children were of "sufficient intelligence at the time to pay attention, and to understand what was being said.). *See also Lyon v. Prouty*, 154 Mass. 488, 490 (1891); *Jacobs v. Hesler*, 113 Mass. 157 (1873).
- The disqualification holds even after the death of one of the spouses, and it extends to conversations on business matters, even though the subjects are not confidential in their nature. *Dexter v. Booth*, 84 Mass. 559, 561 (1861). It is likely, therefore, that the statute renders inadmissible even conversations in which the information was intended to be later imparted to another.
- Complaints of pain or suffering "that would not include statements of facts, nor narrations of past occurrences" are not conversations, and may be testified to by a spouse. *Com.v. Jardine*, 143 Mass. 567 (1887).
- The statement by a husband that he wished his wife were dead was not considered "abusive language admitted in evidence to show abusive treatment," and it was therefore excluded. *Sherry v. Moore*, 265 Mass. 189, 194 (1928) (citing *Com. v. Cronin*, 185 Mass. 96, 97 (1904)); The words must be those "constituting or accompanying abuse, threats or assaults of which the other spouse is the victim," in order to come within the exception of the statute. *Com. v. Gillis*, 358 Mass. 215, 218 (1977).
- Even if the words uttered in a private conversation between spouses are intended to be communicated to others, the communication is nevertheless within the disqualification.
- In a motion for summary judgment or otherwise, one must move to strike any marital conversation in an affidavit, or the conversation will be considered at its full probative value. *Miller v. Miller*, 448 Mass. 320 (2007).
- Query whether the content of marital conversations is discoverable. The exclusion covers both in court and out of court testimony before a "person who has authority to receive evidence." A master who hears a trial is receiving evidence. It is not clear whether a stenographer present at a deposition is a person who "has the authority to receive evidence." The deposition is under oath and can be used as evidence if a deponent becomes unavailable, yet it is not otherwise admissible in evidence.
- There are other exceptions contained in Mass. Gen. Law ch. 2323, sec. 20 that should be examined carefully: for conversations concerning contracts made between spouses, proceedings pursuant to G.L. c.209D, for prosecutions involving alleged violations of abuse protection

orders, and proceedings involving abuse of children.

- Object, even if you shouldn't have to.

## End notes

1. *See* Twenty-Second Report of the Judicial Council of Massachusetts at 72-73 (1946), reprinted at 32 Mass. L. Q. No.1, 69. (1947)
2. A husband and wife were considered one entity with one interest at common law; the testimony would be likely be untruthful because of the affection for the other; the testimony would tend to disturb the marital peace, and any testimony of a spouse on cross examination unfavorable to husband would also tend to disturb the marital peace. *Gallagher v. Goldstein*, 402 Mass. 457, 459-60 (1988) (Citing 2 J. Wigmore, Evidence § 601 (Chadbourn rev. 1979).
3. *Gallagher*, *supra*, 402 Mass. 457, 460 (1988) (opinion by Liacos, J.).
4. *See*, *e.g.*, Inker and McGrath, "husband and wife Conversations," 8 B.B.J. 30 (1964).
5. There also exists, in contrast, a marital "privilege" that pertains only in certain criminal proceedings, in which "neither husband nor wife shall be compelled to testify… against the other." *See* Mass. Gen. Law ch. 208, §20, par.2 (2003); the marital conversation disqualification applies in both civil and criminal proceedings.
6. The Judicial Council of Massachusetts, as early as 1946, observed that the case law was beginning "to treat the present statute as creating a privilege… and not as an absolute disqualification." Twenty-Second Report of the Judicial Council of Massachusetts, reprinted at 32 M.L.Q. 1, 74 (1947).
7. This was suggested to me recently by Hon. Anne M. Geoffrion, as being the opinion of more than a few judges.

# THE *MASON* CASE: THE IMPACT OF SHARED PHYSICAL CUSTODY ON REMOVAL

*By Gayle Stone-Turesky and Katherine E. Garren*

When the Supreme Judicial Court issued the *Mason v. Coleman*, 850 N.E.2d 513 (Mass. 2006), decision on July 10, 2006, family law practitioners throughout Massachusetts began to question whether the Court was moving away from the 20-year-old "real advantage" standard ordinarily applied in removal cases. *Mason* holds that the child's best interest is the sole inquiry for evaluating one parent's request to move where the parents share parenting time nearly equally. *Id.* The *Mason* court expressly rejected considering the requesting "parent's advantage" as a threshold part of the analysis whether to allow the move. *Id.* at 185.

*Gayle Stone-Turesky is a partner at Stone, Stone & Creem in Boston where she concentrates her practice in the area of family law.*

*Katherine E. Garren is an associate at Stone, Stone & Creem where she also concentrates her practice in the area of family law.*

Since *Yannas v. Frondistou-Yannas*, 481 N.E.2d 1153 (Mass. 1985), the Court has consistently held that when a custodial parent wishes to permanently remove a child from the commonwealth, the court must consider whether that parent has a "good and sincere motive for the move" resulting in a "real advantage" to the custodial parent and whether the parent's contemplated move is motivated by a desire to deprive the noncustodial parent of time with the child. Then, taking into consideration the impact of the advantage on the custodial parent and the benefit that flows through the parent to the child, the judge must determine whether the move is in the "best interests of the child." *Yannas*, 395 Mass. at 712.

The rationale for the real advantage standard laid out in *Yannas*, and the line of cases that followed, is that the child's well-being is linked to the custodial parent's well-being. Many of the real advantage removal cases contain facts that point to an economic advantage to the custodial parent that will raise the family's standard of living or a move to be closer to the custodial parent's family that will enhance the extended support network of the child. *See Rosenthal v. Maney*, 745 N.E.2d 350, (Mass. App. Ct. 2001); *Gold v. Gold*, 859 N.E.2d 456 (Mass. App. Ct. 2006). While the impact of the move on the noncustodial parent's relationship to the child is a factor for the court to consider in the best interests analysis, it cannot be the controlling factor. *Yannas* at 712.

In 2003, the Court expanded the *Yannas* real advantage standard to in-state removal cases a well. In *D.C. v. J.S.*, 790 N.E.2d 686 (Mass. App. Ct. 2003), the Appeals Court applied the real advantage standard when the custodial mother wanted to relocate with the children from Norwell to Holyoke in Western Massachusetts. The court later applied the *Yannas* standard in a paternity action when a custodial mother wanted to remove the child to St. Croix. *Wakefield v. Hegarty*, 857 N.E.2d 32 (Mass. App. Ct. 2006).

After more than 20 years of consistent application and even the expansion of the real advantage standard, *Mason*'s holding that the removal standard in cases in which the parties share physical custody is simply the "best interests of the child" standard, without contemplation of whether the move has a real advantage for the custodial parent, seemed at first blush to be a possible departure from the *Yannas* standard. However, in several cases since *Mason*, the court has clearly continued

to apply and even strengthen the real advantage standard in situations where one parent has sole physical custody. *See Tufts v. Tufts*, 850 N.E.2d 1136 (Mass. App. Ct. 2006); *Gold v. Gold*, 859 N.E.2d 456 (Mass. App. Ct. 2006); *Pizzino v. Miller*, 858 N.E.2d 1112 (Mass. App. Ct. 2006); and most recently, *Abbott v. Virusso*, 862 N.E.2d 52 (Mass. App. Ct. 2007).

## The facts of *Mason v. Coleman* and the Probate and Family Court ruling

In *Mason*, the parties had two children born of the marriage. When they divorced, in New Hampshire in 1998, the parties entered into an agreement that provided for joint legal and physical custody of the two minor children. The agreement was incorporated into the New Hampshire divorce decree. Pursuant to the terms of the agreement, the parents divided physical custody of the children approximately equally. They both agreed to move within 25 miles of Chelmsford, Mass., to facilitate the shared custody arrangement. They also agreed that since neither party was certain where they would reside after the divorce, the children would attend school in the district where the mother resides.

After the divorce, both of the parties remarried. The father eventually moved to Nashua, N.H., which was within the distance requirement, being only 17 miles from Chelmsford. Several weeks after the father's move to Nashua, the mother notified the father that she wanted to relocate to Bristol, N.H., where her parents lived and where her new husband hoped to move to be closer to his children from a previous marriage. The mother intended to move into her parent's home with her children. The father refused to consent to the move and subsequently filed a Complaint for Modification requesting that the mother be enjoined from removing the children to Bristol. His Complaint for Modification sought to modify the joint custodial arrangement and requested that he be awarded sole custody of the children. The mother counterclaimed, requesting that the court grant sole custody of the children and permission to remove the children from the commonwealth to relocate to Bristol.

The Probate Court judge allowed the father's temporary order and enjoined the mother from relocating with the children to Bristol. After a four day trial, a different judge determined that a move to Bristol, was not in "the best interests of the children," stating that the Chelmsford schools were superior to the Bristol schools, especially taking into consideration the special needs of one of the children. The parties' oldest child had been diagnosed with attention deficit disorder/at-tention hyperactivity disorder and related learning problems. The child, with the help of both parents and medication, was in the fifth grade and was making "great strides" both socially and educationally in his middle school. *Mason* at 178. The trial court concluded that relocation disruptions to the child's developmental process, coupled with the reduction in time spent with the father, would render the move to New Hampshire "detrimental" to the older child's socialization and education. *Mason* at 178.

The judge considered the impact on the children of uprooting them from their current home and allegations that one of the mother's new stepchildren had behaved inappropriately toward one of her children as factors against allowing the move. In addition, the judge mentioned that there was insufficient evidence to establish a clear financial advantage to the mother needed to substantiate her request to remove the children to Bristol. The judge did not award sole physical custody to either party and ordered that the parties continue to share legal and physical custody of the children. The mother appealed the decision and the Supreme Judicial Court transferred the case on its own initiative.

## Creation of a distinct standard in removal cases when the parties share physical custody

The Supreme Judicial Court began its discussion in *Mason* by enunciating a well detailed and thoughtful distinction between shared legal custody and shared physical custody. The Court initiated its analysis by quoting Mass. Gen. Law ch. 208, § 31 (2000), stating that shared legal custody carries "mutual responsibility and involvement by both parents in major decisions regarding the child's welfare including matters of education, medical care and emotional, moral and religious development." Conversely, sole legal custody gives only one parent these rights and responsibilities." *Mason* at 181. Shared physical custody, according to the Court in *Mason*, contemplates that a child shall have periods of residing with and being under the supervision of each parent, assuring frequent and continued contact with both parents while sole physical custody typically provides that the children reside with only one parent "subject to reasonable visitation by the other parent." Mass. Gen. Law ch. 208, § 31.

The Court went on to describe shared physical custody as an arrangement by its nature that involved shared commitment to coordinate extensively on the details of every aspect of a child's life and required ongoing joint scheduling and provisions for supervision and transportation. "While a joint physical custody agreement remains in effect, each parent necessarily surrenders a degree of prerogative in certain life decision, e.g., choice of habitation, that may affect the feasibility of shared physical custody." *Mason* at 183.

The Court then affirmed Mass. Gen. Law ch. 208, § 31 (1987), which prevents the removal of a child from the commonwealth without the consent of both parents, unless the court upon cause shown otherwise orders. *Yannas* previously held that "upon cause shown means only that removal must be in the best interests of the child." *Yannas* at 711. The Court confirmed the accuracy of the standard applied by the lower probate judge and reviewed her determination of the best interests of the children only for an abuse of discretion. *Mason* at 184. While the Court espoused that the same standard applies in all removal cases, it then went on to hold that the "calculus" of the best interests standards is different in shared parenting cases than from situations that involve sole physical custody.

Principles of the Family Dissolutions Analysis and Recommendations Section 2.17(1) (4)(c) (American Law Institute 2002) [hereinafter ALI] states that removal cases should differentiate between cases involving a primary residential parent and those involving shared physical custody. The *Mason* court adopted the ALI principal that when a relocation renders it impractical to maintain the

same proportion of custodial responsibility to each parent, the court should modify the parenting plan in accordance with the child's best interests. "If neither parent has been exercising a clear majority of custodial responsibility for the child, the court should modify the plan [e.g. enter and order] in accordance with the child's best interest taking into account all relevant factors including the effects of the relocation on the child." *Mason* at 185, citing the ALI Principles of the Family Dissolutions Analysis and Recommendations Section 2.17(1) (4)(c)(2002).

"No longer is the fortune of simply one custodial parent so tightly interwoven with that of the child; both parents have equal rights and responsibilities with respect to the children. In shared custodial situations, the importance to the children of one parent's advantage in relocating outside the commonwealth is greatly reduced." *Mason* at 185. It is for the judge to determine, taking all facts into account, whether removal is in a child's best interest. *Id.* The Court concluded that the Probate Court's decision made detailed written findings that the children's best interest would be negatively affected by the move. The Court affirmed the judge's decision and found that the Probate and Family Court judge did not err in her determination that the best interests of the children would be harmed by the move to Bristol, N.H.

Family law practitioners had become so familiar with the real advantage standard in removal cases over the years that it was often thought that the analysis of the real advantage to the custodial parent practically outweighed the best interests of the child standard. If the advantage to the parent were great enough, then removal certainly would be allowed. The *Mason* court reiterated that it is the best interests of the child standard that applies in all removal cases. So, what impact does *Mason* have on the *Yannas* real advantage standard?

*Mason* left many practitioners wondering whether the court was beginning to reconsider the real advantage standard even in removal cases in which one parent had sole physical custody. The court put a swift stop to the contemplation of any erosion to the real advantage standard five months later with its decision in *Pizzino v. Miller*, 858 N.E.2d 1112 (Mass. App. Ct. 2006).

## Subsequent cases: *Yannas* real advantage standard is alive and well in removal cases where one parent has sole physical custody

In several cases decided after *Mason v. Coleman*, most notably in *Pizzino*, the court has made it clear that *Mason* did not overrule *Yannas*, nor did it in any way erode or even begin to step away from the real advantage standard. In *Pizzino*, a mother who had sole physical custody of children was not allowed by the Probate and Family Court to remove her children to South Carolina, even though her new husband lived there on a military base and had no ability to relocate to Massachusetts. The Appeals Court not only remanded to the trial court, but went further on to hold, "Today, we conclude that a sincere desire to be with a spouse is, per se, a good and sufficient reason that requires a finding that there is a real advantage to the custodial parent in moving." *Pizzino* at 873.

## Two standards in removal cases

In *Mason*, the Court made a clear distinction between removal cases in which the parents share physical custody and cases in which one parent has sole physical custody. The standard is always the "best interests of the children," but how one calculates those interests changes when the parties share physical custody. When one parent has physical custody, *Yannas* applies and the court must determine whether the move is a real advantage to the custodial parent. If so, the court must include the potential advantage to the parent in the calculation of the child's best interests. When the parents share physical custody, the best interests of the children, without regard to the advantage to one parent, is the standard.

It now appears that the standards for removal of children will vary depending upon the parenting plan in effect at the time of the request for removal. The question has become, after the *Mason* decision, whether or not attorneys will begin to discourage shared custodial parenting arrangements – which studies have shown may be the best arrangement for the children – in order to protect their clients' later ability to remove a child from the commonwealth. Does the attorney have a duty to their client to inform them of the potential impact of the *Mason* case and discuss the impact that his or her decision today to agree to a shared parenting plan may impair his or her ability later to remove the children from the commonwealth? For example, if the client is in a field of work in which relocation is often a requirement of maintaining employment, he or she may need to seek sole physical custody with liberal visitation for the other parent rather than agree to a shared physical custody arrangement to protect his or her ability to remove the children at a later time. Under *Mason*, no matter how great the advantage the move may be for the parent who wants to remove the child from the commonwealth, it is the best interests of the child standard alone that will apply.

