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SECTION REVIEW

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SECTION REVIEW

CIVIL LITIGATION

Not a bang, a whimper: The silent e-discovery revolution in state court practice.....3
By Chad P. Brouillard

Is your client entitled to workers' compensation immunity? A discussion of *Fleming v. Shaheen Brothers, Inc.*.....4
By Emily G. Coughlin

Superior Court standing order 1-09: New rules promote transparency in written discovery.....6
By David K. McCay

One claim at a time: The inherent problems with piecemeal application of the anti-SLAPP statute.....8
By Heidi A. Nadel

CRIMINAL JUSTICE

Miranda warnings: The latest research and its implications.....11
By Eric Y. Drogin

A refresher on probation law and procedures.....14
By Michael Fabbri

FAMILY LAW

Eyster v. Pechenik — A *Miranda* warning for prenuptial agreements?18
By Thomas J. Barbar and Liza M. Connelly

The practitioner's perspective: Guardianship of minors practice in the Probate and Family Court.....20
By Amy T. Sollins

HEALTH LAW

Don't get stuck: Massachusetts and New Hampshire require "actual exposure" to maintain a cause of action for HIV/AIDS-phobia.....23
By Martin C. Foster, Stephen M. Fiore and Kerry A. Sousa

IMMIGRATION LAW

Ethical issues in employment and family-based practice.....25
By Marisa A. DeFranco

JUDICIAL ADMINISTRATION

Post-trial juror contact in Massachusetts: A history, some problems and a proposal for reform28
By Andrew Perlman

LAW PRACTICE MANAGEMENT

Navigating through the downturn.....31
By Matthew Goldsmith

PROBATE LAW

Trustees take note: In *O'Connor v. Redstone*, the SJC explores a successor trustee's obligation to seek redress for a predecessor's misconduct.....33
By Patricia L. Davidson

Community Medicaid programs: alternatives to nursing homes.....35
By Alex L. Moschella and Neal A. Winston

PROPERTY LAW

Recent developments in the field of reverse mortgages38
By Robert T. Cannon

The continuing metamorphosis of 40B review41
By Mark A. Kablack

TAXATION LAW

The Madoff Mess and the deductibility of investment theft losses.....43
By Kevin Diamond

Correction

Lisa J. Cooney was mistakenly listed as being an associate with Manchel & Brennan PC, where she was previously employed. She is currently associate general counsel for Five Star Quality Care Inc. in Newton.

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NOT A BANG, A WHIMPER: THE SILENT E-DISCOVERY REVOLUTION IN STATE COURT PRACTICE

By Chad P. Brouillard

Since the proposed e-discovery updates to the Federal Rules of Civil Procedure were introduced in mid-2006, much ink has been spent describing an impending dramatic e-discovery revolution in litigation. Although federal litigation has been impacted, has the e-discovery revolution even come to state court practice, more than two years later? In my experience, the answer is “yes,” but e-discovery has impacted our state practice in a subtle, not dramatic fashion.

Many practitioners by now are aware of the e-discovery rules as contained in the FRCP. As a quick recap, all potential litigants are under an affirmative duty to preserve relevant electronic stored information (“ESI”), which can be contained in virtually every device powered by electricity. To complicate matters for our clients, technical preparation needs to be in place well in advance of the first “e-discovery” lawsuit to prevent the destruction or modification of ESI. Although these preparations can probably only be implemented by the organization’s IT department and in-house counsel, defense counsel can be deemed responsible for the identification and preservation of ESI under the federal rules.

The federal case law preceding and following the enactment of the revised FRCP has turned out to be dramatic indeed. The federal courts have leveled hefty financial sanctions at companies, defense counsel and individual litigants themselves for a failure to ensure that relevant data either was not destroyed by human hand or automatic computer processes. In addition, the federal courts have issued spoliation jury charges, which can be fatal to a case by allowing the jury to assume a cover-up took place.

In contrast, things seem quiet on the state practice level. I am unaware of any Massachusetts case law yet concerning a hardcore e-discovery spoliation dispute leading to sanctions or an adverse jury inference. That being said, electronic documents are being used more on the state court level.

Moreover, the Massachusetts Superior Court recently issued Standing Order 1-09 that places affirmative e-discovery burdens on parties responding to routine document production requests.



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Under Part 3 (c) of the standing order, responding parties have to specify which “electronic storage locations” they searched or excluded from their search in response to *every request* for documents.

The change in state litigation also will continue to come from, of all places, our clients. Our clients increasingly use e-mail and scanned documents in lieu of traditional correspondence. They are in the midst of converting their own offices to paperless environments because of the costs savings. The costs of large-scale paper storage and production can often be reduced to a fraction by implementing electronic records storage.

Also, many industries are implementing paperless solutions for the benefits of increased efficiencies of documentation and reliability. In my firm’s own practice area, medical malpractice defense, health care institutions are in the midst of implementing e-prescribing systems, electronic order entry, electronic health records, patient portals and the personal health record. The drive behind implementing these applications is not primarily cost, but better quality of care.

Increasingly, when we turn to our clients for responsive documents to discovery requests, it is they who come back to us with e-mail correspondence and discs containing .pdfs or .tiffs.

It is only a matter of time before opposing counsel is no longer satisfied during the discovery phase with the electronic documents purely in the form that we have produced them in. Disputes will inevitably turn to questions about how the underlying electronic information is created, modified, stored and destroyed — questions that get at the underlying reliability of the produced electronic records.

Counsel also will increasingly find themselves in the position of trying to have electronic records admitted into evidence for their client’s benefit. The authentication of electronically stored information may require digging into the system and application metadata, the hidden log files that may tell us who did what, when and to which electronic document. Both sides will want access to this information to make arguments for and against the reliability and authenticity of an electronic record.

When the e-discovery rules came down in late 2006, commentators expected that the rules would have a dramatic effect on the litigation landscape beyond the federal courts. It has turned out so far that on the state level, e-discovery has entered the scene more like a silent revolution. Is your practice prepared?

IS YOUR CLIENT ENTITLED TO WORKERS' COMPENSATION IMMUNITY? A DISCUSSION OF *FLEMING V. SHAHEEN BROTHERS, INC.*, 71 MASS. APP. CT. 223 (2008), REV. DEN. 451 MASS. 1105 (2008)

By Emily G. Coughlin

In *Fleming v. Shaheen Brothers, Inc.*, 71 Mass. App. Ct. 223 (2008), the appeals court held that the defendant, Shaheen Brothers, Inc., was entitled to immunity from suit by the plaintiff under Massachusetts General Laws, chapter 152, even though the plaintiff received his paycheck from a separate entity, and that separate entity paid the plaintiff's workers' compensation benefits following the accident. The court held that Shaheen was entitled to immunity because it was the plaintiff's employer as a matter of law at the time of the accident, was insured for workers' compensation, and was liable for the payment of workers' compensation. The court stated that the fact that Shaheen was not the party that actually paid Fleming's workers' compensation "has no bearing on the issue of immunity" as long as Shaheen was the insured employer liable for the payment of that benefit. *Id.* at 229.

In February of 1998, plaintiff Mark Fleming (Fleming) walked into Shaheen's place of business to apply for a warehouse job. Fleming completed an application for employment and interviewed with Shaheen's operations manager. Shaheen subsequently hired Fleming as a temporary employee to work in its warehouse and Shaheen set his hourly wage. Fleming was trained by Shaheen's staff. He worked on the warehouse's premises and was under the direction and control of Shaheen employees. After Fleming's first ninety days of employment, Shaheen had the exclusive right to decide whether to continue Fleming's temporary employment or make him a permanent employee. Shaheen could fire him at any time."

Fleming's paychecks, however, did not come from Shaheen. Shaheen regularly used a company named New Boston Select (NBS) to pay its temporary employees, like Fleming, and to handle related administrative functions. "Shaheen paid NBS an amount equivalent to Fleming's salary, plus a service fee. In return, NBS paid Fleming's wages, withheld Federal and State taxes, and provided unemployment insurance. NBS also paid workers' compensation

insurance premiums for Fleming, although Fleming was also covered under Shaheen's workers' compensation policy. NBS obtained all the information necessary to conduct its payroll through applications, which NBS provided to Shaheen. Similarly, Fleming recorded his hours on a time sheet, which Shaheen provided to NBS. Fleming had no contact with NBS, was never introduced to anyone from NBS, had never been to any NBS location, and only discovered its name when he received his first paycheck. Two weeks after Fleming was hired, he was injured in a work-related accident while operating a forklift. Shaheen notified NBS about the accident and NBS filed the "first report of injury" with the Division of Industrial Accidents. Fleming then began receiving workers' compensation benefits from NBS's insurer."

The appeals court held that for an employer to be immune from suit, it need only satisfy the two-part test the appeals court first articulated in its decision in *Lang v. Edward Co. v. Edward J. Lamothe Co.*, 20 Mass. App. Ct. 231, 232 (1985). To be entitled to immunity, "a direct employment relationship must exist, and 'the employer must be an insured person liable for the payment of compensation.'" *Fleming*, 71 Mass. App. Ct. at 227 (quoting *Lang*, 20 Mass. App. Ct. at 232).

With respect to the first part of the test, "in order to determine whether an employer-employee relationship exists, the finder of fact must identify 'who has direction and control of the employee and to whom does he owe obedience in respect of' the performance of his work" *Fleming*, 71 Mass. App. Ct. at 227 (quoting *Patterson v. Liberty Mut. Ins. Co.*, 48 Mass. App. Ct. 586, 591 (2000) (quoting *Chisholm's Case*, 238 Mass. 412, 419, 131 N.E. 161 (1921))). The court stated that although the method of payment for the work performed may be important, it is not controlling in determining the terms of an employment relationship. *Fleming*, 71 Mass. App. Ct. at 227. Rather, the "primary test is whether one has a right to control the individual's work performance." *Id.* (quoting *National Assn. of Govt. Employees v. Labor Relations Commn.*, 59 Mass. App. Ct. 471, 474, 796 N.E.2d 856 (2003)). In *Fleming*, the court pointed out that it was undisputed that there was a direct employment relationship between Shaheen and Fleming. "It was not disputed that Shaheen independently interviewed and hired Fleming, exclusively controlled Fleming's training, hours and job duties, supervised Fleming's work and indirectly paid his wages and workers' compensation benefits." Although NBS formally paid Fleming's wages and workers' compensation benefits, it had no actual control over hiring, firing, or other work conditions. Under this set of facts, the court was able to find as a matter of law that Shaheen, not NBS, was Fleming's employer.