# PUBLIC HEALTH EMERGENCIES AND LEGAL PREPAREDNESS

*By Priscilla B. Fox*

It's probably safe to say that everyone has heard of the possibility of an influenza pandemic, even if they don't know any details. People also remember the anthrax attacks in 2001 and the suspicious white powder incidents that occurred in Massachusetts around that time, as well as Hurricane Katrina's devastation. If an emergency occurred in the commonwealth that seriously threatened public health — for example, a severe outbreak of a naturally occurring disease, a natural disaster that destroyed essential infrastructure, or a bioterrrorist attack — what would happen? Would hospitals be able to handle an overflow of patients? What if people needed to be isolated or quarantined? How would medical volunteers be handled? Would responders be protected from liability? These are just a few of the questions that the Massachusetts Department of Public Health (MDPH) has been addressing in the past several years.

*Priscilla B. Fox is deputy general counsel for the Massachusetts Department of Public Health. For more information on the issues described in the article, contact her at Priscilla.Fox@comcast.net or MDPH's Office of General Counsel at (617) 624-5220.*

While there is general public awareness that emergency preparations are proceeding at the federal, state and local levels, there is less awareness about the legal aspects of preparedness. This article will discuss the legal activities that the MDPH is engaged in to prepare for any type of emergency, a strategy known as an "all-hazards" approach.

First, some background. Two statutes in Massachusetts authorize emergency declarations. Under Mass. Ann. Laws ch. 17, § 2A (LexisNexis 1999), if the governor declares that an emergency exists which is detrimental to the public health, the commissioner of public health may, with the approval of the governor and the public health council, "take such action and incur such liabilities as he may deem necessary to assure the maintenance of public health and the prevention of disease." The commissioner may also, with the approval of the public health council, "establish procedures to be followed during such emergency to insure the continuation of essential public health services and the enforcement of the same."

Under Chapter 639 of the Acts of 1950 (the civil defense law, under which the Massachusetts Emergency Management Agency operates), the governor may declare a state of emergency due to many circumstances, including natural disasters or enemy attack. A state of emergency confers upon the governor extraordinary powers to protect the lives and property of the citizens of the commonwealth and to enforce the laws. If a serious event threatened the public health, the governor might declare a public health emergency, a state of emergency, or both.

The following summarizes some activities that the MDPH legal staff has been involved in to enhance emergency preparedness.

## Training

A training program called "Legal Nuts and Bolts of Isolation and Quarantine" was developed with the assistance of the attorney general's office after the outbreak of severe acute respiratory syndrome several years ago. It has been presented numerous times in various parts of the state. Designed primarily for local health officials, it provides legal documents that those officials may use for the voluntary and mandatory isolation of a sick patient. It also provides court pleadings and motions for city and town attorneys to use, should it become necessary to seek a court order to forcibly isolate an individual. The documents may be easily modified for other infectious diseases where isolation or quarantine is necessary. The Legal Nuts and Bolts program is now considered an essential course for local public health officials and will continue to be offered on an annual basis.

A second program, recently developed with counsel for the state police, educates police officers about infectious diseases, police authority for community protection, and isolation and quarantine in emergencies. The training has been presented to state police officers and local chiefs of police, and is available for local police officers upon request.

## Pre-credentialing of health care volunteers

An emergency may require the services of a much greater number of health care professionals than are necessary under normal circumstances. Volunteer doctors, nurses, psychologists, and many other professionals may be needed. It is important that these volunteers' credentials be verified in advance, so that they may be put to work quickly and safely when disaster strikes. To that end, the Massachusetts System for Advance Registration has been developed. MSAR is an online database that, when fully operational, will register and verify the credentials of a wide variety of health-related volunteers. Criminal offender record information checks will be incorporated into MSAR in some form; the details are under discussion.

Federal funds have supported MSAR and similar pre-credentialing programs in the other 49 states. The ultimate goal is for states to be able to call upon volunteer health care personnel from other states, should the need arise. However, before this goal can be achieved, legal challenges must be overcome, including finding a way to provide liability protection for private sector volunteers who cross state lines to provide health care.

## Alternate care sites and altered standards of care

In a widespread event such as a flu pandemic, it may become necessary for hospitals to provide medical care under suboptimal conditions (with fewer resources and staff than normally), or in alternate care sites such as school gymnasiums. In anticipation of this, each acute care hospital in the commonwealth is being required to identify and plan for an alternate care site, which will be licensed by MDPH as a satellite of the hospital. Furthermore, in whatever setting they practice, some health care professionals may be required to undertake tasks outside their legally defined scopes of practice.

In early 2006, MDPH and the Harvard School of Public Health convened an advisory group comprising ethicists, lawyers, clinicians and local and state public health professionals, which discussed key ethical, legal and practical issues with respect to altered standards of care. The group then developed draft "Guidelines for the Development of Altered Standards of Care during an Influenza Pandemic" (i.e., a draft description of the process that would be followed to alter standards of care). The next step will be to convene an advisory committee of health care providers and consumers that will develop clinical protocols to be followed as necessary during a pandemic.

## Emergency orders and waivers

MDPH legal staff has drafted templates for orders that could be issued by the commissioner of public health if necessary during a declared public health emergency. These include orders restricting large public assemblies or public transportation, setting priorities for receipt of vaccines, waiving certain regulations in order to expedite the delivery of medical care, etc.

## Liability protection

Much research has been conducted on existing liability protections for volunteer and paid health care personnel in a variety of scenarios, including work as volunteers, work in sites other than their normal work places, and work outside their usual scopes of practice. The research has been summarized in various documents that have been distributed at training programs and posted online. Some legal gaps have been identified, and some solutions proposed through legislation, but work remains ongoing.

## Legislation

Although Massachusetts' current statutes confer necessary authority for emergency response by state and local governments, some of the public health laws are written in archaic language and should be updated. Also, as noted above, there are gaps in liability protection. MDPH continues to work with the Legislature on a bill known as the Massachusetts Emergency Health Powers Act, which would update and clarify existing law, as well as provide liability protection for volunteers.

## Mutual aid

Public health resources vary greatly at the city and town level. Local health officials need a legal mechanism through which they can assist and receive assistance from other localities, either in times of emergency or simply in carrying out their normal activities for example, a regional flu vaccine clinic. Mutual aid agreements are contracts between municipalities, authorized by Mass. Ann. Laws ch. 40, § 4A (West 1995). Working with other organizations, including the City Solicitors and Town Counsel Association, MDPH developed a template for mutual aid agreements among local health agencies (health departments and boards of health). Many towns have voted at town meeting to authorize the town to use the template, and some have taken the next step of signing a mutual aid agreement based on it.

## Interstate and international cooperation

Massachusetts belongs to several interstate mutual aid agreements, including the Emergency Management Assistance Compact (with other U.S. states) and the International Emergency Management Assistance Memorandum of Understanding (with the other New England states and five Eastern Canadian provinces). Although these agreements were initially designed to share assets and personnel of emergency management agencies, it is now recognized that public health departments are essential partners in a coordinated response to an emergency. MDPH legal staff attends regional and international meetings, and assists with legal issues such as credentialing of health care personnel who could be asked to cross state or international borders, and sharing of personally identifiable health information in order to limit disease spread.

In all of the above-described areas, attorneys have been important partners with policy-makers in working toward public health emergency preparedness goals. Although substantial progress has been made, much legal and other work remains to be done to prepare the commonwealth for a large public health emergency.

# RACIAL AND ETHNIC HEALTH DISPARITIES: CAN LAWYERS CONFRONT THE CRISIS?

*By Sara Pic-Harrison and Mary Cyriac*

*"When I was seeing the doctor for the flu, he wanted to talk about AIDS and drugs. It was like he thought all Latinos were addicts."*

*— Statement of Boston resident to Boston Public Health Commission*

## I. Introduction

Health Law Advocates is a public interest law firm based in Boston. Its mission is to represent Massachusetts residents who are denied access to health care. Through HLA's direct client services and collaborations with community coalitions, we became aware of the critical barriers communities of color, immigrants and limited English speakers face when attempting to access quality health care. These barriers are generally referred to as racial and ethnic health disparities.

Racial and ethnic health disparities are well documented and can take different forms. For example, disparities in care may show in rates of diseases. In Boston, African Americans are twice as likely as whites to die of diabetes. What is not always as clear is the cause. According to the U.S. Centers for Disease Control and Prevention, diabetes is strongly correlated with obesity. Some questions immediately arise: Are African Americans suffering from diabetes because of cultural factors that increase obesity, such as diet? Should those cultural factors be addressed by their health care providers? Other questions can lie even deeper: Do Boston's African-American residents even have adequate access to health care providers who can discuss factors such as diet with them? And even if they do have access, do their health care providers routinely discuss risk factors for diabetes with their African-American patients? Does the provider discuss risk factors in a culturally sensitive way or does she approach the discussion with a bias or prejudice? Does the African-American patient listen and accept health advice? If not, is this because of the patient's personal preference,or is it because of past negative experiences with health care providers?

There are many questions about racial and ethnic health disparities, but one thing is clear: An interdisciplinary approach is required to address this growing crisis. Reducing and eventually eliminating disparities is not a problem that can be solved either by the medical community or the public health community alone. Creative strategies are needed to tackle disparities. Lawyers can play an important role in reducing and eventually eliminating racial

*Sara Pic-Harrison is a staff attorney at Health Law Advocates.*

*Mary Cyriac is the 2006-07 Parmet Fellow at Health Law Advocates. Pic-Harrison and Cyriac are both members of the Health Care For All's Disparities Action Network.*

and ethnic health disparities, thro-ugh litigation, legislation and other policy changes.

## II. Legal actions to address racial and ethnic health disparities

It is clear that many factors influence or are responsible for racial and ethnic health disparities. A health care provider may unconsciously stereotype a patient; or a provider who is from a different race or culture from her patient and is not knowledgeable about the patient's cultural attitudes to health care may not know how to address the patient's needs in a culturally appropriate manner. Managed care organizations (e.g., HMOs) may "redline" neighborhoods which are predominantly communities of color or immigrant communities by avoiding contracts with health care providers located in those neighborhoods or by maintaining fewer offices in those neighborhoods. Hospitals can also contribute to disparities, as hospitals in communities of color and low-income communities across the nation shut down, move or are privatized.

Disparities may occur because of intentional discrimination or because of "disparate impact," that is, actions that have a discriminatory impact that is unintentional. Even with such strong statistical evidence of disparities caused by discrimination, there have been very few recent suits filed alleging discrimination in health care access or delivery based on race or ethnicity.

### Title VI of the Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964 states that "no person… shall on the basis of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance." This cause of action, however, was substantially limited by the U.S. Supreme Court in 1985 and again in 2001. In *Alexander v. Choate*, 469 U.S. 287, 293 (1985), the Court unequivocally stated, "Title VI itself directly reach[es] only instances of intentional discrimination." The court reaffirmed this holding in *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001). The Court also held in *Sandoval* that although regulations promulgated under Title VI barring actions that have a disparate impact on racial groups are valid, these regulations do not provide plaintiffs with a private right of action to challenge alleged disparate impact discrimination. After *Sandoval*, a victim of disparate impact discrimination by her health care provider must submit her grievance to the U.S. Department of Health and Human Services (HHS) Office of Civil Rights. However, this system does not allow the victim to file suit herself and instead leaves the investigation and enforcement to a government office, which is frequently underfunded. Further, the grievance must be filed 180 days from the time the injured person knew or should have known about the discriminatory treatment. These limitations further inhibit a person who has experienced disparate impact discrimination, which contributes to racial and ethnic health disparities.

Title VI's force has been additionally limited by the U.S. Department of Health and Human Services. HHS clarified in an appendix to a regulation concerning a different civil rights law that its position"has *consistently* been that…no federal financial assistance flows from the department to the doctor or other practitioner under the program [Medicare Part B], since Medicare Part B — like other social security programs — is basically a program of payments to direct beneficiaries." (Emphasis added). Medicare Part B is the primary vehicle for payment for outpatient health care services for elders and the disabled. Exempting this class of health care providers, which accepts only Medicare Part B and no other federal financial assistance, further limits Title VI's reach.

### Massachusetts' anti-discrimination law

Massachusetts' anti-discrimination laws state that it is unlawful to discriminate "in any place of public accommodation." A "place of public accommodation" includes "hospitals, medical and dental offices and other health care facilities." In order to allege discrimination in a place of public accommodation, the injured person must first file a complaint with the Massachusetts Commission Against Discrimination.

Only 5 percent of complaints (about 166 out of 3,328 cases) filed with the MCAD in 2003 (the most recent report) were based on discrimination in a place of public accommodation. To date, there have been no cases decided by the MCAD that alleged discrimination by a health care provider. Thus, it is unclear whether a litigant attempting to use Massachusetts' anti-discrimination law to address racial and ethnic health disparities, either on a class scale or individually, would be successful.

### Can legal causes of action address racial and ethnic health disparities?

It is clear that legal actions to address racial and ethnic health disparities have been seriously limited in recent years. However, there are potential legal avenues that are as yet unexplored, through both state and federal law. As awareness of the serious problem of disparities grows, lawyers seeking to address this issue through litigation need to think creatively to leverage the legal tools we have.

## III. Legislative and community-based efforts to address racial and ethnic health disparities

Aside from litigation, advocates are working on legislative and community-based approaches to address the problem of racial and ethnic disparities in health care. These efforts demonstrate how health care professionals, policy-makers and the community can contribute to a solution.

### Health reform

In 2006, Massachusetts passed a health reform bill that seeks to expand insurance coverage to most of the commonwealth's resi-

dents. The new health reform law, Chapter 58 of the Acts of 2006, also addresses many other health care issues. It establishes a health care quality and cost council within the Executive Office of Health and Human Services. This council will develop and coordinate the implementation of several goals, including the reduction of racial and ethnic health disparities. The new law also requires that hospital rate increases be contingent upon hospital quality standards, including reducing racial and ethnic disparities in health care.

No regulations have yet been passed pursuant to the new act, but its mandates may prove promising in the movement to eliminate disparities.

## Proposed legislation

At the federal level, in September 2006, Senators Edward M. Kennedy and William H. Frist sponsored a bill titled "Minority Health Improvement and Health Disparity Elimination Act." The bill promotes building cultural competency, diversifying the health care workforce, improving care and access, improving research and data collection, analyzing of disparities and strengthening the Office of Minority Health and Health Disparity Elimination. The bill is awaiting assignment to a legislative committee in Congress.

At the state level, the Disparities Action Network, a statewide coalition of leaders and organizations committed to eliminating racial and ethnic health disparities in Massachusetts, proposed legislation titled "An Act to Eliminate Racial and Ethnic Health Disparities in the Commonwealth." The bill proposes creation of a new state Office of Health Equity to coordinate efforts of public agencies to eliminate disparities. The office would oversee data collection and evaluation, new programs to promote health literacy and health care workforce diversity, as well as improve health care access by reducing language barriers and promoting the use of community health workers. The bill was sponsored by Massachusetts Rep. Byron Rushing and filed in January 2007. It will be assigned to a legislative committee and a hearing will then be scheduled where advocates may testify.

## Data collection

A major part of the problem with addressing disparities is the lack of data. At the state level, Division of Health Care Finance and Policy regulations mandate that, beginning in 2007, hospitals in the commonwealth collect data regarding patients' race, ethnicity and language preference. Although data collection is important, questions remain, such as what kind of data to collect, how specific it should be and also how to effectively use data to reduce disparities. For example, many question whether it is enough simply to collect data regarding race and ethnicity at the point that patients begin to receive a health care service because this data alone does not provide useful information. Some think that tracking the type of treatment, level of care and results patients achieve in relation to race and ethnicity data is the only true way to get a realistic picture of the problem and to begin to solve it. Currently, there is no standard on what specific types of data hospitals must collect.