The court also found that Shaheen satisfied the second prong of the test set forth in *Lang*, *Id.* at 229. The court held that to sat-



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isfy the second prong of the immunity test, the insured person must only be “liable for the payment of compensation” *Fleming*, 71 Mass. App. Ct. at 229 (quoting *Lang*, 20 Mass. App. Ct. at 232). The court held that the employer need not actually pay the workers’ compensation benefits or even pay the insurance premiums to take advantage of the workers’ compensation exclusivity bar *Fleming*, 71 Mass. App. Ct. at 229. The court concluded that Shaheen need only be an insured employer. In this case, “Shaheen carried its own workers’ compensation insurance, which it paid for as the named insured.” In addition, Shaheen “also paid NBS the cost of additional workers’ compensation coverage for those Shaheen employees paid through NBS.” Since Shaheen satisfied both prongs of the *Lang* test, the appeals court held that Shaheen was immune from *Fleming*’s negligence suit.

Fleming argued, however, that Shaheen was not liable for the payment of workers’ compensation because NBS was *Fleming*’s “general” employer not Shaheen. Shaheen, according to the plaintiff, was merely a “special” employer not liable for workers’ compensation under the Workers’ Compensation Act. MASS. GEN. LAWS c. 152, §18, provides that where there exists a general/special employer relationship, “the [general] employer upon whom liability for making workers’ compensation payments has been placed shall have the burdens and immunities of the Act; the other [special] employer will have neither” *Fleming*, 71 Mass. App. Ct. at 228 (quoting, *Nason, Koziol & Wall, Workers’ Compensation* § 7.17, at 168 (3d ed. 2003).

The appeals court held, however, that the facts in *Fleming* failed to establish that NBS was *Fleming*’s general employer. In fact, the court went on to state that there were “no facts indicating that NBS was *Fleming*’s general employer” *Id.* at 228. “NBS cannot be considered a general employer if it did not exercise any control over *Fleming*’s work duties.” Moreover, the court held that performing payroll functions does not amount to a working relationship. *Id.* (citing *Cameron v. State Theatre Co.*, 256 Mass. at 468 (control and actions of the parties determine employment relationship)). Consequently, the appeals court concluded that since Shaheen controlled and directed *Fleming*’s work, and was liable for payment of *Fleming*’s workers’ compensation benefits, Shaheen was immune from suit pursuant to M.G.L. c. 152, despite the fact that Shaheen did not pay *Fleming* directly and *Fleming*’s workers’ compensation benefits were provided by NBS.

The idea of being employed by one entity but being payrolled by another entity was not new to the appeals court.¹ However, in *Fleming* the appeals court had the opportunity for the first time to apply the language from *Patterson* and *Lang* to a situation where an insured employer provided for insurance from more than one

source. Both Shaheen and NBS were insured, however NBS rather than Shaheen paid the plaintiff’s workers’ compensation benefits. The court in *Fleming* acknowledged that nowhere in the Workers’ Compensation Act or in any case law decided pursuant to it, is “the employer” actually required to pay workers’ compensation benefits to be immune from suit under Section 15. *See Lang*, 20 Mass. App. Ct. at 232. In fact, if that were the case, then the court in *Lang* need not have put forth the two-part test or done any analysis to reach its conclusion as to the party entitled to immunity. It could have simply ruled that the party who paid the benefits would be immune. Instead, the appeals court in *Lang* and again in *Fleming* held that an employer need only be “liable for” payment of the compensation benefits to be immune, not that the employer need actually to have paid those benefits.

If Shaheen had leased its employee from a leasing company, or some other type of general-special employment relationship had existed between Shaheen and NBS (as in the case of a borrowed servant), it is clear that the appeals court in *Fleming* would have reached a different result. The key to the defendant’s success in *Fleming* was the lack of control on the part of NBS over the employee. Had there been evidence of any such control, the issue of whether Shaheen was *Fleming*’s employer would have been left for a jury to decide.

Endnotes

1. *See Patterson v. Liberty Mut. Ins. Co.*, 48 Mass. App. Ct. 586, 591 (2000) In *Patterson*, the plaintiff doctor was hired, supervised and controlled by a hospital, but was paid by, provided with workers’ compensation insurance by, and identified as an employee on the W-2 forms of a separate private foundation. The doctor sought compensation benefits for a work related injury from both the hospital and the foundation. An administrative law judge for the Department of Industrial Accidents ruled that both the hospital and foundation were the doctor’s employers, and that both the hospital and the foundation were liable for workers’ compensation. The foundation’s workers’ compensation insurer appealed, arguing among other things that the foundation was not the doctor’s employer as defined by the Workers’ Compensation Act. *Patterson*, 48 Mass. App. Ct. at 587-588. Although the case was decided on other grounds, this court discussed in detail the issue of *Patterson*’s employment, expressing its strong view that the foundation was not the employer despite the fact that it actually paid the doctor, provided the doctor with workers’ compensation and listed the doctor as its own employee in its W-2 Forms. This court expressed its belief that the administrative law judge’s conclusion that the foundation was the doctor’s employer should be “set aside” as not “justified by the evidence or the subsidiary findings.” *Paterson*, 48 Mass. App. Ct. at 591. Likewise, in this case there is no doubt that Shaheen was the plaintiff’s employer and not New Boston. *Id.*

SUPERIOR COURT STANDING ORDER 1-09: NEW RULES PROMOTE TRANSPARENCY IN WRITTEN DISCOVERY

By David K. McCay

I. Background

The use of general objections and “boilerplate” objections in written discovery responses has become pervasive in Superior Court practice. Litigants frequently use objections to obscure whether responsive information or documents exist and/or whether such information or documents will be produced. The remedy available to the requesting party has been to initiate a Superior Court Rule 9C conference in an attempt to resolve the areas of disagreement and then, if necessary, file a motion to compel under Rule 37 of the Massachusetts Rules of Civil Procedure. To address this problem, the Superior Court has issued Standing Order 1-09 requiring greater transparency in responses to written discovery requests.

The new standing order, which is effective Jan. 12, 2009, contains four primary components. First, it establishes a number of uniform, defined terms that are deemed incorporated into all discovery requests. Second, the Standing Order largely prohibits general objections. Third, each objection to an individual discovery request must be specific to that request and have “a good faith basis.” Finally, Standing Order 1-09 mirrors the amendment to Rule 26(b) of the Massachusetts Rules of Civil Procedure, requiring the responding party to produce a privilege log identifying documents withheld on the basis of privilege or as attorney work product. Standing Order 1-09 does not alter the scope of discovery under Rule 26(b) of the Massachusetts Rules of Civil Procedure.

II. New definitions incorporated by reference

With a few exceptions, Standing Order 1-09 adopts Local Rule 26.5 from the U.S. District Court for the District of Massachusetts. Section 1(c) of the standing order contains definitions for the following terms that are deemed incorporated by reference into all discovery requests: communication, document, identify (with respect to persons), identify (with respect to entities), identify (with respect to documents), parties, person, concerning and state the

basis or state all facts. Standing Order 1-09 also permits the use of other defined terms specific to the particular litigation, the use of abbreviations, and narrower definitions for the defined terms in §1(c). *See* §1(a).

III. Objections to interrogatories

Standing Order 1-09 significantly alters the widespread practice of asserting general objections or “boilerplate” objections in response to interrogatories. A party responding to interrogatories can no longer simply assert standard objections, prolonging the time for a specific response until a Rule 9C conference or a motion to compel. Under the standing order, an objection must be specific and made in good faith. *See* §2.

Standing Order 1-09 flatly prohibits the use of general objections in answers to interrogatories. *See id.* “If a party refuses to answer an interrogatory, the party shall so state and identify each objection asserted to justify the refusal to answer.” *Id.* If a party objects but still answers a specific interrogatory, the responding party must also state that, “notwithstanding the objection no information has been withheld from the answer,” or that “information has been withheld from the answer because of the objection.” *Id.* When information is withheld, the answer must include a description of the information withheld and the objection justifying the withholding. *See id.*

IV. Objections to requests for production

Much like its provisions for interrogatories, Standing Order 1-09 also limits the use of objections and requires greater transparency in responses to requests for production. A party can no longer use objections to obscure whether responsive documents exist or whether responsive documents will be produced or withheld.

A. Initial written response

The standing order sets forth relaxed requirements for an initial response to a request for production made in advance of the actual production of documents and/or things. In that case, the initial response may include general objections. If a party makes an initial written response asserting general objections, a more detailed, supplemental response is required within 10 days of the completion of production. *See* §3(a). Standing Order 1-09 also requires that the initial response “articulate with clarity the scope of the search conducted or to be conducted.” *See* §3(c).

B. Supplemental written response

When a party has completed its production, general objections are no longer permitted. *See* §3(b). In an effort to make clear what has been produced and what has been withheld, Standing Order 1-09 requires that each supplemental response contain one of the following statements:



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- (i) notwithstanding prior general objections, all responsive documents or things in the possession, custody, or control of the responding party have been produced;
- (ii) after diligent search no responsive documents or things are in the possession, custody, or control of the responding party; or
- (iii) the specific objection made to the request.

See id. If a party asserts a specific objection, the standing order imposes additional requirements. In addition to the specific objection, the responding party must also describe the nature of the responsive documents and things that are being withheld on the basis of the objection. *Id.*

In its supplemental response, a party must “articulate with clarity” any change in the scope of the search (as described in its initial response) conducted for responsive documents and things. *See* §3(c). A party must also describe any reasons for not searching particular physical or electronic locations. *Id.* Specifically, §3(c) states, “[i]f the scope of the search does not include all locations, including electronic storage locations, where responsive documents or things reasonably might be found, the responding party shall explain why these locations have been excluded from the scope of the search.”

V. Privilege logs now required

Effective April 1, 2008, the addition of Rule 26(b)(5) to the Massachusetts Rules of Civil Procedure formalized the use of privilege logs in Superior Court discovery. Absent agreement of the parties, the amendment requires the responding party to prepare a privilege log when documents are withheld on the basis of privilege or as attorney work product. *See* Mass. R. Civ. P. 26(b)(5). The privilege log must contain the following information: “the respective author(s) and sender(s) if different; the recipient(s); the date and type of document, written communication or thing not produced; and in general terms, the subject matter of the withheld information.” *See id.* Standing Order 1-09 reflects this amendment and requires that the privilege log be served with the supplemental response, unless the requesting party waives entitlement to the privilege log or agrees to a later date. *See* §3(b).

VI. Conclusion

Standing Order 1-09 significantly changes the landscape of written discovery in the Superior Court. These changes make clear that a party can no longer satisfy its discovery obligations by serving general objections or by the simple assertion of boilerplate objections in response to interrogatories or requests for production. Litigators and their clients must now be prepared to provide greater transparency in written discovery responses. Parties no longer will be permitted to use objections to obscure the existence of responsive information, documents and things.

ONE CLAIM AT A TIME: THE INHERENT PROBLEMS WITH PIECEMEAL APPLICATION OF THE ANTI-SLAPP STATUTE

By Heidi A. Nadel

When the Supreme Judicial Court issued its anti-SLAPP decision earlier this year in *Wenger v. Aceto*,¹ the buzz in the legal community focused on the implications of the decision on the tort of abuse of process. In the midst of the discussion of whether *Wenger* dealt another — perhaps fatal — blow to abuse of process claims, an even farther reaching aspect of the decision went virtually unnoticed. The Supreme Judicial Court, without discussion of the issue, blessed the use of the anti-SLAPP statute on a claim-by-claim basis by ordering dismissal of only two of the three claims asserted in the *Wenger* complaint. Some Superior Court judges had already dabbled in a claim-by-claim anti-SLAPP analysis, but *Wenger* firmly opened the door for piecemeal application of the anti-SLAPP statute. While attorneys and courts are comfortable with partial motion practice and dismissal of less than all claims under Rules 12 and 56, importing these concepts to the anti-SLAPP context undermines the very purpose for which the Legislature created the statute and produces haunting constitutional and practical problems.

I. Legislative intent to dispose of frivolous SLAPP suits

In 1994, the Legislature enacted the anti-SLAPP statute, G.L. c. 231, §59H, to address what it perceived as “a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.”² The target of the anti-SLAPP statute is the meritless, disfavored SLAPP suit filed to deter citizens from exercising their right to petition or to punish them for doing so.³ The objective of a SLAPP suit is not to win, but to intimidate an opponent’s exercise of petitioning rights.⁴ The relevant inquiry under the anti-SLAPP statute should be whether the *lawsuit*, not a single claim, should be dismissed. When a lawsuit is based on something more or other than petitioning activity, it is — by definition — not a SLAPP suit and it should be permitted to proceed.

When the Supreme Judicial Court examined the anti-SLAPP statute for the first time in *Duracraft Corp. v. Holmes Prod. Corp.*,⁵ the Court acknowledged the constitutional “conundrum” created by the literal language of the statute: “By protecting one party’s exercise of its right to petition . . . the statute impinges on the adverse

party’s exercise of its right to petition. . . .”⁶ The Court noted that although the purpose of the anti-SLAPP statute was “to dispose expeditiously of meritless lawsuits that may chill petitioning activity,” the language of the statute failed to track or implement this objective and, as written, ignored potential uses of the statute in litigation vastly different from the typical SLAPP suit.⁷

To avoid constitutional problems, the Court fashioned a two-prong inquiry for anti-SLAPP motions. The first prong of that inquiry requires a special movant “to make a threshold showing through the pleadings and affidavits that the claims against it are ‘based on’ the petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities.”⁸ It is only if the special movant makes this showing that the burden shifts to the non-moving party to make the showing set forth in the statute.⁹

The Court intended this two-part test to separate SLAPP suits from meritorious lawsuits and, consistent with legislative intent, to allow dismissal of only the former. When a complaint was based on something more than petitioning activity, the entire complaint was permitted to proceed.¹⁰ The Supreme Judicial Court in *Duracraft* was not faced with the question of how the language of the statute or the Legislature’s stated intent might be squared with an analysis that separately analyzed the basis for each claim of a complaint.

II. The statutory language tracks an “all or nothing” approach

If the Legislature intended the anti-SLAPP statute to be applied to only portions of a lawsuit, it did not evidence that intent in the language it used or the procedures it created in the statute. The statute itself speaks of the “case” and “the claims, counterclaims or cross claims,” (plural) against a party, and not of an individual claim or cause of action that is part of the larger case.¹¹ This reading of the statute is consistent with the fact that the statute automatically halts *all* discovery proceedings until the court rules on the special motion. Consistently, the burden is on the party opposing the special motion to show “good cause” for why it should be allowed to conduct any “specified discovery.”¹² Surely, a party should not be forced to file a motion to obtain discovery on its claims that are *not* the subject of an anti-SLAPP motion. Yet, the practical effect of the statute requires as much. There is no provision in the statute for a partial stay of discovery when a party files a partial special motion or when fewer than all of the claims have any real chance of being dismissed. The Legislature simply did not contemplate a partial motion or a partial win.

The statute’s mandatory fees and costs provision on its face also contemplates an award for a successful special motion and not a “bits and pieces” win. The statute provides: “If the court grants such special motion to dismiss, the court shall award the moving party costs and reasonable attorney’s fees, including those incurred for the special motion and any related discovery matters.”¹³



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If a claim-by-claim analysis is allowed, a party who is only partly successful on a special motion would be entitled to fees and costs for only that portion of the work properly attributed to the successful parts of the motion. How to correctly apportion those fees and costs is likely to be a sorely disputed subject that will require additional litigation and perhaps appellate practice, yet the statute is entirely silent on this subject.¹⁴

In sum, the anti-SLAPP statute's procedural mechanisms are designed to apply to a whole lawsuit and not to each of the claims asserted in a complaint.

III. The *Wenger* illustration

In *Wenger*, plaintiff Dr. Harold Wenger gave his former lawyer, Gregory Aceto, a check for \$10,000 as payment for legal services already performed. When Aceto deposited the check in his bank account, the bank returned the check with a notation of "insufficient funds." Aceto next demanded payment from Wenger in writing, accompanied by a threat that he would file an application for a criminal complaint if payment was not made. Wenger notified Aceto that he intended to assert malpractice claims against him. Two days later, Aceto walked into the Dedham District Court and swore out an application for criminal complaint against his former client for larceny by check. The clerk-magistrate considered the application, held an evidentiary hearing, found there was no probable cause for the complaint to issue and denied the application.¹⁵

Wenger filed suit for abuse of process, malicious prosecution and violation of 93A, alleging that the application for criminal complaint was "baseless and reckless and filed in a transparent attempt to collect a debt."¹⁶ He coupled this with allegations that Aceto had intentionally mishandled his representation to harm him.¹⁷ Aceto filed a special motion to dismiss, alleging the claims against him were based solely on petitioning activity — the filing of the application for criminal complaint. The Superior Court denied the motion, reasoning that there was no arguable legal basis for the criminal complaint because the check was payment for past services and, therefore, did not involve an effort to obtain something of value.¹⁸ By the terms of the anti-SLAPP statute, once the Superior Court entered its order, the automatic stay of discovery lifted and discovery proceeded.¹⁹ At the same time, Aceto appealed and the Supreme Judicial Court *sua sponte* took the appeal from the Appeals Court.²⁰

On appeal, the Supreme Judicial Court vacated the order denying the anti-SLAPP motion as to the abuse of process and malicious prosecution claims. The Court found that those claims were based solely on petitioning activity and that Wenger could not meet his burden of showing the application for criminal complaint was devoid of reasonable legal support by pointing to the fact that the clerk-magistrate found no probable cause to issue a complaint.²¹ The Court, however, affirmed denial of the anti-SLAPP motion with respect to the chapter 93A claim, finding that was a "different matter" because it was based on other allegations, including that Aceto "was negligent, committed legal malpractice, and breached fiduciary duties to [Wenger] in connection with his legal services."²² As part of its order, the Supreme Judicial Court allowed Aceto's request for attorney's fees and costs to the extent they related to the special motion on counts one and two of his amended complaint.²³ The Superior Court later awarded Aceto fees and costs associated with his special motion on counts one and two and for discovery that was conducted *after* the Superior Court's denial of his special motion.²⁴

So, what is the problem?

Wenger's case was not a meritless SLAPP suit. For all of its discussion in *Duracraft* about SLAPP suits and legislative intent, the Court in *Wenger* nevertheless applied the anti-SLAPP statute to a case that simply did not fit within the description of the type of suit the Legislature intended to prevent. Even accepting the Supreme Judicial Court's ruling that two of the three claims Wenger asserted in his complaint were based solely on petitioning activity, the fact that the Court found that the chapter 93A claim was based on something more, fundamentally distinguished Wenger's case from a frivolous SLAPP suit. As such, it simply cannot be said that Wenger filed his case merely to intimidate or chill Aceto's exercise of his right to petition, and there is no basis to conclude that the case as a whole was meritless. There was no way for Wenger to predict that any of his claims would be subject to dismissal under the anti-SLAPP statute; an experienced Superior Court justice found that they were not. When all was said and done with the anti-SLAPP proceedings, Wenger was left with his chapter 93A claim ripe for further litigation. Dismissal of two of Wenger's three claims did not terminate the case, did not even necessarily narrow the scope of discovery needed to adjudicate it, and did not further the Legislature's purpose in enacting the anti-SLAPP statute.²⁵

Applying the procedural mechanisms of the statute in *Wenger* allowed Aceto to significantly interrupt Wenger's ability to pursue all of his claims, including the chapter 93A claim, which ultimately survived both the Superior Court's anti-SLAPP ruling and an appeal. As it turns out, there was no basis for Aceto to seek anti-SLAPP dismissal of the chapter 93A claim, yet discovery on *all* claims was stayed until the Superior Court entered its order denying the anti-SLAPP motion and an expensive and lengthy appeal on *all* claims followed.