## Community benefits

In 1994, Massachusetts was the first state in the nation to issue Community Benefits Guidelines that encourage non-profit hospitals and HMOs to work with their communities to identify unmet health care needs. Using these guidelines issued by the attorney general, hospitals and HMOs can voluntarily provide community benefits through programs, grants and other initiatives addressing the health and social needs of local residents. The attorney general is to monitor and evaluate these efforts.

Using the Community Benefits Guidelines, hospitals could specifically assess the needs of racial, ethnic and linguistic minorities in the communities they serve and learn more about the disparities that exist in the services they provide, as well as strategize about and implement plans for tackling the problems by working with members of those communities. For example, by assessing the linguistic needs of the community, hospitals can appropriately allocate funds to provide translation services. Hospitals can also provide community education regarding issues ranging from accessing health care to wellness regimens.

Because Community Benefits is a set of voluntary guidelines, they cannot be legally enforced. The program's effectiveness depends on the initiative that hospitals take and the encouragement of the attorney general. Newly inaugurated Massachusetts Attorney General Martha Coakley now has the challenge and the opportunity to revitalize Community Benefits to help address the needs of Massachusetts' most vulnerable populations, which are frequently people of color, immigrants and limited English speakers.

## Community-based efforts

HLA is one community-based organization in the commonwealth attempting to end racial and ethnic health disparities through consumer advocacy. HLA is working to address racial and ethnic health disparities through collaborations with advocates, providers and community members. It has focused its efforts on Worcester County, a historically underserved area of the commonwealth and an area where communities of color and immigrant communities are growing rapidly. HLA has addressed disparities through community education on legal rights to health care access and is currently compiling a resource inventory of culturally competent mental health providers in Worcester County in order to identify areas for improvement.

Another example of a grassroots consumer-based advocacy organization is Health Care For All, a statewide organization that promotes health care reform. It is leading the way in creating a health care system that is responsive to the needs of all people, particularly the most vulnerable, and has a community-based project to address racial and ethnic disparities in health. Through community outreach, the project hopes to identify and develop relationships with key community leaders and organizations in Massachusetts' communities of color: work with leaders and community members to identify local disparities issues and determine how they can be addressed; provide disparities-related training and ongoing sup-

port for community members and leaders: and build and facilitate relationships between local hospitals and community members to address local disparities issues.

### Other proposals

Some have proposed that licensure boards require certain standards for education regarding race and ethnicity and cultural competence to be included on health care professionals' licensure examinations. Such a requirement may help promote an integrated cultural competence curriculum in all training programs.

Educational institutions are being encouraged to undertake efforts to diversify the health care workforce. A more diverse pool of health care providers might mean a higher level of cultural competence and increase access and quality of care for minorities seeking health care. Educational institutions can increase the diversity of the workforce by expanding their admissions process to conduct outreach to potential students of color and by accepting more qualified students of color into their health profession training programs.

## IV. Conclusion

Racial and ethnic health disparities are a critical and growing problem. As the Rev. Dr. Martin Luther King Jr. said, "of all the forms of inequality, injustice in health care is the most shocking and inhumane." Although disparities are pervasive, lawyers, advocates and the community can all play a role in reducing them.

# THE EFFECTS OF THE NEW INDEPENDENT CONTRACTORS STATUTE ON OTHER STATUTORY SCHEMES: A WELCOME CONVERGENCE OF WORKER PROTECTIONS

*By Alfred Gordon*

As with many workplace issues, with the passage of the amendments to the independent contractor statute, Massachusetts continues to be on the forefront in worker protections — this time in the fight against the harmful and inappropriate misclassification of employees as independent contractors. The misclassification phenomenon, in which employers improperly foist the costs of doing business onto their employees by labeling them as independent contractors, is a crucial issue because it has implications not just for the employees themselves, but also for the greater economy.

*Alfred Gordon is a partner in the Boston firm of Pyle, Rome, Lichten, Ehrenberg & Liss-Riordan PC. He represents unions and individuals in labor and employment matters before federal and state courts and administrative agencies.*

As for the effects on employees, the U.S. Government Accounting Office warns that because of such misclassification, some workers lose access to the protections to which they are entitled, including protections under state and federal wage and hour, discrimination, and labor laws, among others.[1] But these individual effects are dwarfed by the huge implications for the economy. "In its last comprehensive misclassification estimate, the Internal Revenue Service (IRS) estimated that 15 percent of employers misclassified 3.4 million workers as independent contractors in 1984, resulting in an estimated tax loss of $1.6 billion (or $2.72 billion in inflation-adjusted 2006 dollars) in Social Security tax, unemployment tax, and income tax."[2] In addition, a government-sponsored review of worker misclassification on unemployment insurance programs nationwide estimated annual losses of $436 million due to the underreporting of wages.[3]

Here in Massachusetts, there have been plenty of recent examples of such misclassifications on a very grand scale. For example, this past December, the Supreme Judicial Court debunked an elaborate scheme in which a janitorial services contractor held out its (mostly immigrant) workforce as franchisee/independent contractors.[4] Another recent example is the case of delivery drivers for FedEx Ground and FedEx Home Delivery, whom a number of courts and administrative agencies have determined to be misclassified as independent contractors instead of employees and who are the subject of extensive multidistrict litigation in federal court.[5]

Massachusetts has always been firmly on the front lines of worker protections in this area, recognizing the presumption of employment status in a rather strict unemployment statute as early as 1971.[6] Thereafter, in 1990, the Legislature created an explicit statutory presumption of employment status under Chapter 149 modeled closely on the presumption in the unemployment statute.[7] Most recently, in 2004, the Legislature modified and further strengthened the independent contractor statute, M.G.L. c. 149, § 148B ("Section 148B"), and the penalties for violation of that statute.[8] In so doing, the Legislature has set the strict employee protections in Section 148B on a convergent path with the several other statutes incorporated into Section 148B, and that convergence has finally begun to play out in the courts and administrative arenas.

## The statutory amendments

Subsection (a) of Section 148B sets forth the familiar ABC test for employment status that existed in a slightly different form in the predecessor statute. This subsection states:

(a) For the purpose of this chapter and Chapter 151, an individual performing any service, except as authorized under this chapter, shall be considered to be an employee under those chapters unless:

(1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and

(2) the service is performed outside the usual course of the business of the employer; and

(3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

The first change is that the three-part definition of employee has now been explicitly adopted for the minimum wage and overtime provisions of Chapter 151 in addition to its continued coverage for Chapter 149. As for the test itself, it has always been written and read conjunctively in that the employer has the burden of proving all three prongs of the test in order to classify the worker as an independent contractor.

The only major change to the test comes in the second prong, which formerly allowed the employer to prove either that the worker's service was performed outside the normal course of the employer's business or that the work was performed "outside of all places of business of the enterprise."[9]

It was this second option under the nearly identical unemployment statute that led the SJC in 2003 to hold that adult newspaper deliverers were independent contractors because the deliveries all took place outside of the employer's premises.[10] While this second prong is still available in an employer's defense under the unemployment statute, it is no longer available under the independent contractor statute, and as a result, an employer must conform its practices to the stricter independent contractor statute to avoid the civil and criminal penalties now attached to these statutory violations.

The new subsection (b), which has also been added to the unemployment statute by the same legislation, takes the employer's own interpretations out of the mix in determining whether a worker is an employee or an independent contractor. The statutes now conform to the principle that an employer's failure to withhold income taxes or to pay workers' compensation premiums or unemployment compensation contributions — i.e., the employer's own statutory violations — should not be considered in determining whether a worker is, in fact, an independent contractor.

But beyond these changes, the major impact of the new independent contractor statute is found in the modified and enlarged subsection (d),[11] which extends the criminal and civil penalties in Section 27C of Chapter 149 to misclassifications of employees in the minimum wage and overtime context under Chapter 151 and in the withholding of state income tax under Chapter 62B.[12]

The new subsection (d) also extends the civil penalties of Section 27C to misclassifications associated with the workers' compensation statute (which already carries its own criminal penalties).[13] In addition, although officers and management agents have always been deemed the "employer" for purposes of these provisions, the statute now states that such individuals "shall be liable for violations of this section," specifically indicating the prospect of individual liability for business owners and managers.[14]

## Application and construction of the statute

Upon the passage of the new independent contractor statute, the attorney general issued an advisory about the implementation and impact of the statutory changes, noting the stricter test and expanded penalties and exhorting employers to "re-examine many of their work relationships to ensure they are complying with the law."[15] As the attorney general explains, some of the effects of the amendments are clear, such as the explicit extension of the three-prong independent contractor test to Chapter 151 (minimum wage and overtime). The fact that the SJC has already construed the nearly identical test in the unemployment context leaves little doubt as to the manner in which the test will be applied to violations of Chapters 149 and 151. What is also now becoming clear is the ultimate impact of the extension of the independent contractor statute into penalties for violations of Chapter 152 (workers' compensation) and 62B (income tax withholding).

The workers' compensation statute contains its own definition of employee: "[E]very person in the service of another under any contract of hire, express or implied, oral or written, excepting . . . a person whose employment is not in the usual course of the trade, business, profession or occupation of his employer . . . ."[16] This definition, the core of which has remained relatively unchanged since the early 20th century, has been construed pursuant to the common law "direct or control" test.[17] Although the Legislature did not amend the definition of employee in the workers' compensation statute in 2004, the statutory amendments certainly intended some effect on the workers' compensation scheme with the extension of the civil penalties under Section 27C to violations of Chapter 152.

The new statute states: "Whoever fails to properly classify an individual as an employee according to this section *and in so* doing violates Chapter 152 . . . shall be subject to all of the civil remedies, including debarment, provided in Section 27C of this chapter."[18] Accordingly, the attorney general has interpreted the new statutory language as equating the misclassification of employees under the independent contractor statute to misclassification under the workers' compensation law. Because the attorney general's office is charged with enforcing these laws, the attorney general's interpretation of these laws is entitled to substantial deference.[19] Appropriately deferring to this interpretation, the Department of Industrial Accidents and the reviewing Superior Courts have now adopted the three-prong test from Section 148B(a) in making their workers' compensation determinations.[20]

While the Department of Revenue has not similarly adopted the definition from the independent contractor statute, the department's decision is based on the unity of definitions of employee under the federal and state

revenue codes.[21] Since the definition of employee in Chapter 62B specifically incorporates the definition from the Internal Revenue Code, the Department of Revenue continues to abide by that definition and makes employee/independent contractor decisions using the 20 guiding factors outlined in IRS revenue ruling 87-41. In the revenue ruling, the IRS considers factors similar to the ABC test — such as the integration of the worker's services into the business, the nature of the work, and whether the worker hires him — or herself out to the general public — but these factors are merely guidance, and the violation of any one of them does not automatically lead to a finding of employee status, unlike the three factors from the state independent contractor statute.

However, the enhanced penalties of the independent contractor statute now specifically apply when an employer is found to have violated Chapter 62B. Under the clear language of the amendment, as explained by the attorney general, if an employer misclassifies an employee under the independent contractor statute and, in so doing, fails to comply with the withholding requirements of Chapter 62B, those enhanced penalties will apply.[22]

In this regard, although employers have attempted to use the possible criminal penalties under this statutory scheme to force a more narrow construction of these statutes, this approach has been considered and rejected by the SJC.[23] In *Smith v. Winter Place LLC*, the defendants argued that the existence of criminal penalties required that the statute be construed narrowly under the rule of lenity. At the oral argument, the justices reacted skeptically to this argument by the defendants, and the parties submitted supplemental briefing on this issue. In its decision, the SJC ruled in favor of the plaintiffs and rejected the defendants' interpretation of the statute, thus rejecting the claim that the mere existence of criminal penalties required a narrow construction of the statute.[24]

In sum, when faced with these amended provisions, either under an employee's private right of action[25] or under a civil or criminal proceeding undertaken by the attorney general,[26] the strong worker protections under the independent contractor statute are destined to seep into the application of the other related statutes. The linkage of the two concepts in the penalty statute almost begs a reviewing court to read and decide the independent contractor provisions of the different statutes concurrently and congruently, which will, in the end, lead to the strengthening of employee protections across the administrative divides of the commonwealth.

## End notes

1. U.S. General Accounting Office, Pub. No. GAO-06-656, *Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification* (July 11, 2006) at 1, 6-7, 25. *See also* GAO, *Contingent Workers: Incomes and Benefits Lag Behind Those of Rest of Workforce*, GAO/HEHS-00-76 (June 30, 2000).
2. *Employment Arrangements*, GAO-06-656, at 1-2
3. Planmatics, Inc., *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs* (February 2000).
4. *Coverall North America, Inc. v. Comm'r of the Div. of Unemp. Asst.*, 447 Mass. 852 (2006).
5. *E.g., Estrada v. FedEx Ground Package System*, Sup. Ct. of California, Los Angeles County, No. BC 210130 (July 26, 2004), *reversed and remanded on other grounds*, No. B187951, 2006 WL 3378246 (Cal. App. 2 Dist. Nov 22, 2006) (No. B187951); *FedEx Home Delivery and Local 170, Int'l Bhd. of Teamsters*, Decision and Direction of Election, Case No. 1-RC-21966 (Jan. 24, 2006), *review denied*, (March 23, 2006); *In re FedEx Ground Package System, Inc., Employment Practices Litigation* (No. II), 381 F. Supp. 2d 1380, 1381 (Jt. Panel on Multidistrict Litigation 2005).
6. Mass. Gen. Laws ch. 151A, § 2 (2004).
7. Mass. Gen. Laws ch. 149, § 148B, St. 1990, c. 464 (approved Dec. 29, 1990).
8. St. 2004, c. 193, § 26 (effective July 19, 2004).
9. St. 1990, c. 464.
10. *Athol Daily News v. Bd. of Review of the Div. of Emp. & Training*, 439 Mass. 171 (2003).
11. Formerly paragraph 2 of the unnumbered and unlettered section 148B.
12. Pursuant to separate legislation in 2004, certain penalties under section 27C(a)(3) relating to public works contractors now specifically apply to violations of section 148B. St. 2004, c. 125, §§ 5-11.
13. *See* M.G.L. c. 152, § 14.
14. M.G.L. c. 149, § 148B(d).
15. Atty. Gen. Advisory # 2004/2, *Chapter 193 of the Acts of 2004, Amendments to Massachusetts Independent Contractor Law, M.G.L. c. 149 sec 148* (2004).
16. Mass. Gen. Laws ch. 152, §1(4) (2004).
17. *See, e.g., Thorson v. Mandell*, 402 Mass. 744 (1988), *citing McDermott's Case*, 283 Mass. 74, 76-77 (1933); *see also Murphy v. Cowperthwaite*, Rev. Bd. of the Dept. of Industrial Accidents No. 051145-01, 2004 MA Wrk. Comp. LEXIS 12 (June 2, 2004).
18. M.G.L. c. 149, § 148B(d) (emphasis added).
19. *See Smith. v. Winter Place LLC d/b/a Locke-Ober Co., Inc.*, 447 Mass. 363, 367-68 (2006).
20. *American Zurich Ins. Co. v. Dep't. of Industrial Accidents*, 21 Mass. L. Rep. 224 (Mass. Super. Ct. 2006); *Rainbow Dev.elopment, LLC v. Commonwealth of Massachusetts*, 20 Mass. L. Rep. 277 (Mass. Super. Ct. 2005) (adopting the test from section 148B(a) over the appellant's objection that the "control" test was the only relevant test).
21. Mass. Gen. Laws ch 62B, § 1 (2004) (defining employee "as defined in section [3401](c) of the Internal Revenue Code . . . .")
22. Atty. Gen. Advisory # 2004/2 at 5-6.
23. *Smith, supra* note 196.
24. *Id.*
25. *See* M.G.L. c. 149, § 150.
26. *See* M.G.L. c. 149, § 27C(a)(1).

# THE EMPLOYEE-SHAREHOLDER: AT THE FRONTIER OF BUSINESS AND EMPLOYMENT LAW[1]

*By David E. Belfort and Michael L. Mason*

In many closely held corporations, the rights and responsibilities of shareholders, officers, and directors are impacted by these individuals' employment relationship with the company. Likewise, the traditional employment relationship may be significantly modified when an individual possesses an ownership interest in a corporation. This article explores the fundamental issues raised by the rights and obligations of the employee-shareholder in Massachusetts under rapidly evolving precedent.

## 1. Introduction: Rise of the employee-shareholder

Corporate law and employment law are traditionally conceived of as two distinct bodies of law, with corporate law governing the formation and governance of corporate business entities and employment law governing the respective rights and obligations of employers and employees. Changes in the business corporation statutes, tax regulations, insulation from liability and other factors have increasingly led co-venturers in small businesses to choose the corporate form over partnership. Statistics reveal that these small corporations are becoming an increasingly relevant segment of our economy. As of 2005, there were 637,800 small businesses in Massachusetts.[2] In 2003 alone, small businesses created 29,934 new jobs in Massachusetts, nearly a 30 percent increase from the previous year.[3]

In many so-called "closely held" corporations, shareholders who own and control the corporation also serve as employees.[4] Often, they are the only employees. As a result, the line of demarcation between the corporation and its employees, and, by extension the border between corporate law and employment law, is blurred.

In this context, overlapping issues arise to complicate the black letter law of corporations and employment, particularly during an employee-shareholder's separation from the corporation. When advising clients, corporate counsel must take into account the influence of employment law principles, and employment counsel must consider how an employee's corporate ownership alters the traditional employment relationship. For example, employment counsel may be called upon to determine to what degree one's status as a shareholder affects the typical "at will" nature of employment. Similarly, corporate counsel may be asked to give an opinion as to the degree to which one's status as an employee-shareholder affects his or her obligations to the corporation.

Massachusetts courts have increasingly dealt with these issues since the landmark *Donahue v. Rodd Electrotype* case was decided in 1975. In *Donahue*, 367 Mass. 578, 593 (1975), the Supreme Judicial Court held that shareholders in a closely held corporation owe one another a duty of "utmost good faith and loyalty." As the number of closely held corporations has grown, so has the number of employee-shareholders. While a number of gray areas remain, there exists a distinct and evolving body of case law to which both corporate and employment counsel may look for guidance in clarifying the employee-shareholder's rights and obligations. While specialized knowledge of both practice areas is not required, there is a significant interplay and overlap between corporate and employment law in cases involving shareholder-employee rights and obligations in closely held corpora-

*David E. Belfort is a partner and Michael L. Mason is an associate with Corrigan, Bennett & Belfort PC in Cambridge. Their focus is on employment and business litigation.*

tions. In order to provide effective legal advice, counsel must recognize the areas of overlap and the nature of the interplay between these two areas of law.

## 2. Enhanced rights of the employee-shareholder

In general, the employee-shareholder enjoys enhanced job protection as compared to the ordinary "at will" employee. In *Wilkes v. Springside Nursing Home, Inc.*, 370 Mass. 842 (1976), the SJC applied the "utmost good faith and loyalty" standard applicable to shareholders in closely held corporations to the employment relationship. In the *Wilkes* decision, the SJC recognized that minority employee-shareholders were vulnerable to being deprived of their ownership rights and benefits through termination of their employment by the majority. *Id.* at 849. While the court confirmed the majority shareholders' discretion in managing corporate affairs, it also affirmed the employee-shareholder's right to enhanced protection against being "frozen out" of corporate affairs through termination.

The Court found that majority shareholders must demonstrate a legitimate business purpose for terminating the minority shareholder's employment. *Id.* at 851. If the majority is able to demonstrate a legitimate business purpose, the burden shifts to the minority shareholder, who must then demonstrate that the same objective could have been achieved through a less harmful course of action. *Id.* at 850-52. The court will then weigh the proffered legitimate business purpose against the practicability of the less harmful alternatives. Under the *Wilkes* doctrine, an employee-shareholder may not be terminated as long as a practical, less harmful alternative exists. As such, an employee-shareholder may enjoy significantly enhanced job protection as compared to the typical "at will" employee.

The line of cases following *Wilkes* illustrates the relative weight assigned to the employee-shareholder's rights as compared to the interests of the corporation. In *O'Connor v. U.S. Art Co., Inc.*, No. 031728BLS, 2005 WL 1812512 (Mass.Super. June 27, 2005), the Superior Court (van Gestel, J.) relied upon *Wilkes* in finding that an employee-shareholder who was terminated for "poor bookkeeping practices that left receivables unaccounted for and payables outstanding" was wrongfully terminated in contravention of the fiduciary duty owed by the majority. *Id.* at *9. "With an ordinary employee not entitled to partner-like treatment, the termination of O'Connor may have been justified," the court held. *Id.* at *10. "Given O'Connor's enhanced status as an owner, however, [the other shareholders] did not act in a manner demonstrating the utmost good faith." *Id.*

In finding for the plaintiff, the court identified several practical and less harmful alternatives available to the majority:

> For example, U.S. Art International's controlling group could have appointed [the majority shareholder] as president, hired a competent bookkeeper and made O'Connor vice president of marketing, with an adjustment in compensation to a modified salary-plus-commission based compensation. Or the company treasurer, who from day one always was [the majority shareholder], could have acted in a treasurer's function, not simply as a title holder. Or the stockholders could have called a real meeting and discussed among the four of them ways and means to correct the bookkeeping issues and still preserve a role for O'Connor in the international sales aspects of the business, in which no one said his skills were lacking. Indeed, there are, this Court is confident, numerous other rational business means for solving the bookkeeping issues short of firing O'Connor and shutting down the business. (*Id.* at *10)

As in *Wilkes*, the *O'Connor* court recognized that the plaintiff "was cut off from all further salary and received no compensation whatsoever for his . . . interest in the company." *Id.* Because the majority deprived the plaintiff of his return on investment and failed to pursue the least harmful means of achieving their stated purpose, the court held that it breached its fiduciary duty to the plaintiff.

*Leslie v. Boston Software Collaborative, Inc.*, No. 010268BLS, 2002 WL 532605 (Mass. Super. Feb. 12, 2002), presents an even more extreme example of the primacy of employee-shareholder rights. In *Leslie*, the court found that an employee-shareholder who spent too much time working on personal matters in the office, swore too much at inappropriate times, used crude ethnic slurs, and was rejected by customers nevertheless was protected under the *Wilkes* doctrine. *Id.* at *3. Despite the business purpose underlying the plaintiff's termination, the court held that the majority nevertheless failed to afford him "the utmost good faith and fair dealing." *Id.* at *8. The court found that a number of less harmful alternatives existed, including insulating the plaintiff from employees, directing him to upgrade his technical skills, and utilizing "creative compensation techniques" to provide incentives for him to modify his behavior. *Id.*

Given the current interpretation of the *Wilkes* doctrine in the courts, it is fair to assume that, in determining whether an employee-shareholder has been wrongfully terminated in violation of the majority's fiduciary duty, a court will give great weight to the majority's consideration of alternative courses of action.

It is important to note that not every employee-shareholder is entitled to heightened job security. In *Merola v. Exergen Corp.*, 423 Mass. 461 (1996), the SJC found that the majority shareholders in a closely held corporation did not breach any fiduciary duty to the plaintiff employee-shareholder when the corporation terminated his employment. Although the court held that "there was no legitimate business purpose for the termination of the plaintiff," he nonetheless "failed to establish a sufficient basis for a breach of fiduciary duty claim." *Id.* at 466.

The *Merola* plaintiff did not own a significant number of shares in the corporation, and he was not an officer or director. Rather, the plaintiff was apparently an ordinary employee who had purchased his shares through an employee stock option program subsequent to his hiring. *Id.* at 463. In declining to find a breach of fiduciary duty in the plaintiff's termination, the Merola court relied upon the fact that, in this case, "investment in the stock was an investment in the equity of the corpo-

ration which was not tied to employment in any formal way." *Id.* at 465. Unlike the *Wilkes* plaintiff, the *Merola* plaintiff did not depend on his salary as the principal return on his investment. *Id.* at 464-65. Rather, any return on his stock investment was "independent of the salary he received as an employee." *Id.* at 465.

In deciding whether a breach of fiduciary duty has occurred, it is not the mere fact of stock ownership that determines the duty owed to the employee-shareholder. Instead, *Wilkes*, *Merola*, and other cases reflect the fundamental principle that the *Wilkes* doctrine is intended to protect those whose employment and ownership interests are inextricably linked, and those whose employment provides a means of return on their investment.

Employee-shareholders who are wrongfully terminated may recover directly from the offending majority shareholders in the form of equitable remedies, including unjust enrichment, lost wages and compensation for lost ownership. *See Wilkes*, 370 Mass. at 853-54; *O'Connor*, 2005 WL at *11.

## 3. Obligations of the employee-shareholder

Employee-shareholders owe significant duties to the corporation and their fellow shareholders. Massachusetts courts have held that an employee-shareholder violates his fiduciary duty when he actively competes against the corporation. *Chelsea Indus., Inc. v. Gaffney*, 389 Mass. 1, 11-12 (1983); *Cain v. Cain*, 3 Mass. App. Ct. 467, 474 (1975). One also breaches his or her fiduciary duty by, *inter alia*, soliciting customers, accepting unauthorized commissions and kickbacks, and entering into a course of conduct designed to harm the employer's reputation during the period of employment. *See Augat, Inc. v. Aegis, Inc.*, 409 Mass. 165, 173 (1991); *In Re: Tri-Star Tech. Co.*., 257 B.R. 629, 636 (D. Mass. 2001); *Tech Plus, Inc. v. Ansel*, No. 96-01668-B, 1999 WL 482329, at *6 (Mass. Super. Mar. 22, 1999).

However, an employee-shareholder does not breach his fiduciary duty by merely preparing to compete with the corporation. *Chelsea Indus.*, 389 Mass. at 10 (finding that the employee defendants "had the right to plan and prepare for creation of a competing business while carrying on the normal duties of their employment and receiving compensation for their services without disclosing their plans to the plaintiff employer"); see also *Meehan v. Shaughnessy*, 404 Mass. 419, 435 (1989) (holding that departing law firm partners who secretly set up new law firm and made other "logistical arrangements" during their tenure did not breach their fiduciary duty); *Augat, Inc. v. Aegis, Inc.*, 409 Mass. 165, 172 (1991) (employee may plan to go into competition with employer and has no duty to disclose plans).

These obligations are in line with those owed generally by shareholders in closely held corporations, as well as by directors and officers. However, the duties owed by an employee-shareholder are greater than those owed by an ordinary employee. By way of contrast, an "at will" employee with no ownership interest may take active steps to compete with his employer during his employment, and he has no duty to disclose these plans. *Augat, Inc.*, 409 Mass. at 172. An employee-shareholder may not actively compete, and must disclose any plans to do so.

Employee-shareholders who are found to have violated their fiduciary duties by actively competing during their employment, soliciting customers or employees, usurping corporate opportunities, and the like, are liable for damages that include, *inter alia*, any "secret profit or benefit received" as a result of their wrongful activities, forfeiture of compensation paid by the employer "which exceeded the worth of the employee's services," and the employer's increased costs resulting from the employee-shareholder's breach. *See In Re: Tri-Star Tech. Co.*, 257 B.R. 629, 636-38 (D. Mass. 2001); Chelsea Indus., 389 Mass. at 16-18.

## 4. Effect of shareholder agreements

The rights and obligations detailed above can be modified through voluntary agreement, particularly in the form of shareholder agreements and employment agreements. The case law demonstrates that these agreements may supersede the general, common law principles in areas specifically addressed. However, the general principles will still govern the parties' relationship to the extent that any valid agreements do not apply.

In *King v. Driscoll*, 418 Mass. 576 (1994), the SJC held that the stock buy-back agreement between shareholders in a closely held corporation did not relieve them of their duty of utmost good faith and loyalty. *Id.* at 586. Although the plaintiff, a departing shareholder-employee, was subject to this agreement and did not take issue with its terms, the court nonetheless found that the plaintiff's fellow shareholders violated their duty of utmost good faith and loyalty during the series of events leading up to the plaintiff's termination, most notably their vote to terminate his employment in response to his participation in a derivative suit. *Id.* As such, even though the parties had entered into an agreement governing their separation, the *Wilkes* doctrine nevertheless protected the plaintiff employee-shareholder.

The *Blank v. Chelmsford OB/GYN* case presented the SJC with a variation on *King*. *See* 420 Mass. 404 (1995). In *Blank*, the SJC found that, where an employment agreement provided for termination by either party upon six months' notice and a shareholder agreement provided for stock buy-back, a shareholder-employee who was terminated with the specified notice and paid the agreed upon value for his shares could not state a claim for breach of fiduciary duty arising from his termination. While the court acknowledged that the mere fact of the parties' agreements did not relieve shareholders of the "high fiduciary duty" owed to one another, it held that the parties' contractual provisions governing termination and stock repurchase defined their duties:

> [Q]uestions of good faith and loyalty with respect to rights on termination or stock purchase do not arise when all the stockholders in advance enter into agreements concerning termination of employment and for the purchase of stock of a withdrawing or deceased stockholder. (*Id.* at 408, citing *Don-*

*ahue*, 367 Mass. at 598 and *Evangelista v. Holland*, 27 Mass. App. Ct. 244, 248-49 (1989))

The SJC found that, even though the duty of utmost good faith and loyalty exists, it "is to be evaluated in light of an agreement that permits termination by either party without cause on notice." *Id.* at 408-09. Because the applicable agreements governed the plaintiffs' claims, and because he did not allege that the majority shareholders breached either agreement, the plaintiff's claims were dismissed. *Id.*

## 5. Conclusion

Applicable precedent clearly protects employee-shareholders whose employment represents a means of return on their investment from being "frozen out" by majority shareholders through termination. In addition, by virtue of their ownership interest in a closely held corporation, employee-shareholders owe strict duties to the corporation and to their fellow shareholders. Shareholder agreements and employment contracts do not obviate these rights and duties, but such covenants effectively alter shareholder employee rights and duties relative to the corporation.

In advising clients in cases involving employee-shareholders in closely held corporations, counsel should consider that an employee-shareholder's actions in the employment sphere may violate his or her fiduciary duties to the corporation. Likewise, counsel should be aware that employment determinations involving shareholders must be made with deference to the employee-shareholder's right to "utmost good faith and loyalty" on the part of the controlling shareholders. Whenever possible, contracts governing employee-shareholder rights and duties should be carefully considered and drafted to clarify these issues and to reflect the parties' intentions. In the context of closely held corporations, issues of corporate law and issues of employment law are often inextricably intertwined, and an understanding of the interplay between these areas of law is crucial to providing sound legal advice to closely held corporations and their employee-owners.

## End notes

1. Many thanks to Claudia T. Centomini, Esq., Thomas M. Ciampa, Esq.,and Catherine E. Reuben, Esq., for their invaluable editorial assistance.
2. U.S. Small Business Administration, *Small Business Profile: Massachusetts* (2006).
3. *Id.*
4. By way of definition, Massachusetts courts have adopted the following three-part test to determine whether a corporation is "closely-held": First, the shares of the corporation must not be generally traded or offered for sale on any securities market, and there is no ready market for the corporation's stock. Second, the corporation has had, and continues to have, a small number of shareholders. Third, a substantial majority shareholder participation in the management, direction and operations of the corporation has existed since its formation. *Merola v. Exergen Corp.*, 38 Mass. App. Ct. 462, 463-64 (1995).