The encroachment on Wenger's right to petition went even farther than it might have in a typical case. After he defeated the anti-SLAPP motion in Superior Court, Wenger was finally able to conduct discovery on his claims. As it turns out, however, he did so at his own peril. The statute allows for fees and costs associated with the special motion to dismiss and "related discovery," which is undefined.²⁶ Once the Supreme Judicial Court reversed the Superior Court on counts one and two, the Superior Court awarded Aceto attorneys' fees and costs associated with the discovery conducted after the Superior Court's ruling. If the Superior Court's fee award in *Wenger* stands after appeal, the message to litigants will be that it is unsafe to proceed with discovery until the appeal process is completed for fear that some or all of the Superior Court ruling may be reversed. Partial dismissal makes this problem even more difficult. In such instances, parties are forced to litigate not only how much of the work done on a special motion itself should be awarded when only some claims are dismissed, but such things as how much of each deposition taken was spent dealing with the dismissed versus surviving claims. Like Wenger, litigants likely will find themselves in front of the appellate courts more than once just to resolve anti-SLAPP issues.²⁷

IV. Conclusion

The *Wenger* case is only one illustration of the problems with a piecemeal anti-SLAPP approach, and it is by no means a perfect example. To date, the courts have not squared the language and purpose of the anti-SLAPP statute with a claim-by-claim application of the statute and its sweeping procedural mechanisms. De-

spite its noble beginnings, the statute has already become — somewhat ironically — a costly and abusive litigation device which has undoubtedly spawned far more litigation than it has saved.²⁸ Although the Supreme Judicial Court has rejected a literal reading of the statute and has tried to balance competing petitioning rights, by silently endorsing piecemeal application of the statute, the Court has given litigants yet one more way to use the anti-SLAPP statute to delay and obstruct meritorious lawsuits.²⁹

Endnotes

1. *Wenger v. Aceto* 451 Mass. 1 (2008). SLAPP stands for “Strategic Litigation Against Public Participation.”

2. Preamble to 1994 House Doc. 1520. *See also Kobrin v. Gastfiend*, 443 Mass. 327, 331 (2005) (Legislature enacted the anti-SLAPP statute “to provide a quick remedy for those citizens targeted by frivolous lawsuits based on their government petitioning activities.”).

3. “SLAPPS are by definition meritless suits.” *Duracraft Corp. v. Holmes Products Corp.*, 427 Mass. 156, 164 (1998) (quoting Barker, Common Law and Statutory Solutions to the Problems of SLAPPS, 26 Loy. L.A. L. Rev. 395, 399 (1993)). The statute’s legislative history reveals that the typical mischief that the anti-SLAPP statute was intended to remedy was lawsuits directed at individual citizens of modest means for protesting development projects. *Plante v. Wylie*, 63 Mass. App. Ct. 151, 156 (2005) (citing *Kobrin*, 443 Mass. at 336 and *Office One, Inc. v. Lopez*, 437 Mass. 113, 121-122 (2002)).

4. *Duracraft*, 427 Mass. at 161 (citing *Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 816-17 (1994) (in turn, citing Pring, SLAPPS: Strategic Lawsuits Against Public Participation, 7 Pace Env’tl. L. Rev. 3, 5-6, 9 (1989))).

5. 427 Mass. 156 (1998).

6. *Id.* at 166.

7. *Id.* at 163, 166.

8. *Id.* at 167-168.

9. *Id.* at 168.

10. *See, e.g., Ayasli v. Armstrong*, 56 Mass. App. Ct. 740, 748-49 (2002) (opposition to redevelopment project before town boards was protected petitioning activity; harassing signs and threats to disrupt project were not; entire complaint permitted to go forward); *Garabedian v. Westland*, 59 Mass. App. Ct. 427, 432 (2003) (enlisting neighborhood opposition to development project protected; harassing truck drivers and intimidating them was not; entire complaint allowed to go forward).

11. M.G.L. c. 231, §59H.

12. *Id.*

13. *Id.*

14. In *Fabre v. Walton*, the Supreme Judicial Court recognized a right of interlocutory appeal from the denial of a special motion to dismiss. 436 Mass. 517, 521-22 (2002).

15. *Wenger*, 451 Mass. at 2-3 & n.4.

16. *Id.* at 8 (quotations omitted). *Wenger* originally filed abuse and

process and malicious prosecution claims, but amended as of right to add a chapter 93A claim.

17. *Id.*

18. *Id.* at 7.

19. M.G.L. c. 231, §59H.

20. *Wenger*, 451 Mass. at 2.

21. *Id.* at 8. The Court explained that the law did not definitively foreclose the ability to seek a larceny by check based on past services. *Id.*

22. *Id.* at 8-9.

23. *Id.* at 9 n. 10. In accordance with this ruling, Aceto later obtained some portion of the fees and costs he sought relative to his appeal.

24. Order dated August 28, 2008 (Sanders, J.), *Wenger v. Aceto*, Civil Action No. 2008-00156 (Norfolk Superior Court). The matter of fees is currently on appeal. *See Wenger v. Aceto*, Appeals Court No. 2008-P-1780.

25. Indeed, while the Supreme Judicial Court found that the abuse of process and malicious prosecution claims were distinct, the facts underlying the chapter 93A claim were part and parcel of the process-related torts and provided proof of the coercive nature of Aceto’s filing. In *Adams v. Whitman*, 62 Mass. App. Ct. 850 (2005), the Appeals Court recognized that process-based torts are, by definition, based on petitioning activity, but held that where the process invoked is itself coercive or promotes and ulterior advantage, an abuse of process claim will survive the first prong of the anti-SLAPP analysis. *Id.* at 857. *Wenger*’s claims reflect precisely the criteria set forth in *Adams*. The chapter 93A claim placed Aceto’s application for criminal complaint in the context of an attorney who charged too much money for work that was substandard, persistently placed his own interest above those of his client, engaged in a pattern of misrepresentation concerning both the quality and amount of the legal work he did, and then dragged his client into a criminal proceeding when the client did not pay the bill. In the face of these allegations, the abuse of process claim could not be deemed meritless. *See id.* at 856 (citing *Carroll v. Gillespie*, 14 Mass. App. Ct. 12, 26 (1982) (initiating process alone was so coercive and promoting of ulterior advantage that it supported an abuse of process claim)).

26. M.G.L. c. 231, §59H.

27. These problems can never truly be addressed unless those seeking to invoke the anti-SLAPP statute face some potential downside if they file frivolous special motions. Until that time, there is nothing to stop parties from filing blanket special motions even when they know that less than all (or maybe none) of the claims are based on petitioning activity. In some states, fees are available to an opposing party where an anti-SLAPP motion is found to be frivolous. *See, e.g.* Cal. Civ. Proc. Code §425.16(c).

28. A search for “anti-SLAPP” in Massachusetts federal and state cases in LEXIS yielded 155 results. This number includes only those cases that are published on LEXIS and does not account for unpublished or unwritten decisions of the Superior Court that are not in the LEXIS database.

29. Certainly, there is a strong temptation to allow parties to seek and obtain dismissal of fewer than all claims under the anti-SLAPP statute when, for example, a plaintiff tacks onto its complaint a single factually-distinct claim based solely on petitioning activity. Fundamentally, however, the anti-SLAPP statute as conceived of, and as written in its current form, was not designed to provide for partial dismissal and as shown in *Wenger* is ill-suited for it.

MIRANDA WARNINGS: THE LATEST RESEARCH AND ITS IMPLICATIONS

By Eric Y. Drogin

In the landmark case of *Miranda v. Arizona*¹, the Supreme Court of the United States paved the way for a litany of warnings that are familiar to virtually anyone who watches television or attends the movies. Less familiar — to lawyers and judges, as well as to the public at large — is the fact that the specific wording of these warnings was never prescribed by *Miranda* and varies widely across jurisdictions. Prosecutors and defense counsel alike need to understand how *Miranda* language can affect their cases and how to obtain and utilize the proper expertise for establishing or questioning the validity of a given defendant's *Miranda* waiver.

The legal background

Miranda never mandated that an arresting officer must state, in the following exact words: "You have the right to remain silent. Every word you say can and will be used against you" Instead, Chief Justice Warren's majority opinion called for the use of "clear and unequivocal terms" to convey the various components of this warning,² adding that a "fully effective equivalent" to the decision's sample wording would also suffice.³ The Court later confirmed this distinction by supporting the use of "the now familiar *Miranda* warnings ... or their equivalent"⁴ and by noting with approval that other courts "have not required a verbatim recital of the words of the *Miranda* opinion."⁵

In Massachusetts, the reliability of a *Miranda* waiver is determined by considering "all of the relevant circumstances surrounding the interrogation and the individual characteristics and conduct of the defendant."⁶ In order to judge an interrogation appropriately, lawyers and courts should both identify the *actual language* used to articulate the *Miranda* rights and determine the individual defendant's capacity to perceive, retain and process that specific information. The commonwealth bears the burden of establishing beyond a reasonable doubt that the defendant's *Miranda* waiver was voluntary, knowing and intelligent.⁷

The research

The leading scientific authority on the linguistic variability and impact of *Miranda* warnings is forensic psychologist — and

Massachusetts native — Professor Richard Rogers. Rogers and his colleagues have obtained some critical findings in this area:

1. A review of cases from 945 federal, state, and county jurisdictions revealed that 866 different versions of *Miranda* warnings had been given, ranging in length from 21 to 408 words and demanding a level of comprehension that ranged from the second grade to post-college.⁸
2. An assessment of 107 defendants with mental disorders indicated that the 25 percent who were most impaired only understood about 24 percent of *Miranda* warnings, while the 25 percent who were least impaired could comprehend only about 66 percent of these warnings.⁹
3. An analysis of 121 Spanish translations of *Miranda* warnings revealed numerous omissions and mischaracterizations, including the absence of such key elements as the rights to silence and counsel, and the presence of "dissimilar content with a substantial trend toward more information in English than [in] Spanish versions."¹⁰
4. A comparison of juvenile and adult *Miranda* warnings surprisingly found that the juvenile warnings tended to be over 50 words *longer*, ranging from 52 to as many as 526 words longer than the adult versions, and featuring correspondingly *higher* required reading levels.¹¹

Such findings tend to refute what have been described as common "*Miranda* myths": "Everyone already knows the *Miranda* warnings"; "*Miranda* warnings are the same wherever you go"; "While *Miranda* warnings are easy to understand, juvenile warnings are very easy to understand"; and "*Miranda* warnings delivered in Spanish are the same as those delivered in English."¹² Contrary to these notions, the latest research suggests that attorneys, judges, and experts should examine both the specific content of given warnings as well as any cognitive shortcomings of the defendant.

The evaluation

Developing a comprehensive forensic psychological test to assess *Miranda* language difficulties across jurisdictions has been problematic. The use of one pioneering group of measures — collectively described in various appellate decisions as the "Grisso Test" or "Grisso Instrument"¹³ — was hamstrung from the outset by the presumption that "to the best of our knowledge, the wordings which we used are employed identically or with slight variations in most other jurisdictions."¹⁴ As a result, "*Miranda* research for ... two decades implicitly assumed the general uniformity of *Miranda* warnings."¹⁵ In recent years, these measures have encountered admissibility difficulties in a number of jurisdictions, including New York,¹⁶ Connecticut¹⁷ and Florida.¹⁸



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More recently, Rogers and his colleagues have developed and initially validated a *Miranda* Vocabulary Scale (MVS) that accounts for language differences in the warnings and reflects “key vocabulary words found in *Miranda* warnings across American jurisdictions.”¹⁹ However, there can be no single measure that can function as an “independent, fully comprehensive determinant of a defendant’s state of mind in regard to confession evidence.”²⁰

A properly trained forensic evaluator would seek out the precise wording of the *Miranda* warning administered in a given case. Initially, the warning should be analyzed to determine the overall level of difficulty it represents, using a Flesch-Kincaid estimate²¹ or similar methodology. Once the evaluator knows the degree of difficulty presented by the warning, he or she must then assess the defendant’s oral and reading comprehension, using a measure such as the Peabody Picture Vocabulary Test (PPVT4) or Wide Range Achievement Test (WRAT4).

This crucial testing should occur within the context of a full clinical examination that ascertains general intelligence, identifies interfering psychiatric conditions, screens for neuropsychological dysfunction, and assesses the potential for malingering. To place these examination results in context, the evaluator must review whatever treatment, correctional, educational, arrest, employment and other records can be obtained. The evaluator should explore two main questions: has the defendant been exposed to *Miranda* warnings on other occasions in the past?,²² and do obtained results reflect an ongoing pattern of impairment or do they instead appear to have surfaced all too conveniently at the same time that the defendant was most recently examined?

The forensic evaluator should also conduct an interview that investigates the defendant’s recollection of the nature of the interrogation that produced the *Miranda* waiver, and whether the defendant was, for example, intoxicated, malnourished or sleep-deprived.²³ A competent and persuasive forensic opinion will reflect that the evaluator compared the actual *Miranda* warnings to the defendant’s individual skills, deficits and mental condition, with particular attention to the same “totality of the circumstances” test as that employed by the legal system for which the evaluation was conducted.²⁴ Overall, “without appropriately broad psychometric investigation, such evaluations are likely to face robust *Daubert* challenges to admissibility in both state and federal courts.”²⁵

Conclusion

Counsel cannot afford to presume that every *Miranda* warning employs the same language that we find in countless films and television programs, or even in the *Miranda* case itself. If the words are different, meaning and clarity are likely to be different as well. Things can become even more complicated when evaluating a mentally ill, cognitively challenged, youthful or primarily non-English speaking defendant. Under these circumstances, counsel may need to procure a comprehensive and competent forensic mental health evaluation in order to raise any doubts regarding the validity of the given warnings. Such considerations are of equal value to prosecutors who seek to underscore the sufficiency of a particular *Miranda* waiver.

Endnotes

1. *Miranda v. Arizona*, 384 U.S. 436 (1966).
2. *Id.* at 467-68.
3. *Id.* at 476.

4. *Rhode Island v. Innis*, 446 U.S. 291, 297 (1980).
5. *California v. Prysock*, 453 U.S. 355, 360 (1981).
6. *Commonwealth v. Selby*, 420 Mass. 656, 663, 651 N.E.2d 843, 848 (1995).
7. *See, e.g., Commonwealth v. Jackson*, 432 Mass. 82, 85, 731 N.E.2d 1066, 1070 (2000); *Commonwealth v. Day*, 387 Mass. 915-921, 444 N.E.2d 384, 387 (1983).
8. Richard Rogers et al., *The Language of Miranda in American Jurisdictions: A Replication and Further Analysis*, 32 LAW & HUM. BEHAV. 124 (2008).
9. Richard Rogers et al., *Knowing and Intelligent: A Study of Miranda Warnings in Mentally Disordered Defendants*, 31 LAW & HUM. BEHAV. 401 (2007); *see also* Virginia G. Cooper & Patricia A. Zapf, *Psychiatric Patients’ Comprehension of Miranda Rights*, 32 LAW & HUM. BEHAV. 390 (2008). Most participants in the Rogers et al. study (71.0%) were diagnosed with such psychotic disorders as Schizophrenia, Schizoaffective Disorder, and Psychotic Disorder NOS (Not Otherwise Specified). Other, sometimes overlapping conditions included Polysubstance Abuse/Dependence (36.4%) and Bipolar Disorder (9.3%). Social scientists have also focused on the difficulties that persons with Mental Retardation may experience when confronted with *Miranda* warnings. *See, e.g.,* Solomon F. Fulero & Caroline Everington, *Assessing Competency to Waive Miranda Rights in Defendants with Mental Retardation*, 19 LAW & HUM. BEHAV. 533 (1995); Solomon F. Fulero & Caroline Everington, *Assessing the Capacity of Persons with Mental Retardation to Waive Miranda Rights: A Jurisprudential Therapy Perspective*, 28 LAW & PSYCHOL. REV. 53 (2004); Michael J. O’Connell et al., *Miranda Comprehension in Adults with Mental Retardation and the Effects of Feedback Style on Suggestibility*, 29 LAW & HUM. BEHAV. 359 (2005).
10. Richard Rogers et al., *Spanish Translations of Miranda Warnings and the Totality of the Circumstances*, 33 LAW & HUM. BEHAV. (forthcoming 2009).
11. Richard Rogers et al., *The Comprehensibility and Content of Juvenile Miranda Warnings*, 14 PSYCHOL. PUB. POL’Y & L. 63 (2008).
12. Richard Rogers, Daniel W. Shuman & Eric Y. Drogin, *Miranda Rights ... and Wrongs: Myths, Methods, and Model Solutions*, 23 CRIM. JUST. 5, 5-8 (2008).
13. These tests include the Comprehension of *Miranda* Rights (CMR), Comprehension of *Miranda* Rights - Recognition (CMR-R), Comprehension of *Miranda* Vocabulary (CMV), and Function of Rights in an Interrogation (FRI).
14. THOMAS GRISSO, JUVENILES’ WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 49 (1981).
15. Richard Rogers, *A Little Knowledge is a Dangerous Thing ... Emerging Miranda Research and Professional Roles for Psychologists*, 63 AM. PSYCHOL. 776, 778 (2008); *see also* Richard Rogers, Mandy J. Jordan & Kimberly S. Harrison, *A Critical Review of Published Competency-To-Confess Measures*, 28 LAW & HUM. BEHAV. 707 (2004).
16. The Court stated that the result obtained by the “Grisso Test” was “undermined by significant differences between the vocabulary used in the test and that used in the actual warnings given to the defendant.” *People v. Hernandez*, 846 N.Y.S.2d 371, 373 (N.Y. App. Div. 2007). *See also People v. Cole*, 807 N.Y.S.2d 166, 170 (N.Y. App. Div. 2005).
17. The Court stated that the trial court had “reasonably found,” based upon “due consideration” of expert testimony, that “the Grisso protocol had not been critically evaluated by Grisso’s peers and that it had not been generally accepted as scientifically valid.” *State v. Griffin*, 273 Conn. 266, 285, 869 A.2d 640, 651 (2005).
18. The Court stated that “with respect to the Grisso Test results, the trial court properly found that the defense had not laid an adequate foundation” to satisfy relevant admissibility standards. *Carter v. State*, 697 So.2d 529, 533 (Fla. Dist. Ct. App. 1997).

19. Richard Rogers et al., *Development and Initial Validation of the Miranda Vocabulary Scale*, 33 LAW & HUM. BEHAV. (forthcoming 2009).

20. JOHN PARRY & ERIC Y. DROGIN, MENTAL DISABILITY LAW, EVIDENCE AND TESTIMONY 127 (2007).

21. Rogers et al., *supra* note 11.

22. Prior instances of receipt and acknowledgement of *Miranda* rights and overall criminal justice system experience are pertinent in determining the voluntariness of a defendant's most recent waiver. *See, e.g., Commonwealth v. Garcia*, 443 Mass. 824, 833, 824 N.E.2d 864, 871 (2005).

23. The courts must exercise special care in analyzing *Miranda* waiver competency when evidence indicates the defendant may have been intoxicated. *Commonwealth v. Silanskas*, 433 Mass. 678, 682, 746 N.E.2d 445, 453 (2001).

24. *See Commonwealth v. Edwards*, 420 Mass. 666, 670, 651 N.E.2d 398, 401 (1995).

25. JOHN PARRY & ERIC Y. DROGIN, CRIMINAL LAW HANDBOOK ON PSYCHIATRIC AND PSYCHOLOGICAL EVIDENCE AND TESTIMONY 116 (2000).