# SHOW ME THE MONEY: NEW SJC RULE MAKES DISCLOSURE OF PROFESSIONAL LIABILITY INSURANCE TO BBO MANDATORY

*By Alan E. Brown*

Effective Sept. 1, 2006, all Massachusetts attorneys must annually disclose to the Board of Bar Overseers whether they carry professional liability insurance. In adopting this rule, Massachusetts joined 20 other states in requiring some type of professional liability insurance disclosure. Information on Massachusetts attorneys became accessible to the public by telephone on Sept. 1, 2006, with Internet access scheduled to take effect on Sept. 1, 2007. But will this information make Massachusetts clients more knowledgeable or simply more confused?

*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.*

Imagine the following:

[Phone rings]

BBO: Board of Bar Overseers.

Client: Hi. I'm thinking about hiring attorney Smith of Boston. What can you tell me about him?

BBO: Attorney Smith was admitted in 1985 and has no record of public discipline. I can also tell you that attorney Smith carries professional liability insurance.

Client: Oh, you mean malpractice insurance? That means if something goes wrong I'll be protected, right?

BBO: Unfortunately, there is no guarantee. Massachusetts does not require attorneys to carry professional liability insurance, so it's possible attorney Smith won't have insurance in the future. Even if attorney Smith has insurance, it still might not cover your particular problem. Also keep in mind that we don't know how much insurance he carries.

Client: Hmmm… just knowing whether attorney Smith has insurance doesn't really tell me much, does it?

Do clients benefit from knowing whether their lawyers carry professional liability insurance? How many clients will actually seek out this information before retaining counsel or understand the information once they obtain it?

## Part of a national trend

Despite these unanswered questions, on June 28, 2006, the Supreme Judicial Court approved Rule 4:02, subsection (2A), bringing Massachusetts in line with a national trend. Rule 4:02, subsection (2A) states in relevant part:

**Professional Liability Insurance Disclosure**

(a) Each attorney shall, as part of the annual filing required by subsection (1) of this rule and on forms provided by the board for this purpose, certify whether he or she is currently covered by professional liability insurance. Each attorney currently registered as active in the practice of law in this commonwealth who reports being covered by professional liability insurance shall notify the board in writing within 30 days if the insurance policy providing coverage lapses or terminates for any reason without immediate renewal or replacement with substitute coverage.

(b) The foregoing shall be certified by each attorney in such form as may be prescribed by the board. The information submitted pursuant to this subsection will be made available to the public by such means as may be designated by the board.

(c) Any attorney who fails to comply with this subsection may, upon petition filed by the bar counsel or the board, be suspended from the practice of law until such time as the attorney complies. Supplying false information or failure to notify the board of lapse or termination of insurance coverage as required by this subsection shall subject the attorney to appropriate disciplinary action.

This rule closely tracks the ABA Model Court Rule on Insurance Disclosure, but does not go as far as the rules adopted in five other states. Attorneys in Alaska, New Hampshire, Ohio, Pennsylvania and South Dakota must disclose whether they have professional liability insurance directly to their clients. South Dakota's rule, one of the most extensive in the nation, requires a lawyer not carrying at least $100,000 in malpractice insurance to make the following disclaimer in every written communication to clients: "[t]his lawyer [or firm] is not covered by professional liability insurance." Not to be outsmarted, the South Dakota rule even specifies that the font used for the disclosure be no smaller than the font used for individual lawyers' names!

Three states — Delaware, Michigan and New Mexico — require disclosure of professional liability insurance to bar authorities for statistical purposes but do not make the information available to the public.

Arkansas and Kentucky considered and rejected professional liability insurance disclosure requirements altogether. Proposals currently remain under review in California, New York and Utah. Only one state, Oregon, mandates that lawyers maintain professional liability insurance.

Like our counterparts in other states, Massachusetts practitioners should note that failure to provide the BBO with the required insurance information can result in an administrative suspension. Likewise, misrepresenting whether one carries professional liability coverage constitutes a violation of Mass. R. Prof. C. 8.4(c) (lawyer prohibited from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation) and can lead to discipline.

## A worthy goal

The BBO's objective is to protect clients from lawyers who engage in unethical conduct, not to compensate clients for attorney malpractice, unless the loss of funds results from a defalcation for which the attorney was suspended or disbarred.[1] The new disclosure rule furthers that worthy BBO objective. And if clients access the information from the BBO Web site, it will provide them with information relevant to deciding whether to retain a particular lawyer.

Currently, many clients mistakenly believe that all lawyers carry insurance. Reports, however, estimate that approximately one-third of American lawyers do not carry professional liability insurance. Although the new rule makes insurance information available to clients and poses a relatively modest burden on practitioners, several key questions face Massachusetts attorneys in evaluating the advantages and disadvantages of the new professional liability insurance disclosure requirement.

First, how many clients will actually access the insurance information publicly available from the BBO, either by phone or online? Second, of those clients who access the information, how useful is the information they receive and will it do more harm than good? Adopting a disclosure rule would appear to put mistaken or uninformed clients on an equal footing with their more sophisticated counterparts in negotiating legal services. Whether the new disclosure rule will accomplish that goal in practice remains unclear.

## Education or confusion?

Informing clients whether a particular lawyer carries professional liability insurance may lull many clients into a false sense of security, as the new rule does not require attorneys to provide sufficient information to make the disclosure meaningful. For example, even if coverage exists at the time a client retains an attorney, the new Massachusetts rule does nothing to ensure that coverage remains in place throughout the representation. Most professional liability policies are "claims made" policies. Thus, the policy must be in effect both at the time of the alleged error and the time of the claim.

Nor does the rule educate clients about routine exclusions in professional liability insurance policies, such as an exclusion for intentional misconduct, or inform clients about an attorney's level of coverage. Both exclusions and coverage levels are critical to evaluating the protection afforded by a particular policy. Many clients who rely solely on the existence of malpractice coverage in choosing one attorney over another may ultimately find that they presupposed protections that do not, in fact, exist.

## Meaningful long-term impact?

Few Massachusetts attorneys, even small firm and solo practitioners, will likely feel either a positive or negative impact as a result of the new professional liability insurance disclosure requirement, because few clients are likely to contact the BBO for this information. The practice of law is a service industry. Client service, not insurance coverage, drives selection of counsel. Most clients care more about their individual relationships with their attorneys than whether their lawyers have insurance coverage they may never even need. Nor do clients believe their lawyers will betray them and commit malpractice. Just like in marriage, few clients walk down the legal services aisle contemplating filing suit against their new bride or groom. While it may be true that some lawyers will obtain professional liability coverage in order to avoid disclosing a lack of insurance, no data exists to show how many Massachusetts attorneys will do so.

Ultimately, therefore, while some astute clients will access the BBO's insurance information prior to retaining counsel, it is likely that a far greater number will not. Unfortunately, those clients who most need the information — those who can least afford the consequences of malpractice — are probably the least likely to access this information.

## Exploring alternatives

The new professional liability insurance disclosure rule should form the basis for an open, continuing dialogue in the Massachusetts legal community on the issue of protecting clients from attorney error. The vested interest of every attorney in this issue is clear: the public's respect for our legal system will be commensurate with the confidence that we as attorneys, individually and collectively, inspire.

*The mandatory professional liability insurance model*

When attorney error occurs, the availability of professional liability insurance usually determines the viability of a malpractice claim, because legal malpractice suits are so complex

and expensive to prosecute. Even a strong liability case can fall victim to a lack of insurance coverage. Some states have opted to make professional liability insurance mandatory. Such a rule could provide benefits to Massachusetts attorneys in the form of asset protection and potentially declining premiums. Certainly this option provides the greatest protection to clients, which will in turn increase the public's overall confidence in our legal system. Oregon attorneys, for example, pay approximately $2,000 per year for $300,000 per occurrence coverage. However, critics rightly point out that underwriting a state such as Massachusetts, with far more lawyers, might not result in premium declines, especially for small firm and solo practitioners. Therefore, despite the sense of stability mandatory professional liability coverage offers, the cost to practitioners in Massachusetts may just be too great.

*Improving the quality of disclosure information*

Massachusetts could refine its new professional liability insurance disclosure rule in the future to increase the number of clients who have access to insurance information while improving the quality of the information provided. Significantly, rather than burying insurance information at the BBO, other forms of disclosure should be explored. Insurance information could be disclosed in a fee agreement or engagement letter, as part of firm letterhead, or in some other type of client communication. Alternatively, why not require attorneys to disclose coverage in their advertising? Interestingly enough, no state has adopted a rule specifically addressing disclosure of malpractice insurance in advertising. This would hit potential clients with relevant insurance information at a most critical stage: before they even place that first call. As clients let their fingers do the walking, they could make side-by-side comparisons of attorneys based on factors including insurance coverage. Such a rule would also target those less sophisticated clients who rely primarily on print, radio and television advertising in selecting counsel.

Massachusetts attorneys advertise on a purely voluntary basis. Thus, requiring insurance disclosure in advertising burdens attorneys without coverage only to the extent they seek to reap advertising's benefits. It also encourages attorneys who wish to advertise to protect themselves and their clients by obtaining coverage. In order to avoid public deception, such a rule would necessarily have to mandate that the attorneys maintain coverage during the entire period in which the advertisement is publicly circulated. Such a requirement would discourage counsel from allowing coverage to lapse and, like a mandatory insurance requirement, may lend stability to professional liability coverage in the commonwealth.

## Conclusion

Massachusetts has joined a growing national trend in adopting a professional liability insurance disclosure rule. Clients rightfully need to know if their counsel is insured. Since few clients might ultimately seek out this information from the BBO, and the feasibility of mandatory insurance is questionable, Massachusetts should consider expanding the number of clients who have access to this crucial information and increasing the quality of the information provided. The bar should also lead the way in educating clients about professional liability insurance coverage and its role in the attorney-client relationship so that clients become better informed and are not left with a false sense of security.

Massachusetts' new professional liability insurance disclosure rule has the potential both to benefit and infuriate the public. The adoption of the new rule marks the beginning of a fresh era of insurance coverage discourse. Let us seize this opportunity to improve the bar and its reputation for the benefit of Massachusetts attorneys and their clients, and continue an open dialogue on the issue.

## End notes

1. The Clients' Security Board focuses on lawyers whose dishonesty has resulted in the loss of client funds, affording no protection at all to victims of attorney negligence.

# HIGHLIGHTS OF THE UNIFORM TRUST CODE

*By Timothy D. Sullivan*

This article is not an exhaustive analysis of the Uniform Trust Code. Rather, it is a review of those items that are likely to be of the most interest to a practicing lawyer.

As much of trust law in this country developed in Massachusetts courts, the UTC is not a radical departure from our current jurisprudence. Instead, it comes as an evolutionary progression of the law.

The UTC simplifies trust administration and makes financial institutions more competitive. This fact has not escaped states that have adopted the UTC. In New Hampshire, early adoption of the act is part of a deliberate attempt to pry financial services jobs away from Massachusetts.[1] The UTC has now been adopted in at least 19 states.

*Timothy D. Sullivan is chair of the Uniform Trust Code Subcommittee for the Massachusetts Bar Association and president of AndoverLaw PC in North Andover, where he focuses his practice on wills, trusts, estates and fiduciary litigation.*

The UTC was drafted to fit neatly into a fabric that includes other uniform laws. Thus, the concepts and definitions from the Massachusetts Prudent Investor Act[2] and the Massachusetts Principal and Income Act[3] work in concert with the UTC.[4]

## Notice

Notice under the UTC is simplified without dated and expensive publication requirements. Yet, notice provisions are designed to assure that those who should receive notice are likely to receive notice. Delivery is permitted by first class mail, personal delivery or delivery to the person's last known place of residence or place of business. §109(a).

In part because courts are not generally required to be involved in the administration of a trust, the UTC defines trust beneficiaries broadly as "any person having a present or future interest in a trust," even if contingent and including a power of appointment." §103(3).

The trustee is generally required to notify "qualified beneficiaries" who have attained the age of 25 of the existence of the trust, the identity of the trustee and their right to trustee reports and other information reasonably related to the trust. §105 (b) (8) & (9). "Qualified beneficiaries" are those beneficiaries who are current or permissible distributees under the trust, persons who would take if the interests of the current beneficiaries terminate, and persons who would take if the trust terminated on that date. §103(13). In addition, any beneficiary who sends a request for notice to the trustee is entitled to notice. §110(a).

## Court intervention

Generally, the court is not a necessary party during the administration of a trust. Thus, regardless of whether the trust is testamentary or intervivos, the trust is not subject to continuing judicial supervision unless expressly ordered by the court. § 201(b).

However, where judicial intervention is desirable, Article II of the UTC always allows an interested person to invoke the jurisdiction of the courts. §201(a).

## Nonjudicial settlement agreements

The UTC encourages more efficient methods of dispute resolution. A non-judicial settlement agreement may be entered into if the agreement does not violate a material purpose of the trust, and the terms and conditions of the agreement are those that could properly be approved by the court. §111(c). The UTC requires that all persons who would be required to reach a binding settlement if the settlement were to be approved by the court to enter into the settlement agreement. §111(a).

Matters which may be resolved by a nonjudicial settlement agreement include:

(1) the interpretation or construction of the terms of the trust;

(2) the approval of a trustee's report or accounting;

(3) the direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;

(4) the resignation of a trustee and the determination of a trustee's compensation;

(5) transfer of a trust's principal place of administration; and

(6) liability of a trustee for an action relating to the trust. §111(d)

## Virtual representation

Often, the issue of a minor, incapacitated, unborn or unascertained beneficiary arises in trust administration. Massachusetts currently requires the judicial appointment of a guardian *ad litem* to represent these interests. The process is cumbersome, time consuming and expensive. Under the UTC, the trustee will often avoid those unnecessary expenses as the UTC allows an interest to be represented by another beneficiary having "a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented." §304.

## Trust for care of animal

Recognizing the fact that as our society changes, our pets have become more than "mere chattel," section 408 of the UTC specifically authorizes the creation of a trust for the benefit of an animal.

## Purpose trust

Current Massachusetts law requires trusts to either be for the benefit of people or for charity. The UTC recognizes that trusts may be desirable tools to be used for broader purposes. Thus, Section 409 allows a trust to be created for any purpose that is not otherwise against the law or against public policy.

## Powers to correct mistakes

Too often, poorly drafted provisions or unforeseen circumstances create problems and expensive court intervention. Section 411 helps reduce these expenses. It allows the settlor of a non-charitable trust, with the consent of all of the beneficiaries, to modify or terminate the trust. Judicial intervention is not necessary.

Where beneficiaries have died and/or where there is not complete agreement, Sections 412 and 415 allow a court to modify a trust to comply with a settlor's intent or unanticipated changes in circumstances. Similarly, Section 413 codifies the common law principles of Cy Pres.[5]

Finally, Section 414 allows the trustee, with notice to all qualified beneficiaries, to terminate a trust when the size becomes insufficient to justify the costs of administration. Assuming there is no dispute, this may be done without the cost of judicial intervention.

## Spendthrift provisions

Spendthrift provisions in a trust are generally enforceable under the UTC. However, there are several exceptions. The first two exceptions are consistent with current Massachusetts law: a judgment creditor such as a lawyer who provided services for the protection of a beneficiary's interest in the trust should be paid; and the commonwealth or the federal government may enforce a claim where specifically authorized by statute. §503(b)(2) & §503(b)(3).

A third exception is made under the UTC allowing claims by a beneficiary's child, spouse or former spouse who has a judgment or court order against the beneficiary for support or maintenance. §503(b)(1).[6]

In addition to the above exceptions, there are certain situations where a trust does not shelter a settlor or beneficiary. For example, a revocable trust is subject to the claims of a settlor during his lifetime §505(a)(1). Also, at the death of the settlor of a revocable trust, the trust property is generally available to satisfy claims of the settlor's creditors and the final expenses of the settlor to the extent his probate estate is insufficient to pay those expenses. §505(a)(3).

## Trustees

Massachusetts law is well developed regarding the duty of trustees to act loyally and prudently. In those areas, the UTC generally tracks Massachusetts law.

However, trustees will experience some administrative differences upon adoption of the UTC. These differences tend to fall in the category of improving efficiency and reducing judicial intervention. For example, under the UTC, a vacancy in a trusteeship of a non-charitable trust "must be filled in the following order of priority: (1) by a person designated by the terms of the trust to act as successor trustee; (2) *by a person appointed by unanimous agreement of the qualified beneficiaries*; or (3) by a person appointed by the court." § 704(c). Charitable trusts are treated essentially the same:, Charities expressly named in the trust may agree to appoint a successor trustee without judicial intervention. §704(d).

The UTC generally protects the trustee with a relatively short (one-year) statute of limitations. The statute starts to run when the beneficiary is sent a report adequately disclosing the existence of a potential claim. §1005(a).

However, the UTC does not encourage trustee misconduct. If the trustee does not adequately disclose information sufficient to determine the existence of a potential claim, the statute of limitations increases to five years. The five years does not start to run until after the termination of the interest, termination of the trust, or the removal, resignation or death of the trustee. §1005(c). Further, the UTC specifically grants the court authority to award costs and fees, including reasonable attorney's fees. §1004.[7]

In summary, the UTC generally tracks current Massachusetts law. Where there are differences, most of the differences simplify the administration of trusts and reduce the amount of expensive routine judicial supervision and intervention.

When all states have adopted the UTC, institutions will enjoy a consistent set of laws and regulations, with less risk and expense. Trust beneficiaries will enjoy lower costs, and as a result of clearer notification and reporting requirements, more assurance that the information they need to protect their interests is complete and accurate.

## End notes

1. Shortly after adopting the Uniform Trust Code, New Hampshire adopted the "Trust Modernization and Competitiveness Act." The stated legislative purpose of that act is "to establish New Hampshire as the best and most attractive legal environment in the nation for trusts and trust services, and this environment will attract to our state good-paying jobs for trust and investment management, the legal and accounting professions, and support an infrastructure required to service this growing sector of the nation's economy." N.H. R.S.A. 320:1 – This

section defines Hawkers and Peddlers.

2. Mass. Gen. Laws. ch. 203C §1 et seq (2004).
3. Mass. Gen. Laws. ch. 203D § 1 et seq (2004).
4. The Prudent Investor Act appears as Article Nine of the UTC in states that did not adopt the Prudent Investor Act prior to adoption of the UTC.
5. Equity jurisdiction is commonly used today to achieve similar results, particularly when tax provisions go awry.
6. As this section would represent a controversial change in Massachusetts law, at least one ad hoc committee, consisting of representatives from a broad cross-section of the trust community, opted not to recommend the adoption of this section in Massachusetts.
7. Interestingly, the Reporters Notes to § 1004 state that this section is based on Massachusetts General Laws c. 215 §45.

# THE EVOLVING LANDSCAPE OF EASEMENT RELOCATION AFTER *M.P.M. BUILDERS*

*By Timothy C. Twardowski and E. Christopher Kehoe*

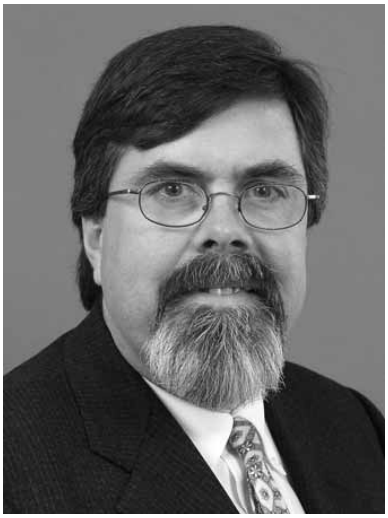
In the landmark decision *M.P.M. Builders, LLC v. Dwyer*, 442 Mass. 87 (2004), the Supreme Judicial Court decided that, subject to certain limitations, the owner of a servient estate may change the location of an easement without the consent of the owner of the dominant estate. The *M.P.M. Builders* decision adopted the American Law Institute's "modern rule" on the relocation of easements in the *Restatement (Third) of Property (Servitudes) § 4.8 (3) (2000)* and diverged from the majority of states that require mutual consent to change the location of an easement. This article provides a look back at the *M.P.M. Builders* decision and examines the evolving landscape of easement relocation in Massachusetts since the restatement approach was adopted nearly three years ago.

## The *M.P.M. Builders* decision

The facts of the *M.P.M. Builders* case are relatively straightforward. The defendant, Dwyer, owned a parcel of land in Raynham abutting another parcel owned by the plaintiff, M.P.M. Builders. The 1941 deed to Dwyer's parcel specified that the land was conveyed together with a "right of way along the cartway to Pine Street" that crossed M.P.M. Builders' land. The deed described the location of the easement but included no provision for its possible relocation. In July 2002, M.P.M. Builders received approval from the Town of Raynham to subdivide its property into seven residential lots. Dwyer's right of way, however, cut across three of the lots and would have interfered with M.P.M. Builders' construction plans for each. M.P.M. Builders proposed to construct, at its own expense, two new access easements that would provide unrestricted access to Dwyer's property in the same general area of the existing cartway, but Dwyer refused. M.P.M. Builders then sought a declaratory judgment that it had the right to unilaterally relocate the Dwyer easement. The Land Court judge, however, entered summary judgment against M.P.M. Builders and dismissed the case.

On direct appellate review before the SJC, Dwyer argued that, under the existing common law, once the location of an easement has been fixed, it cannot be changed except by agreement of the parties. *See, e.g., Anderson v. DeVries*, 326 Mass. 127, 132 (1950); *Davis v. Sikes*, 254 Mass. 540, 546 (1926); *Bannon v. Angier*, 84 Mass. 128, 129 (1861). M.P.M. Builders countered that under *Lowell v. Piper*, 31 Mass. App. Ct. 225 (1991), the common law allows a servient estate owner to "relocate an easement as long as such relocation would not materially increase the cost of, or inconvenience to, the easement holder's use of the easement for its intended purpose." More importantly, M.P.M. Builders — as well as an amicus brief filed by the Real Estate Bar Association of Massachusetts and The Abstract Club — urged the SJC to adopt the approach taken by Section 4.8(c) of the *Restatement (Third) of Property (Servitudes)* as the law of the commonwealth. Section 4.8 (3) provides that:

> Unless expressly denied by the terms of an easement, as defined in § 1.2, the



*Timothy C. Twardowski is an associate in the Boston office of Robinson & Cole LLP, where he focuses his practice on a broad range of matters pertaining to land use and development and related litigation.*

*E. Christopher Kehoe is a partner in the Boston office of Robinson & Cole LLP, where he represents lenders, buyers, sellers and developers in the purchase, sale and financing of real estate.*

> owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not (a) significantly lessen the utility of the easement, (b) increase the burdens on the owner of the easement in its use and enjoyment, or (c) frustrate the purpose for which the easement was created.

The *M.P.M. Builders* decision observed that Section 4.8 (3) is "designed to permit development of the servient estate to the extent it can be accomplished without unduly interfering with the legitimate interests of the easement holder." Moreover, Justice Judith A. Cowin, writing for a unanimous court, explained:

> We are persuaded that § 4.8 (3) strikes an appropriate balance between the interests of the respective estate owners by permitting the servient owner to develop his land without unreasonably interfering with the easement holder's rights. The rule permits the servient owner to relocate the easement subject to the stated limitations as a "fair trade-off for the vulnerability of the servient estate to increased use of the easement to accommodate changes in technology and development of the dominant estate."

Because an easement is, by definition, a nonpossessory interest in real estate, the SJC concluded that the restatement approach would "neither devalue easements nor place property interests in an uncertain status." And, in response to Dwyer's claim that the restatement approach would result in increased litigation over property rights, Cowin explained that the SJC "[does] not reject desirable developments in the law solely because such developments may result in disputes spurring litigation."

Although the preferred approach to relocating an existing easement remains for both parties to agree upon a plan that satisfies their respective interests, that will not always be possible. In those instances, *M.P.M. Builders* instructs that the owner of the servient estate "may not resort to self-help remedies" but should obtain a declaratory judgment that the proposed relocation meets the criteria set forth in Section 4.8(c) of the restatement as adopted by the SJC.

## The aftermath of *M.P.M. Builders*

In the nearly three years since the *M.P.M. Builders* decision, the escalation of property rights litigation that some feared would result if the SJC adopted the restatement approach to relocating easements has not materialized. To date, more than three dozen published lower court decisions and a handful of Appeals Court opinions have cited the *M.P.M. Builders* case.

While that quantity of citing cases might suggest that *M.P.M. Builders* stimulated a flurry of property rights litigation, a closer examination reveals that the majority of those citations are unrelated to the issue of easement relocation. *See, e.g., Frishman v. Maginn*, 21 Mass. L. Rep. 41 (Mass. Super. Ct. 2006); *Abbott v. Arthur Mackenzie Prods.*, 21 Mass. L. Rep. 2 (Mass. Super. Ct. 2006) (breach of contract and commercial litigation cases respectively, quoting the SJC's discussion of summary judgment standards in *M.P.M. Builders*).

Moreover, nearly all of the Superior Court and Land Court decisions citing *M.P.M. Builders* do little more than recognize the restatement approach as the law of the comonwealth and order a trial to determine whether the easement relocation criteria have been satisfied. *See, e.g., Sacco v. Chilton Realty Trust*, 14 LCR 332 (2006) (ruling that the parties "must be given an opportunity to show how the easement relocation meets (or fails to meet) the M.P.M. criteria, and that can only come at trial"); *Sova v. Randazza*, 13 LCR 425, 428 (2005) (noting that the issue of easement relocation under *M.P.M. Builders* raises factual issues that must be addressed at trial).

Massachusetts appellate courts have not weighed in on the *M.P.M. Builders* criteria. However, in a 2004 quiet title action concerning the extent of certain easement rights across land owned by the Town of Bedford, the Appeals Court clarified that *M.P.M. Builders* does not allow a dominant estate owner to relocate an easement without the consent of the servient estate. *See Town of Bedford v. Cerasuolo*, 62 Mass. App. Ct. 73, 80 (2004). The Appeals Court has also cited to *M.P.M. Builders* in support of the principle that the same type of flexibility reflected in the restatement approach should also be applied in the context of locating an easement by necessity. *See Kitras v. Town of Aquinnah*, 64 Mass. App. Ct. 285, 296-97 (2005).

As of the date of this writing, only one published opinion has examined whether the Section 4.8 (3) criteria were met by a proposal to relocate an existing easement by the owner of a servient estate. *See Moses et al v. Cohen et al*, 2007 WL 197110 (Mass. Land Ct. Jan. 12, 2007). While a lower court decision does not establish precedent, Justice Charles W. Twombly's opinion in *Moses v. Cohen* merits discussion as the first examination of the *M.P.M. Builders* criteria by a Massachusetts court.

## *Moses v. Cohen*

Briefly summarized, the *Moses* case involved a proposal to relocate an easement that provided pedestrian access to a Chilmark beach across property owned by defendant Cohen. In 2001, Cohen demolished an existing cottage on the servient estate and commenced construction of a larger house to the east of where the cottage formerly stood. Plaintiff Carlin Property (Carlin) filed suit to enjoin construction on the grounds that the new house would block the existing easement.

The injunction was granted and then lifted when Cohen agreed that further construction would be done at Cohen's risk. In February 2006, after Cohen had completed construction, the Land Court ruled that Carlin had a deeded easement over Cohen's property located partly within the footprint of Cohen's newly constructed home. To avoid a court order to demolish the offending portion of the home, Cohen proposed to relocate Carlin's easement in accordance with the *M.P.M. Builders* decision.

The *Moses* decision observes that "because the restatement has not been adopted in the majority of states, there are very few cases examining the three requirements the servient estate owner must meet before the court will permit relocation of an easement." The court therefore looked to the comments and illustrations that accompany Restatement Section 4.8(c) for guidance. First, Twombly noted that the purpose of the criteria is to "protect the easement owner's legitimate interests," including the *length* and *topography* of the easement. The restatement provides an illustration in which the servient owner proposed to relocate an easement roadway across his property that provides access to the dominant estate from a public road. The proposed path, however, was longer than the original easement and passed through swampy ground prone to flooding. According to the restatement, "the court should deny the relocation because the new location would lessen the utility of the easement and increase the burdens on the dominant owner for maintenance and repair." On the other hand, the restatement found that the criteria were met where a servient estate owner proposed to replace an existing road with a new one that also provided direct access to the dominant estate and was shorter than the original.

Turning to the instant case, Twombly first addressed several common issues raised by both parties at trial and then examined each of the proposed easement alternatives under the *M.P.M. Builders* criteria. Below is a summary of his analysis.

At trial, Carlin argued that none of the proposed easements (Cohen submitted several alternative configurations for the court's consideration) could satisfy the *M.P.M. Builders* criteria "because the *value* of any of the replacement paths would not be equivalent to the original easement." Carlin contended that "the value of [the] easement is based not on its capacity to provide Carlin with beach access, but rather on its capacity to prevent Cohen from utilizing his property." The court disagreed, finding that the value of Carlin's easement should be based solely upon its ability to provide access to the beach.

The court also rejected Carlin's contention that none of the proposed easement alternatives could meet the *M.P.M. Builders* requirements because they did not provide as good an ocean view as the original easement. Twombly observed that Carlin "does not have a view easement" and specifically concluded that "view or lack thereof, is also not a factor in whether or not Carlin's 'use and enjoyment' are burdened by a proposed easement." Instead, Carlin's use and enjoyment of the proposed easements would "be evaluated looking at whether or not she is able to employ the easement for the purpose for which it was created, namely, walking to the parking lot, without any increased burdens." Under the *M.P.M. Builders* decision, those burdens could include "length or conditions of the land" but not ocean views.

The court also specifically addressed the issue of whether a proposed easement that required additional maintenance by the owner of the dominant estate would increase the burden on Carlin's use and enjoyment of the property. Carlin claimed that she never had to perform any maintenance on the original easement because it was primarily sand and clay underfoot and generally devoid of vegetation. The court, however, noted that "[a]s a matter of law, absent an agreement to the contrary, the owner of the dominant estate has the duty to maintain an easement." *See, e.g., Texon, Inc. v. Holyoke Mach. Co.*, 8 Mass. App 363 (1979); *Prescott v. White*, 38 Mass, 341, 343 (1838). Therefore, the court determined that an analysis of Carlin's actual maintenance was irrelevant. Twombly explained the distinction between a dominant estate holder's duty to maintain and actual maintenance as follows:

> Whether or not Carlin did, in fact, maintain the original easement is immaterial. What is relevant is the fact that the burden was on Carlin to maintain the original easement. If this court approves the relocation of Carlin's easement, Carlin would continue to bear the same burden to maintain the replacement path. Any difference in the frequency of Carlin making repairs or routine maintenance on the new path, compared to the original path, has no bearing on Carlin's burden to do so. In other words, Carlin assumed a burden to maintain the path when she purchased the land in 1980, and has carried that burden until the present. She would continue to bear that same burden if her easement were relocated. The court finds, therefore, that Carlin's burden to enjoy or use her easement will not change regardless of which replacement path the court might choose because Carlin has had the burden of maintenance all along.

The court then examined each of the proposed easement alternatives under the *M.P.M. Builders* criteria. Twombly's discussion of the alternatives focused primarily on the location, length and topography of the proposed alternatives. Additional consideration was given to the question whether erosion was likely to occur sooner on a proposed easement than the original, in part because both parties acknowledged that erosion was a legitimate concern on the properties at issue. Below we summarize the court's analysis of those factors under the *M.P.M. Builders* criteria.