A REFRESHER ON PROBATION LAW AND PROCEDURES

By Michael Fabbri

Introduction

The convergence of the commonwealth's already overextended criminal detention system with the present economic downturn will undoubtedly result in further overcrowded conditions. Due to this disproportionate burden on prisons, there will likely be increased scrutiny on decisions to turn probationers into prisoners. In other words, there will be institutional pressure for all the stakeholders in the probation system to "get it right." Already, some practitioners are seeing — in Middlesex County and no doubt elsewhere — increased requests by probation departments for assistance by prosecutors in handling probation violation matters to address the procedural and substantive issues typically raised during these hearings.¹ The unique mechanisms involved in the review and potential revocation of probation during these hearings bear repeating.

The general authority to impose probation and conditions

The authority of a court to impose probation flows generally from its broad sentencing power,² and more specifically, from a number of probation-related statutes.³ When ordering probation, a court can impose conditions that "may include, but shall not be limited to, participation by said person in specified rehabilitative programs or performance by said person of specified community service work for a stated period of time."⁴ In the Superior Court, the conditions must at a minimum include compliance with all court orders, periodic and prompt reporting to probation, seeking and maintaining employment, providing support to one's dependents, and obeying all criminal laws, ordinances and regulations.⁵ A "supervision" or "administrative" fee must also be assessed on each probationer.⁶ Furthermore, the conditions of probation may be modified by a judge where there is a change in circumstances and where the modification does not amount to a new punishment.⁷ The length of the probationary period may be for whatever period of time the court, in its discretion, deems "appropriate" or "proper."⁸ The time period may be later extended, but only if it is

done within the original period or within a reasonable time after the end of the probation.⁹

Only a judge may set the conditions of probation, not a probation officer.¹⁰ The conditions of probation should be primarily directed at the rehabilitation of the probationer and the protection of the public, but they may also serve the goals of punishment, deterrence and retribution.¹¹ Even conditions that affect legal or constitutional rights may be imposed, so long as they are adequately clear and not "vague."¹² For example, a court may impose a condition that no alcohol may be consumed even where alcohol was not a factor in the case¹³ and can require the probationer to participate in sex offender treatment even though a probationer may be required by the treatment provider to make admissions of criminal behavior.¹⁴ The court can also restrict a probationer's association with certain persons or groups of people,¹⁵ though a restriction prohibiting a defendant from entering the Commonwealth would generally be invalid.¹⁶

Violation of probation procedures: Notice, hearing and standard of proof

By and large, probation violation proceedings¹⁷ are governed by court rules. While a number of statutes set forth the general power of the courts to impose and revoke probation, court rules provide the authority for probation officers to arrest for alleged violations.¹⁸ The rules also detail the step-by-step process involved in initiating, deciding and disposing of an alleged probation violation, whether it be based upon a new criminal charge or a broken condition of probation. A sizable body of case law (some of which is discussed in this article) has helped refine and fine tune the process.

A probation violation proceeding may be initiated when a probation department issues and serves a written notice on a probationer¹⁹ at his or her arraignment on a new criminal charge.²⁰ The notice must be given in hand, state the nature of the new criminal violation, and specify the date, time and place of the hearing for the alleged violation (no sooner than seven and generally within 30 days of the service of notice).²¹ If the arraignment takes place in the court in which the probationer is on probation, the hearing normally will be held on the pretrial conference date scheduled for the new offense.²² Otherwise, the arraignment court will notify the probation court of the new charges and will schedule a hearing in the probation court for the appointment of counsel²³ and commencement of violation proceedings in that court (giving notice of the same to the probationer).²⁴

The notice procedure is somewhat different if the basis of the alleged violation is non-criminal behavior that amounts to a breach of a condition of probation or other misconduct.²⁵ In such cases, a written notice is served in hand or mailed first class (returned receipt) to the probationer setting forth the condition(s) alleged to have been violated and indicating the date, time and place of the hearing for the appointment of counsel and scheduling of a violation proceeding.²⁶ At this first appearance date, the probation violation hearing generally will be scheduled for between seven and 30 days after the initial appearance.²⁷ While a continuance may be



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granted for good cause shown, it may not be granted because of the pendency of an underlying criminal case, and no general continuances are permitted.²⁸

At the probation violation hearing, the court must determine two separate and distinct issues: first, whether a violation in fact has occurred; and if so, what disposition should be imposed.²⁹ All testimony at the hearing must be presented under oath.³⁰ The probation officer is responsible for the presentation of the case with or without the assistance of the local district attorney.³¹ Both the probation department and the probationer may present evidence, cross-examine witnesses and make closing statements.³² Most importantly, the burden of proof is on the probation officer to prove that the violation occurred by a preponderance of the evidence.³³

Notably, the rules of procedure contain a separate section governing the admissibility of hearsay evidence at a probation violation proceeding, and it is an area of probation law that has been widely litigated.³⁴ In general, the rules permit the introduction of hearsay evidence, much of which in the normal course is typically not subject to a dispute about reliability or veracity.³⁵ However, where the *sole* basis for the violation is hearsay, the rule specifically excludes the proffered evidence unless the court *in writing* finds that the evidence is “substantially trustworthy and demonstrably reliable.”³⁶ The rule imposes an *additional* requirement that where the violation is based upon criminal conduct, the probation officer must show “good cause” for proceeding without the witness who has personal knowledge of the proffered evidence.³⁷

Dispositions

If, after a hearing as outlined above, the court has found that a factual basis for a violation has been proven, the court must next exercise its considerable discretion and determine whether revocation of probation is warranted or whether some other action is more appropriate given the facts of the violation and personal circumstances of the probationer.³⁸ The court must make express findings of fact and enter them on the record in writing, detailing the evidence relied upon for its decision.³⁹ It must give the probationer an opportunity to present evidence and to propose “dispositional terms.”⁴⁰ Thereafter, the court must impose one of the following dispositions (taking into consideration the probation officer’s recommendation, public safety, victim impact and other specified factors⁴¹):

- a) continue the terms of probation as it deems appropriate;
- b) terminate the probationary conditions and period;
- c) modify the probationary terms, including adding conditions and/or extending the term of probation; or
- d) revoke the probation, stating the reasons why in writing.⁴²

If the court orders that probation be revoked, the court shall order the execution of any suspended sentence then in effect be imposed, or, if no sentence was imposed after the probationer’s conviction on the underlying offense, the court shall impose any sentence authorized by law.⁴³ Either party aggrieved by the decision of the court may take a direct appeal to the Appeals Court by filing a notice of appeal within 30 days of the court’s action.⁴⁴

Conclusion

The aim of probation, among other things, is to provide the framework for the encouragement and enforcement of rehabilita-

tive efforts extended to or imposed upon those previously adjudicated responsible for criminal wrongdoing. In many instances it provides a necessary safety net to probationers as they negotiate the road toward a crime-free future.⁴⁵ Given the importance of this indispensable judicial tool, there can be little doubt that “probation violation proceedings” are among the most significant matters handled by the courts of the commonwealth.⁴⁶ Indeed, these proceedings afford both substantive and procedural due process protections to probationers, provide an expeditious means of addressing missteps — both small and large — by probationers, and help ensure continued public trust and confidence in the judicial system’s ability to respond appropriately to alleged probation violations.⁴⁷

For probation violation proceedings to remain credible, *probationers* must believe that not only will they be treated fairly if they transgress, but that the citizenry expects that their probation cases will be processed swiftly and appropriately based on the nature and extent of the violation at issue. Most importantly, judges, probation officers and the public need to understand and trust that *criminal practitioners* — prosecutors and defense counsel — are up to the task of ably and zealously representing their respective clients whose rights and interests are at stake. The former is in place and rests on a firm foundation of established rules and reasoned case law. The latter is up to the dedication, commitment and interest of the members of the criminal bar.

Endnotes

1. Dist. Ct. R. Prob. Viol. Proc. 5(f) permits prosecutors to aid, but not interfere with, probation officers in their presentation of probation cases to the court; *see also* BMC Standing Order 2-04 VI(f); *Commonwealth v. Negron*, 441 Mass. 685, 686-87 (2004) (stating that the separation of powers doctrine allows “an assistant district attorney [to] participate in probation hearings by providing legal representation to the probation department without interfering with that department’s internal functioning”); *Commonwealth v. Tate*, 34 Mass. App. Ct. 446, 447-48 (1993) (same).

2. *See e.g.*, *Commonwealth v. Power*, 420 Mass. 410, 413-14 (1995).

3. M.G.L. c. 276, § 87 (2008) (authorizing a district, juvenile, or superior court to place a defendant on probation “after a finding or verdict of guilty”); M.G.L. c. 279, §§ 1, 1A (2008) (deciding that a court may place on probation any defendant who has received a suspended sentence, a fine, or a stay of the execution of a sentence); M.G.L. c. 119, § 58 (2008) (allowing any child adjudicated as a “youthful offender” to be placed in the care of a probation officer until the age of twenty-one).

4. M.G.L. c. 276, § 87A (2008) (indicating that such conditions are applicable to probation imposed pursuant to M.G.L. c. 119, § 58, M.G.L. c. 276, § 87, and M.G.L. c. 279, §§ 1 and 1A).

5. Superior Court Rule 56.

6. M.G.L. c. 276, § 87A (2008) (stating that probation fees may only be waived after hearing and written finding of “undue hardship” due to limited income, employment status, or any factor).

7. *See, e.g.*, *Commonwealth v. Morales*, 70 Mass. App. Ct. 839, 843-44 (2007) (finding that where the defendant was a convicted child sex offender, and there was a material change in circumstances after sentencing by him being designated a “sexually dangerous person,” the added condition that the defendant not reside near minor children was “not so drastic” to constitute a changed sentence and was a reasonable non-punitive measure consistent with the original terms of his sentence); *Buckley v. Quincy Div. of Dist. Ct. Dep’t*, 395 Mass. 815 (1985) (reaffirming that, as a matter of established common law, terms and conditions of probation may be modified from time to time “as a proper regard for the welfare, not only of the defendant, but of the community...” (internal quotation and citation omitted)).