### Length of the proposed easement and other dimensional considerations

The *Moses* case suggests that the length of a proposed easement, compared to the length of the original easement, is a significant factor in determining whether a proposal lessens the utility of the easement and whether it increa-ses the burdens on the owner of the dominant estate. More importantly, an examination of length should focus more on its practical effect on the easement holder, and less on its statistical magnitude. For example, the court considered two proposals that increased the length of Carlin's easement from approximately 250 feet to approximately 350 feet. From a purely statistical perspective, a 40 percent increase in length could reasonably be considered substantial. The court, however, concluded that "an increased length of 100 feet is *relatively minimal*, and would not be enough of a reason *on*

*its own* to deny relocating the original easement." In reaching that conclusion, Twombly was persuaded by evidence that showed that "a person can comfortably walk 100 feet in about 15 seconds." Therefore, the additional length did not lessen the utility of the easement and did not increase the burden on Carlin's use and enjoyment.

It is important to note that, when considering the length of the proposed easements, the court expressly declined to consider any additional distance that Carlin would have to travel *on her own property* to reach the beginning of the proposed easement on Cohen's property. In fact, the court declared that its analysis would not incorporate "any other elements" of Carlin's property into its decision, stating that "the *M.P.M.* criteria only involve comparing the original easement to the proposed relocated easement, and not differences involving travel over the dominant estate."

In addition to the length of the proposed easements, the court also looked favorably upon proposed easements that maintained the same width as the original easement.

### Physical condition of the proposed easements

The court also considered the physical condition of the proposed easements, examining whether the topography was sloped or flat and whether it provided a suitable surface for persons walking to and from the beach. In addition, the court gave substantial weight to the issue of erosion, rejecting two proposed easements on the grounds that their location closer to the mean high tide water line increased the likelihood of erosion as compared to the original easement. The court noted that such erosion "would certainly frustrate the purpose for which the easement was created," namely to provide walkable access from the Carlin lot to the beach.

### Privacy

The court also rejected a proposal that would have relocated the easement closer to the Cohen house, explaining that it was "so close to Cohen's house that it would burden the enjoyment of [Carlin's] easement and lessen its utility because of a total loss of privacy as compared to the original easement." Twombly found that that path "would be onerous for Carlin to traverse in light of the high likelihood of encountering a stranger on her way to the beach." In addition, because it was so close to the house, the path "[brought] with it an inherent loss of privacy for both parties, and it is axiomatic that Carlin's use and enjoyment of the easement would be burdened due to such close quarters."

## Easement drafting after *M.P.M. Builders*

Nearly three years after the Supreme Judicial Court adopted the restatement approach to easement relocation, Massachusetts courts are just beginning to wrestle with the *M.P.M. Builders* criteria. Although the law of easement relocation is clearly an evolving area, the *Moses* decision offers some important lessons for attorneys drafting easement language after *M.P.M. Builders*.

First, an express prohibition against relocation without the consent of the dominant estate holder negates the servient estate owner's ability to relocate the easement under *M.P.M. Builders*.

Additionally, the full extent of a client's interests in the easement should be clearly reflected in the instrument. Is the client merely interested in reserving a right of way across the servient estate, or did she choose a particular path because it provides a spectacular view of the beach? While the restatement suggests that the length and topography of an easement should be considered under any *M.P.M. Builders* analysis, the *Moses* decision suggests that Massachusetts courts will not consider any interests that are not reflected in the language of the easement.

# TEN COMMON TAX RETURN ERRORS FOREIGN NATIONALS SHOULD AVOID

*By Paula N. Singer*

With the dramatic increase in international business and personnel exchange, most paid preparers are now encountering foreign national clients. Foreign nationals who are resident aliens, either because they are U.S. lawful permanent residents (LPRs, or "green card" holders) or because they are "substantially present" under the 183-day U.S. residency formula, are taxed on their worldwide income under the same rules that apply to U.S. citizens. However, foreign nationals who are not resident aliens (called "nonresident aliens") are only subject to U.S. tax on gross U.S.-source fixed or determinable income (such as dividends, rents and royalties) and on income effectively connected to a U.S. trade or business, which is taxed after limited deductions at either single or married filing separately rates. Foreign nationals who are both a resident alien and a nonresident alien in the calendar year are subject to tax under the rules for dual-status taxpayers.

*Paula N. Singer is a partner in the tax law firm of Vacovec, Mayotte & Singer LLP in Newton. Singer is co-founder and chairman of the tax and immigration software company Windstar Technologies Inc. She has spent more than 20 tax seasons preparing tax returns for individuals with cross-border issues.*

Based on a recent Government Accountability Office Report, over 56 percent of U.S. taxpayers now use paid preparers. According to this report and a report submitted to Congress by Nina Olsen, the national taxpayer advocate, at a congressional hearing on paid preparers, many of these returns are prepared in error. Neither report addressed the accuracy of tax returns prepared for foreign nationals, although many of these returns, whether prepared by paid preparers or by the foreign nationals themselves, are prepared incorrectly because of the different rules that can apply to these returns. Because of the new IRS focus on international tax compliance, foreign nationals and their preparers should expect more scrutiny of their returns by the IRS.

## New IRS compliance initiatives

Marti Sartipi, international policy program manager, small business/self-employed division, announced on the IRS TaxTalkToday.tv Webcast, "International Issues and U.S. Taxpayers," that they now have 300 personnel trained in international compliance matters and are in the process of hiring and training 100 more. Sartipi also announced that the IRS international compliance initiatives include:

- Automated processes to assist in identifying nonfilers;
- Planned audits of 10,000 tax returns with international issues (foreign nationals working in the United States and U.S. citizens and residents working abroad); and
- Imposition of penalties for failure to submit required disclosure documents.

The failure to file required disclosure documents can result in significant penalties. For example, failure to file a Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (called an "FBAR") can result in civil penalties, criminal penalties or both. An FBAR is required for each account in which a resident alien has an interest or signatory authority if the aggregate value of a resident's financial accounts exceeds $10,000 at any time in the calendar year. Civil penalties can vary greatly:

- $500 for a negligent violation;
- Up to $10,000 for a nonwillful violation;
- Up to $50,000 for a pattern of negligent activity; and
- $100,000 or 50 percent of the account for willful failure to file.

A new IRS Compliance Initiative Plan (CIP) for audits of accounts payable transactions with foreign vendors, including foreign national payees, has also been announced. This CIP is an outgrowth of results of the IRS's Voluntary Compliance Program (VCP) for U.S.-source income payments to foreign persons originally directed toward the financial industries. Generally, U.S.-source income payments to foreign persons are subject to 30 percent withholding unless an exception such as reduction under a tax law or treaty applies. However, proper paperwork must be submitted prior to payment for a withholding exception to be valid. Payers (called "withholding agents" because of their withholding obligations) who fail to withhold and pay over the

taxes timely, or who allow exemptions from withholding without collecting the proper paperwork, are liable for the taxes, penalties and interest. The IRS stated that the results of the VCP were "enormously successful."

Much to the IRS's surprise, of the 400 companies making VCP submissions, 25 percent were multinational companies (MNCs), including all of the major accounting firms and many large law firms. The focus of the new audits on accounts payable transactions includes fees for personal services and royalty and license fees, which may have service components. The new initiative has the potential of identifying foreign national nonfilers, as well as nonresident employees paid through accounts payable who should be paid on payroll, including some who are working in the United States without work authorization. The types of companies that will be the focus of these audits are pharmaceuticals, publishing, high tech, law firms, accounting firms and entertainment industry companies.

The recent interest of members of Congress in international tax compliance should result in still more international compliance initiatives. In a correspondence to IRS Commissioner Mark Everson, the Senate's two top tax writers, Senate Finance Committee Chair Chuck Grassley (R-Iowa) and ranking minority member Max Baucus (D-Montana), chastised the IRS for failure to make good use of information about investment income earned abroad by U.S. citizens and residents under the automatic exchange of information agreements with U.S. treaty partners. According to a U.S. government report, between 1999 and 2003, U.S. residents' foreign investments increased from $2.6 trillion to $7.2 trillion. The senators are concerned because GAO recommended system modifications that would cost very little and could result in additional revenue of millions of dollars have gone unheeded.

These IRS international compliance initiatives have the potential for identifying foreign nationals failing to submit their U.S. tax returns or submitting incorrect returns. When U.S. citizens submit tax returns prepared in error, or fail to report all of their taxable income, the results can be penalties and interest (assuming the error was unintentional). However, tax returns prepared in error for, or by, foreign nationals can be much more costly because foreign nationals may lose immigration benefits if the tax return errors come to light in an immigration proceeding.

## Impact on immigration benefits

Foreign nationals are entitled to immigration benefits, such as authorization to work in the United States based on their current immigration status. Nonimmigrants may be accorded future immigration benefits, such as an opportunity to become an LPR. LPRs who meet certain criteria may be eligible for immigration benefits, such as supporting immigration petitions for relatives or applying for U.S. citizenship.

Foreign nationals who submit tax returns that result in lower taxes than their tax obligation were they to file correctly may be found not to be "of good moral character" in immigration proceedings. These lower taxes can result from:

- Deductions for which they do not qualify (the standard deduction).
- Incorrect personal exemptions.
- The wrong return (1040 instead of 1040NR).
- The wrong filing status (married filing jointly instead of married filing separately).

Foreign nationals who submit the wrong return may jeopardize an application for future immigration benefits, such as an application to adjust to LPR status. The three most recent U.S. tax returns are required to be submitted for this immigration process. Submitting a Form 1040NR when they should have submitted Form 1040, or a Form 1040 when they should have submitted a Form 1040NR, could cause problems with this process if it resulted in lower U.S. taxes.

The most serious problems can occur for those foreign nationals who are LPRs who relocate to work abroad for a period of time. Just like U.S. citizens, LPRs must continue to submit U.S. tax returns as residents while living and working abroad. Non-immigrant foreign nationals who are "lawfully admitted for permanent residence," is defined as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant,in accordance with the immigration laws, such status not having changed." LPRs residing abroad typically while on assignment for an American employer are "special immigrants" returning to "an unrelinquished lawful permanent residence in the United States." Such LPRs must take steps to preserve their LPR status or they will be considered to have abandoned it and may have their LPR status revoked.

Certain tax return filings can evidence an intention to abandon their LPR status. For example, LPRs who are residents of a country with which the United States has an income tax treaty may qualify as a nonresident for U.S. tax purposes under the tiebreaker rule of the residency article of the treaty. However, submitting a Form 1040NR or 1040NR-EZ is considered evidence of an intent to abandon their LPR status. Also, a claim of bona fide residence in a foreign country for purposes of claiming section 911 foreign earned income exclusions could be viewed as abandonment of LPR status. (Only LPRs who are nationals of a tax treaty country can use the bona fide residence test because of the nondiscrimination clause of the treaty.) This can occur because the facts supporting bona fide residence in the foreign country are the same types of facts that are used to support that they have a permanent residence in the United States.

Form N-400, *Application for Naturalization*, requires applicants for naturalization to have resided in the United States as an LPR for at least five years (three years if married to a U.S. citizen) before submitting this form. Part C, Continuous Residence, asks the following questions: "Since becoming a Lawful Permanent Resident of the United States:

13. Have you EVER called yourself a 'nonresident' on a federal, state or local tax return?

14. Have you EVER failed to file a federal, state or local tax return because you considered yourself to be a 'nonresident'?"

An LPR who has submitted a Form 1040NR or 1040NR-EZ tax return since becoming an LPR must answer "yes" to question 13.

Most states impose residency taxation based on domicile in the state. Tax preparers frequently encourage taxpayers who relocate abroad to take the position that they are no longer domiciled in their home state to save taxes. However, states with domicile rules take the position that, if the individual cannot show the establishment of a new domicile in the new location, or they have facts indicating that they intend to return to the state, or both, they continue to be treated as domiciled in the home state. LPRs who have taken the position that they are no longer domiciled in their home state, and as a result submit a nonresident state tax return, must answer "yes" to question 13. LPRs failing to submit a state tax return because they considered themselves to be nonresidents of the state and had no income sourced in the state, must also answer "yes" to question 14. The immigration service can use the answers to those questions to claim that LPR status was abandoned and that the continuous residency requirement in support of the application for U.S. citizenship, therefore, has not been satisfied.

## Ten common mistakes to avoid

The following are 10 common tax return mistakes that foreign nationals need to avoid:

1. Filing the wrong tax return

Foreign nationals can be nonresident aliens (Form 1040NR or 1040NR-EZ), resident aliens (Form 1040 or 1040EZ), or dual-status taxpayers (Form 1040 with a Form 1040NR statement for those arriving, or Form 1040NR with a Form 1040 statement for those departing, who elect dual-status treatment). Many foreign nationals, particularly foreign students and exchange visitors, who remain nonresident aliens for a period of years under the 183-day residency formula, and arriving aliens not in the United States a full calendar year, submit a Form 1040 claiming deductions such as the standard deduction which are not available to nonresident aliens or dual-status taxpayers.

Currently, e-filing is not available for Forms 1040NR, 1040NR-EZ or dual-status tax returns. Those foreign nationals whose returns are prepared using e-filing are frequently the wrong return. Some foreign nationals who have a nonresident return prepared correctly for them may choose instead to e-file because it results in a higher refund (because of the standard deduction).

2. Filing using married filing jointly status incorrectly

A nonresident married to a U.S. citizen or resident alien as of Dec. 31 may elect to file as a resident jointly with their spouse. Residents include a spouse who made a first-year choice election to be a part-year resident. However, two married nonresident aliens may not make this election to file jointly as residents. They must file as nonresident aliens using married filing separately rates, which are the highest rates.

3. Failing to include all income in the return

Foreign nationals who are resident aliens are subject to U.S. income tax on worldwide income in the same manner as U.S. citizens. Foreign nationals who elect to file as a resident with a U.S. citizen or resident spouse must include their worldwide income in their U.S. return.

Resident aliens frequently fail to include foreign income in their U.S. return for a variety of reasons:

- Foreign investment income is taxed at source so they think they have no obligation to include it in their U.S. tax return;
- They know that their foreign investment income should be included in their U.S. return but rules such as foreign tax credits are too complicated for them to deal with;
- Their capital transactions are not taxed in their home country and they expect that the transactions are not taxable in the U.S. either;
- Their tax preparer never asked them about income from abroad so they did not know that it was income for U.S. tax purposes; and
- They fail to mention income earned abroad because they think it should not be taxed in the U.S. and they do not expect to be caught for not reporting the income.

4. Claiming incorrect personal exemptions

In order for a dependent to be claimed for a personal exemption, the dependent must be a U.S. citizen or resident alien unless an exception applies. There are exceptions for dependents who are U.S. nationals or residents of Canada or Mexico. Nonresidents who are residents of South Korea, within certain restrictions, can claim dependent exemptions. (A similar rule for residents of Japan was eliminated by the new treaty with Japan.) Nonresident business apprentices and students from India can claim a dependent exemption for their spouse.

5. Incorrectly claiming a tax treaty benefit

The United States has income tax treaties with over 60 countries. Many foreign nationals, particularly foreign students and scholars, may be eligible for treaty exemptions from tax. Eligibility for treaty benefits is based on tax residency (not citizenship) in the treaty country as described by the treaty article under which a benefit is claimed.

Treaty benefits for income such as dividends, interest, rents and royalties require the taxpayer to be a resident of the treaty country and not a resident of the United States when the income is paid. Generally, tax treaty provisions for students, trainees, teachers, and researchers allow the taxpayer to keep the treaty benefits even if they are no longer tax residents of the treaty country and/or have become tax resident in the United States. (These benefits are preserved even if the recipient elects to file jointly with a U.S. citizen or resident spouse.) However, student, trainees, teachers and researchers who are no longer residents of the treaty country frequently claim tax treaty benefits on their U.S. investment income for which they are no longer eligible.

6. Claiming improper temporarily-away-from-home expense deductions

Taxpayers who have been providing services who are temporarily away from their tax home may claim deductions for their travel, meals and lodging. (Expenses related to their family members are generally not deductible.) To be temporarily away, taxpayers must be at their temporary work location for a period anticipated to be a year or less. Their tax home is their principal place of business. A short absence of a few months between visits is not sufficient to restart the clock for purposes of these deductions. If travel, food and lodging have been paid or reimbursed by their employer, deductions may only be claimed if the amounts are included in their Form W-2 gross income.

These rules also apply to foreign students and scholars in F, J, M or Q nonimmigrant status who are recipients of taxable grants because the tax law deems them to be engaged in a U.S. trade or business. Temporarily-away-from-home deductions for foreign students and scholars for their taxable grants should not be claimed on Form 2106 because they are not employees. They must attach a statement reducing their taxable scholarship by the actual expenses and record the net taxable scholarship on their return.

7. Excluding certain taxable capital gains on stock sales on Form 1040NR

Capital gains on property other than real estate are fixed or determinable annual or periodic income subject to 30 percent tax on the net gain (reportable on page four of Form 1040NR) unless an exception applies. Nonresident aliens can exclude their capital gains on property such as stock if:

- The capital gain is foreign source, or
- The capital gain is U.S. source but the recipient is in the United States for less than 183 days in the tax year.

Capital gains are U.S.-source income if the recipient has a tax home in the United States. Generally, a taxpayer's tax home is in the United States if they are here for a period anticipated to be longer than one year.

Foreign nationals in certain nonimmigrant categories typically remain nonresidents for a number of calendar years under the 183-day residency formula - F, J and M students (five calendar years); J and Q nonstudents (two calendar years out of the most recent seven); and A diplomats and G international organization employees (indefinitely). (Diplomats and employees of international organizations are not exempt from tax on their investment income.) Many of these taxpayers have U.S.-source gains subject to 30 percent tax that are never reported on their U.S. tax returns because of misunderstandings about these rules.

8. Failing to file disclosure forms

Foreign nationals who become a resident alien who maintain income-producing assets overseas; transferor assets to foreign entities; are grantors of, or recipients of income from, foreign trusts; or are recipients of certain gifts or bequests from abroad may be required to submit disclosure forms such as:

- Form TD F 90-22.1 to report a financial interest in or signatory authority over a financial account(s) in a foreign country;
- Form 926 to report cash and other transfers to a foreign corporation owned by the taxpayer;
- Form 3520 to report transactions to or from, and/or ownership of, foreign trusts, and/or gifts from foreign donors or bequests from foreign decedents;
- Form 3520-A required to report on foreign trusts with a U.S. owner;
- Form 5471 to report U.S. shareholders of foreign corporations (and to determine deemed dividend income subject to current taxation);
- Form 5472 to report foreign shareholders of certain U.S. corporations;
- Form 8833 to report certain income tax treaty claims;
- Form 8621 to report U.S. shareholders of a Passive Foreign Investment Company (PFIC) and to make a Qualified Electing Fund (QEF) election;
- Form 8858 to report U.S. persons owning foreign disregarded entities;
- Form 8865 to report on certain controlled foreign partnerships; and
- Form 8891 to report income being deferred on certain Canadian Registered Retirement Plans.

Foreign nationals who are nonresident aliens may be required to submit one of the following disclosure forms:

- Form 8840 to report facts supporting a claim of nonresidency status based on a closer connection to a foreign country or countries;
- Form 8843 to report U.S. days that do not count for residency determination purposes; and
- Form 8854 to report information required annually of former U.S. citizens and long-term U.S. lawful permanent residents.

9. Failing to file a federal tax return

Foreign nationals fail to file U.S. tax returns for a variety of reasons:

- Their income was exempt from withholding taxes under a tax treaty and they are unaware of the requirement to file a return for the treaty claim;
- Their U.S. income has not been subject to U.S. withholding taxes, as is typical with rents paid to nonresident alien landlords, and the taxpayers are unaware of the obligation to file a tax return to claim offsetting deductions;
- All of their income was paid abroad and they are unaware of the sourcing rules that can cause income such as compensation for services in the United States to be U.S.-source income (regardless of the currency or location of the payment); and
- They are living and working temporarily overseas and are unaware of the requirement to submit a U.S. tax return either because they remain a resident

alien from frequent travel to the United States or they are an LPR. (This filing lapse is common with U.S. citizens living and working overseas as well.)

Nonresident aliens who fail to timely file their nonresident tax return can lose deductions and credits to which they would otherwise be entitled if they fail to correct the lapse in filing voluntarily before being contacted by the IRS. Generally, timely filed for purposes of this rule is 16 months from the original due date of the return. LPRs working temporarily abroad who fail to submit their tax return timely may lose eligibility for the section 911 foreign earned income exclusions if they are contacted by the IRS regarding this lapse before voluntarily filing. Timely filing for purposes of this rule is 12 months from the original due date of the return.

10. Failing to file a state income tax return

Foreign nationals who prepare their own tax returns frequently fail to submit a required state income tax return. In fact, a number of Internet sites and special tax preparation software that prepare nonresident returns do not prepare state income tax returns. Whether foreign nationals have a state income tax filing obligation depends upon whether they are a resident in (under the state's rules) or earn income from certain sources in a state that imposes income taxes on individuals, and whether their income meets the filing threshold.

## Summary

Many foreign nationals submit incorrect income tax returns either because they prepare their own return without any awareness of the special tax rules that may apply to their return or because they use a paid preparer unaware of these rules. Foreign nationals need to avoid the 10 common tax return errors for two reasons.

First, because of new IRS initiatives, incorrect tax returns have a higher risk of being caught, as do foreign nationals failing to file their required returns. This can result in penalties and interest. Second, incorrectly prepared returns have the potential for causing problems with immigration proceedings. Such incorrect tax returns cannot always be corrected because of the three-year statute of limitations that applies to most returns. Foreign nationals need to comply correctly with their tax return obligations in this new compliance environment.

# When charities go political

*By Marc C. Lovell*

Charitable and religious organizations play a rather unique role in American society, and that unique role is most certainly reflected in the existing tax laws that apply to such organizations. However, tax practitioners with such organizations on their client roster may need to develop a much closer awareness of the particular activities of their charitable or religious organization clients in order to ensure such organizations do not run afoul of some key tax legislation that has become a recent area of focus by the Internal Revenue Service.

In the wake of an increasing number of complaints regarding politicking by charities and churches in the advent of the 2004 election season, the IRS examined 82 organizations (about half of which were churches) and found 75 percent in violation of provisions regarding political activity.[1] There is an increasing trend with this problem, particularly during presidential and midterm elections, which triggered the IRS to issue an information release, IR-2006-87, in June 2006. It reminded charities to avoid engaging in prohibited political activity, and was part of an overall effort to launch a new educational and enforcement initiative it calls the Political Activity Compliance Initiative (PACI).[2] The IRS has increased the number of agents who investigate charity misuse as this area garners more IRS attention.

*Marc C. Lovell, J.D., LL.M., heads a solo practice in Ware with a focus in the taxation area, including federal, state and local taxation issues and Canadian taxation issues. His practice also includes addressing particularly unique or complex taxation matters. He can be reached at mclair@mnsi.net.*

## A brief history

When charitable organizations, such as foundations, were first given tax-exempt status in 1913, there were no corresponding prohibitions on political activities or lobbying. It was not until 1952 that a House Select Committee was formed to investigate foundations and charities. This committee, which became known as the Cox Committee (chaired by U.S. Rep. Eugene Cox, R-Ga.) was particularly concerned with the use of foundations and charities to further communistic agendas. It concluded that such abuses were not in fact taking place, but did note that such organizations were certainly very vulnerable to these types of abuses given the lack of regulation in this area since 1913.

A second similar committee was subsequently established to conduct a full investigation of tax-exempt foundations and similar organizations to determine if any of their resources were being used for purposes outside the stated purposes of these organizations. The conclusion was clear: The absence of regulation in this area was permitting significant irresponsibility with and misuse of the resources available to such organizations. This was of particular concern since this committee viewed foundations as becoming too powerful, with too much ability to influence public opinion. Increased regulation of political activity with such organizations was recommended.

Proposed legislation was introduced on June 2,1954, by Lyndon B. Johnson (then a Texas senator), which was quickly adopted. In 1987, Congress sought to stiffen the regulation of politicking by charities and added several provisions and penalties.

Accordingly, today's rules and regulations in this area represent the culmination of about 50 years of gradual evolution.

## Overview of current regulations

Organizations that receive tax exempt status under the Internal Revenue Code (IRC) section 501(c)(3) are given that status because they are ". . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals . . ."[3]

The section further states, in relevant part, that in order to qualify for tax exempt status under the section, the organization must operate in a manner ". . . where no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."

Regulation of charitable organizations in this area falls into two categories: regulation of lobbying activity and regulation of political activity.

## Prohibited lobbying activity

Tax exempt organizations, or those seeking

tax exempt status under section 501(c)(3), are prohibited from having a substantial part of their activities devoted to influencing legislation (lobbying). Note that the term "substantial part" implies that some lobbying activity for a 501(c)(3) organization is permissible. There is only a violation where such activity is considered a substantial en-ough part of the organization's overall activity. To make this determination, the IRS uses two tests: the substantial part test and the expenditure test.

The substantial part test involves a facts and circumstances analysis. The various factors the IRS considers include the amount of time spent by organization staff and volunteers and the amount of money spent by the organization on lobbying activities.

The expenditure test is more quantitative. Under this test, reference is made to IRC section 4911, which basically outlines a tiered table indicating what the acceptable dollar amounts of expenditures are for lobbying purposes relative to the amount spent for other legitimate section 501(c)(3) purposes, with an overall cap of $1 million for the lobbying expenditures.

Generally, 501(c)(3) organizations can elect to use the more certain, quantitative expenditure test by filing Form 5768 within the taxable year for which the election is to become effective (and the election remains effective until later revoked). It should be noted that churches do not have the ability to elect the expenditure test and must use the substantial part test.[4]

## Prohibited political activity

Generally, organizations that are granted tax-exempt status under section 501(c)(3) are prohibited from participating in any political campaigning or becoming involved in any activities that would be of benefit or detriment to a candidate.

The inquiry of whether a 501(c)(3) organization has engaged in prohibited political activity is one involving a facts and circumstances analysis. Neutrality, equal opportunity and non-partisanship are central features in such an inquiry.

Clearly, a 501(c)(3) organization is not permitted to make a contribution to a political campaign fund or even state that it favors a particular candidate. However, engaging in activities designed to educate voters on the issues or simply to register voters is permissible, so long as these types of activities are not accomplished in a manner that favors a particular candidate over the other.[5] The organization can even invite a candidate to speak to constituents so long as equal opportunity to do so is provided to other candidates in the same electoral race and so long as the organization does not indicate any support or opposition to the candidate. IRS guidelines even suggest that the organization explicitly state that it doesn't support or oppose the candidate who is speaking.[6] In addition, all candidates invited should have equal ability and opportunity to reach the constituents of the organization.

In the case of a religious organization, for example, those who lead or head the organization are certainly free to state their own viewpoints and opinions as individuals. The 501(c)(3) prohibitions on political activity in no way abridge freedom of speech or expression of the individuals heading the organization. However, these persons cease to speak for themselves as individuals where they make partisan comments in official organization functions or publications or otherwise in a manner where their individual views could be attributed to the organization itself. This makes the statement of a "personal opinion" in a monthly newsletter or bulletin prohibited political activity.

Even the organization's business relationships with parties or candidates can implicate the rules on political activity. Factors such as who pays for advertising in the organization's publications, who the organization rents office space to and whether the organization charges its typical rate for space or services are examples of some of the considerations in the facts and circumstances analysis.

## Grave consequences for violations

Investigations into political or lobbying activities on the part of 501(c)(3) organizations most often come from direct complaints from one of the organization's constituents (or someone who at least has knowledge of the organization's activity that may constitute political or lobbying activity).[7]

Where a violation of the lobbying limits or political activity prohibition occurs and the violation isn't particularly egregious, the IRS will generally issue a warning letter. However, in cases where more serious violations occur, the consequences can be devastating and expensive. The penalties can involve both the organization and its managers.

Where lobbying activity is at issue and the substantial part test was violated, not only can the organization lose its tax exempt status, but a special excise tax under IRC section 4912 equal to 5 percent of the lobbying expenditures that were made in the year that the organization lost its tax exempt status can also be assessed against the organization. In addition, the same 5 percent amount may be assessed against the organization's managers on a joint and several basis where they agreed to make the expenditure under circumstances where they knew such expenditure would likely result in the organization's loss of tax exempt status.

Where lobbying is at issue and an organization has elected to use the expenditure test and violates that test, loss of tax-exempt status is a possible consequence. In addition, the organization will pay a 25 percent excise tax of the amount of expenditure that exceeded the permitted amount under IRC section 4911.

Where the organization violates the political activity prohibitions, loss of tax-exempt status can occur. Another possible consequence is an excise tax under IRC section 4955 equal to 10 percent of the political expenditures. Moreover, a further tax of 2.5 percent of such expenditures can be imposed on the organization managers jointly and severally, subject to a cap of $5,000 per expenditure. If such expenditure is not corrected, IRC section 4955 imposes additional taxes. The IRS can impose the excise tax in addition to or in lieu of revocation of tax-exempt status.

## The moral of the story

Attorneys who represent either 501(c)(3) organizations or individuals who serve on boards of directors/trustees of such organizations or who advise those who are employed in managerial, decision-making roles within such organizations must ensure they are

acutely aware of the various activities and events within the organization that could be construed as political or lobbying activity under the applicable IRC statutes and regulations.

As a first preventative step, the attorney should seek to educate the managers and event organizers for the organization on what is acceptable and what is not in this area of the law. Clearly, certain activities under the rubrics of political activity and lobbying are quite acceptable. Ensuring key staff members and directors/trustees understand the do's and don'ts is imperative. The attorney might find the several examples in IRS Publication 1828 very useful in this process.

Second, the attorney may even wish to play a participating advisory role in the organization of any event that initially seems like it could be construed as a political or lobbying activity or become one. This means ensuring managers let the attorney know what events are in the planning stages. Similarly, the attorney should review and approve official publications of the organization and regularly review business activities of the organization with third parties. Input from the advising attorney should also be sought on the subject of expenditures of the organization that are directed toward purposes that appear political in nature or are made for the purpose of influencing legislation.

These regulations are largely "behavioral based"; that is, the behavior of even just one individual within the organization can jeopardize the tax exempt standing of the organization and expose the organization and its paid staff or volunteers to substantial financial penalties. In addition, in a typical election setting where emotions can run high on various issues, it becomes very easy for someone representing the organization to cross the sometimes unclear line between permitted activity and prohibited activity. Ensuring the organization does not run afoul of these regulations requires a close working relationship and established attorney-client procedures between the advising attorney and the organization's management and/or directors.

Benjamin Franklin said it best: "An ounce of prevention is worth a pound of cure."

## End notes:

1. IR-2006-36, Feb. 24, 2006.
2. IR-2006-87, June 1, 2006.
3. I.R.C § 501(c)(3).
4. Churches pose some unique audit problems to the IRS since they do not file any annual returns and provide little or no regular, periodic information to the IRS. **Specific legislation, the Church Audit Procedures Act (CAPA)**, was passed in 1984 to provide clearer procedures for the audit of a church by the IRS. This legislation is presently codified at I.R.C. § 7611, and mandates initial approval of the audit by a regional commissioner, notice to the church of an audit, an offer of a pre-examination conference and other procedures. It also provides a definition of what "church records" are and generally serves to provide churches with less dependence on IRS internal procedure for their rights within an audit situation.
5. In *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000), the court held that these IRS-imposed limitations on political activity were constitutional.
6. IRS Publication 1828 is helpful in outlining some of the guidelines along with some explanatory examples.
7. Various groups, such as Americans United for Separation of Church and State, have filed many complaints with the IRS in an effort to ensure the regulations are enforced and that potential violations are investigated.