8. M.G.L. c. 119, § 58 (2008) (“for such time and on such conditions as it deems appropriate”); M.G.L. c. 276, § 87 (2008) (“for such time and on such conditions as it deems proper”); *see also* M.G.L. c. 279, §§ 1, 1A (2008) (“for such time and on such terms and conditions as it shall fix”),

9. *Commonwealth v. Mitchell*, 46 Mass. App. Ct. 921, 922 (1999) (further appellate review denied) (“[T]he court’s power to extend or revoke a defendant’s probation after the expiration of its original term because of the defendant’s failure to comply with one or more of the conditions of his probation . . . during the term turns on whether both the probation officer and the court act with reasonable promptness in light of all the circumstances of the particular case, including the possibility of specific prejudice to the defendant resulting from delay in bringing matters to a head.”). *Compare id.* (deeming a two and one-half year lapse of time to take action on a probation violation unreasonable) *with Commonwealth v. Sawicki*, 369 Mass. 377, 384-87 (1975) (deeming reasonable a six month delay from end of probation until extension). *See generally*, M.G.L. c. 279, § 1 (2008); M.G.L. c. 119, § 59 (2008); Superior Court Rule 57.

10. *Commonwealth v. MacDonald*, 50 Mass. App. Ct. 220, 223 (2000) (“[I]t is the function of the sentencing judge to set the conditions of probation.” (internal quotations and citations omitted)); *see also Commonwealth v. McDonald*, 435 Mass. 1005, 1006-1007 (2001) (holding that a probation officer could not expand the terms of probation by adding a “no contact” order” to the “stay away” order imposed by the sentencing judge); *Commonwealth v. Lally*, 55 Mass. App. Ct. 601, 603 (2002) (holding that the defendant could not be found in violation of the terms of his probation for refusing to undergo random drug screens as required by his probation officer where the sentencing court only imposed the condition of substance abuse treatment if necessary).

11. *Commonwealth v. Power*, 420 Mass. 410, 414-15 (1995) (reaffirming the multiple goals of probation).

12. *Id.* (upholding the special condition that the probationer not profit from the sale of her story despite the potential First Amendment implications).

13. *Commonwealth v. Williams*, 60 Mass. App. Ct. 331, 332 (2004) (finding that because it was related to the goals of probation, the condition that the probationer refrain from any use of alcohol was valid despite the fact that his criminal case did not involve any evidence of his alcohol use or abuse

14. *Commonwealth v. Brescia*, 61 Mass. App. Ct. 908, 909 (2004) (stating that although the probationer was required to attend sex offender treatment as a condition of his probation and despite the fact that the treatment provider could terminate him for refusing to make admissions of criminal conduct, the condition did not amount to compelled self-incrimination because revocation of his probation was not an automatic result of his refusal to make those admissions).

15. *Commonwealth v. Lapointe*, 435 Mass. 455, 459 (2001) (upholding probation condition preventing the probationer from living with any of his minor children, current or future, even though it affects his right to association because the condition was reasonably related to the goals of probation; *see also Commonwealth v. Kendrick*, 446 Mass. 72, 75-77 (2006) (upholding condition that the probationer have no contact with children under 16 and that he avoid any locations where he might come into contact with children under 16).

16. *Commonwealth v. Pike*, 428 Mass. 393, 401-05 (1998) (stating that conditions that infringe on constitutional rights must be reasonably related to the goals of probation and banishment from the state does not relate to any of the goals of probation).

17. The commentary to Rule 1 of the District Court Rules for Probation Violation Proceedings aptly makes the distinction between referring to the proceedings as “violation proceedings” and not “revocation proceedings.” Correctly, the author of the commentary points out that referring to the proceedings as “revocation proceedings” presupposes that a violation has in fact occurred and that a revocation determination is the only is-

sue being adjudicated. Indeed, the purpose of a probation proceeding is to decide *first* if a violation has occurred and *then* whether probation should be revoked or altered. Accordingly, the rules and this article refer to the process as “probation violation proceedings.”

18. *See* M.G.L. c. 119, § 58 (2008); M.G.L. c. 276, §§ 83-103 (2008); and M.G.L. c. 279, §§ 1, 1A (2008).

19. The same general rules apply whether the probation order was imposed after a finding of guilt or a continuance without a finding but not when pretrial probation is imposed. Dist. Ct. R. Prob. Viol. Proc. 1.

20. Dist. Ct. R. Prob. Viol. Proc. 3 (b). It is also important to note that the district court rules provide that upon a finding of probable cause that a probationer has violated a condition of probation and that he or she should be held in custody pending a hearing, the probationer shall *not* be admitted to bail. *See* Dist. Ct. R. Prob. Viol. Proc. 8 (d). In contrast, the BMC rules *permit* alleged probation violators to be admitted to bail in the discretion of the court. *See* BMC Department Standing Order 2-04 V (a).

21. *Id.*

22. *Id.*

23. A probationer facing a potential violation has a right to counsel. *Commonwealth v. Faulkner*, 418 Mass. 352, 359-360 (1994).

24. Dist. Ct. R. Prob. Viol. Proc. 3 (c). The district attorney’s office must also receive notice of all probation violation proceedings so that it may exercise its statutory rights and fulfill its statutory obligations. *See* M.G.L. c. 258B § 3; M.G.L. c. 279, § 3 (2008); Dist. Ct. R. Prob. Viol. Proc. 3 (b), (c); Dist. Ct. R. Prob. Viol. Proc. 4 (b).

25. This decision may be made by a probation officer “in accordance with the rules and regulations of the Office of the Commissioner of Probation” or by a judge or the court supervising the probationer. Dist. Ct. R. Prob. Viol. Proc. 4 (b). On a related issue, the Appeals Court held that a probation violation and revocation was properly based upon non-criminal conduct committed by the defendant before the official start of his probation but while he was serving a preceding committed sentence. *Commonwealth v. Ruiz*, 71 Mass. App. Ct. 578, 582-85 (2008) (“That certain conditions activate upon the defendant’s release to probation after a prison term does not mean that, upon the sentencing orders being imposed, certain other probationary conditions are not immediately activated and in effect during a prison sentence as well as in the subsequent, post-prison probationary term.”).

26. Dist. Ct. R. Prob. Viol. Proc. 4 (c).

27. Dist. Ct. R. Prob. Viol. Proc. 4 (d).

28. Dist. Ct. R. Prob. Viol. Proc. 5 (e); Dist. Ct. R. Prob. Viol. Proc. 7 (a).

29. Dist. Ct. R. Prob. Viol. Proc. 5 (b); *see also Commonwealth v. Arroyo*, 451 Mass. 1010, 1011 (2008).

30. Dist. Ct. R. Prob. Viol. Proc. 5 (a).

31. Dist. Ct. R. Prob. Viol. Proc. 5 (c).

32. *Id.* Additionally, because a probationer has a liberty interest at stake, due process requires advance “disclosure of the evidence against him or her.” *Commonwealth v. Wilcox*, 446 Mass. 61, 66 (2006). It would appear, at a minimum, this discovery would include names, addresses and dates of birth of witnesses to be called, any police reports, copies of all documents to be introduced at the hearing, and any exculpatory evidence available.

33. *Id.*; *see also Commonwealth v. Holmgren*, 421 Mass. 224, 225-28 (1995) (holding that a probation violation may be based upon evidence of a criminal violation even if the defendant has been acquitted of the charge because proof that a violation has occurred must only be proven by a preponderance, where a criminal conviction requires proof beyond a reasonable doubt).

34. Dist. Ct. R. Prob. Viol. Proc. 6; *see generally Commonwealth v. Harrigan*, 53 Mass. App. Ct. 147 (2001); *Commonwealth v. Calvo*, 41 Mass. App. Ct. 903 (1996); *Commonwealth v. Joubert*, 38 Mass. App. Ct. 943 (1995); *Commonwealth v. Delaney*, 36 Mass. App. Ct. 930 (1994); *Commonwealth v. Commonwealth v. Durling*, 407 Mass. 108 (1990);

35. *See* Dist. Ct. R. Prob. Viol. Proc. 6 (a), including commentary (explaining that evidence qualifying under legal exceptions to the hearsay rule, such as business records, excited utterances, and dying declarations, are presumptively reliable and admissible at probation violation hearings). Furthermore, due process only requires that hearsay evidence presented at a probation violation hearing be “substantially reliable.” *Commonwealth v. Wilcox*, 446 Mass. 61, 70-71 (2006) (holding that Sixth Amendment confrontation rights are not applicable to probation revocation proceedings).

36. Dist. Ct. R. Prob. Viol. Proc. 6 (b).

37. *Id.*; *Commonwealth v. Durling*, 407 Mass. 108, 114-20 (1990) (finding that proffered hearsay was reliable where separate detailed police reports contained fact-based observations by two officers — and not mere conclusions — and finding that “good cause” was shown for not presenting live witnesses because it would have been inconvenient to produce live testimony); *see also Commonwealth v. King*, 71 Mass. App. Ct. 737, 740-42 (2008) (stating that where hearsay is the only source of the violation, the reliability of the evidence must be substantial, thus satisfying the “good cause” requirement for not having live witnesses, but where the reported hearsay contained limited personal observations by police and describes the victim as being sarcastic and unaffected by the alleged assault, the reported hearsay was not sufficiently reliable and trustworthy to support a finding of a probation violation).

38. Dist. Ct. R. Prob. Viol. Proc. 5 (d) and commentary.

39. Dist. Ct. R. Prob. Viol. Proc. 7 (c).

40. Dist. Ct. R. Prob. Viol. Proc. 5 (d).

41. Dist. Ct. R. Prob. Viol. Proc. 7 (d). A court, however, may not rely upon conduct occurring after the end of the probationary period in deciding what disposition to impose following a finding of a probation violation. *Commonwealth v. Arroyo*, 451 Mass. 1010, 1011 (2008).

42. Dist. Ct. R. Prob. Viol. Proc. 7 (e).

43. Dist. Ct. R. Prob. Viol. Proc. 7 (e), (f). A suspended sentence *must* be put into effect except in two instances: where a stay is granted pending appeal in accordance with Mass. R. Crim. P. 31, or where the court gives the probationer a “brief period of time” to attend to personal matters before being incarcerated. Dist. Ct. R. Prob. Viol. Proc. 7 (e).

44. *Commonwealth v. Negron*, 441 Mass. 685, 687-688 (2004); *see also Commonwealth v. Christien*, 429 Mass. 1022, 1022-23 (1999) (allowing for a motion to be filed pursuant to Mass. R. Crim P. 30(a) where the defendant challenges the unlawfulness of the sentence itself).

45. *Cf. Commonwealth v. Wilcox*, 446 Mass. 61, 64 (2006) (“The purpose of probation rather than immediate execution of a term of imprisonment in large part is to enable the [convicted] person to get on his feet, to become law abiding and to lead a useful and upright life under the fostering influence of the probation officer.” (internal quotation omitted)).

46. Commentary to Rule 1 of the District Court Rules for Probation Violation Proceedings.

47. *See generally* Dist. Ct. R. Prob. Viol. Proc. 1 and commentary.

EYSTER V. PECHENIK — A MIRANDA WARNING FOR PRENUPTIAL AGREEMENTS?

By Thomas J. Barbar and Liza M. Connelly

Miranda warnings are the procedural safeguards that the police must give a suspect before any questioning can take place. As we all learned in Criminal Procedure (or are reminded when watching various television shows), they are:

1. You have the right to remain silent
2. Any statement that you do make may be used against you in a court of law
3. You have the right to the presence of an attorney, and
4. If you cannot afford an attorney, one will be appointed for you prior to any questioning, if you so desire.

These same procedural warnings could be said to apply to anyone wishing to ensure that a prenuptial agreement is valid when executed, and enforceable if disputed, particularly in light of the recent Appeals Court decision, *Eyster v. Pechenik*, 71 Mass. App. Ct. 273 (2008).

The facts of the case can be summarized as follows: at the time of execution of the agreement and subsequent marriage, the husband, Jan A. Pechenik, was 32 years old and a biologist. He had obtained a bachelor's, masters and Ph.D degree. Linda Sue Eyster was

29 and in the process of getting her Ph.D in biology, having already received her bachelor's and master's degrees. Pechenik drafted his own prenuptial agreement which was only one page long, based on information he obtained from newspapers, magazines and one book. The agreement did not contain a schedule of the assets of either party. It also did not contain any express reference to the marital rights the parties would have under M.G.L. c. 208, § 34 (2006). The agreement consisted mostly of both parties renouncing claims to any financial assets of the other party, and a schedule of how Eyster's ownership interest would accrue over time in the condominium that Pechenik had purchased. The parties had one son, Oliver. After 22 years of marriage, Eyster filed for divorce.

1) *Miranda* warning part I — You have the right to remain silent

A prenuptial agreement may be expansive enough to address issues such as property division and alimony. It may also be narrowly drawn to only address property the parties each held separately before marriage. Both have been upheld by the court.

But if the agreement does not contain an express waiver of whatever the rights of the parties are, then the court will hold that the agreement was invalid at the time of execution. In *Eyster*, the court held that as there was no express waiver by the wife at the time of execution of the agreement as to her marital rights, the agreement was not valid.

The court applied the "fair disclosure" rules articulated in *Rosenberg v. Lipnick*, 327 Mass. 666 (1979) to determine if the prenuptial agreement was valid at the time of execution. Those rules are: (1) the agreement contained a fair and reasonable provision as measured at the time of its execution for the party contesting the agreement, (2) the contesting party was fully informed of the other party's worth prior to the agreement's execution, or had, or should have had, independent knowledge of the other party's worth, and (3) a waiver by the contesting party is set forth.

Eyster's appeal in the matter focused on the third *Rosenberg* rule, and that is where the court began its analysis. The court held that there was no informed waiver of marital rights because the agreement did not contain any express provisions regarding what the rights of the parties would be under M.G.L. c. 208, § 34 and how the disposition of the assets and property in the prenuptial agreement could be very different from how they might be divided in a divorce proceeding.

2) *Miranda* warning part II — Any statement that you do make may be used against you in a court of law

The court also held that the prenuptial agreement was invalid because the husband's limited research and one-page agreement suggested that he also did not fully understand what his marital rights were. The agreement did not mention either party's total net worth, and there were no schedules outlining their respective as-



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sets. While the agreement did address gifts and inheritance that either party might receive during their lifetime, there was no provision for assets acquired during the marriage.

3) *Miranda* warning part III — The right to the presence of an attorney

Another factor the court considered was that neither party had retained counsel to represent them in the matter, and neither party had counsel review the agreement before its execution. While the court points out that having an attorney review the document is not a requirement for it to be valid, in this case, where the agreement fell short of meeting the *Rosenberg* fair disclosure rules, both parties would have benefitted from having an attorney familiar with prenuptials review the agreement to ensure it was valid before it was executed. For example, it is very likely that an attorney would have specified the rights of the parties, identified the purpose of the agreement, defined separate property, defined marital property, attached M.G.L. c. 208, § 34 as an exhibit, and attached schedules of the each party's assets, liabilities and income.

4) *Miranda* warning part IV — If you cannot afford an attorney, one will be appointed for you prior to any questioning, if you so desire.

While the right to have an attorney retained to represent one's interests in a prenuptial agreement is certainly not a protected right under the Constitution, in this case, the lesson seems to be that when it comes to prenuptial agreements, one cannot afford not to have counsel at least review the agreement and ensure its validity prior to execution. The parties would have better spent their time and resources obtaining counsel prior to execution, rather than having the agreement declared invalid by the court when the husband sought to enforce it. By not retaining counsel during the drafting, review and execution stages, the parties essentially created a document that had no effect when needed. While this worked to the advantage of the wife, as she did not want the agreement to

be enforced, it went against the entire purpose of the agreement that Pechenik had in mind and left him in the exact same position as if the document had never been signed in the first place, a mistake most people cannot afford to make when drafting prenuptial agreements. Certainly the legal fees associated with the drafting of the prenuptial agreement would have been a very small percentage of the attorney fees associated with the litigation in the Probate and Family Court and the Massachusetts Appeals Court.

***Eyster's* lesson**

So what is the lesson to take away from *Eyster*? What are the warnings to be heeded?

1. Do not remain silent as to an express waiver of marital rights. Be sure to include both the marital rights that the parties acquire under M.G.L. c. 208, § 34 *and* those which the parties are waiving in the agreement, and even attach an exhibit outlining M.G.L. c. 208, § 34.
2. Be sure that the terms are clear, that complete schedules of assets, income and liabilities of both parties are attached to the agreement, and that each party has received full and complete disclosure of other party's net worth prior to execution.
3. Retain counsel to ensure the terms of the agreement are fair, and that each party understands their rights under the agreement, and their right not to sign the agreement if there is any lack of clear understanding on the matter.
4. Do not wait until you are in court under a divorce proceeding to see if the agreement will be enforced by the court. Hire counsel at the outset and ensure that the agreement meets the *Rosenberg* rules before execution so that validity is less likely to be questioned at the time of enforcement.

THE PRACTICIONER'S PERSPECTIVE: GUARDIANSHIP OF MINORS PRACTICE IN THE PROBATE AND FAMILY COURT

By Amy T. Sollins

In the past 10 years, the number of children under guardianship in Massachusetts has increased by 38 percent.¹ In August 2008, the Children's Law Center of Massachusetts issued the report *Protecting Children: A Study of the Nature and Management of Guardianship of Minor Cases in Massachusetts* (hereinafter "the study"). The study reported various findings, such as Department of Social Services (DSS) supported reports of abuse and neglect of children under guardianship, that give rise to the concern that our current guardianship practice is not adequately safeguarding the interests of the children it seeks to protect.

From a practitioner's perspective, there are several reforms that may improve the practice of guardianship actions in the Probate and Family Court, and improve the outcomes for children under guardianship. This article will discuss four: (1) the requirement of heightened pleading standards; (2) joining DSS as a necessary third-party to guardianship actions that have DSS involvement; (3) establishing a *nisi* period after the guardianship decree has issued; (4) and requiring the permanent guardianship decree to include specific written findings.

Require heightened pleading standards under the Guardianship of Minors Statute

The liberty interest of a parent in his relationship to his child is fundamental.² In recognition that it implicates the fundamental right of a parent, under a guardianship proceeding, the petitioner has a heightened burden of proof: unfitness must be proven by clear and convincing evidence.³ Due to the fundamental liberty interests at stake, heightened pleadings standards are also warranted.

A guardianship action pursuant to G.L.c. 201, § 5 (2006) is commenced by the filing of a petition on the official form. The current form does not require the petitioner to state the reason for seeking the guardianship. The form is not sufficient to safeguard the constitutional concerns at issue.

In *Blixt v. Blixt*, the Supreme Judicial Court found that heightened pleading requirements are appropriate in grandparent visitation actions where "the burden of litigating a domestic relations proceeding can itself be so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare become implicated."⁴ It is inarguable that the same concerns present in grandparent visitation matters are present in guardianship actions and involve a much more serious infringement of parental rights.

In *Blixt*, the Court stated that because a parent's liberty interests are implicated in a grandparent visitation action, the petitioner "should make an initial showing that satisfies a judge that the burden of proof ... can be met."⁵ The SJC described the type of pleading appropriate under the circumstances: "[A]ny complaint filed under the statute should be detailed and verified or be accompanied by a detailed and verified affidavit setting out the factual basis relied on by the plaintiffs to justify relief."⁶

Under guardianship petitions where the potential interference with parental rights is profound, the heightened pleading standard set out in *Blixt* should apply. The petitioner should be required to state the reason for seeking the guardianship in a detailed and verified manner, or file an accompanying affidavit detailing the factual basis for the relief sought consistent with *Blixt*.

Join the Department of Social Services as a necessary third party to guardianship actions that have DSS involvement

The Protecting Children study reported several concerning findings with regard to the role of DSS in guardianship actions. The study reported the following with regard to DSS involvement with children under guardianships that were involved with the study:

Of the 491 children in the study, 276 (69%) were found to be in the DSS database. Of these 217 (54%) were involved prior to the filing of the guardianship petition in the Probate and Family Court. 189 of the 276 children were the subject of "supported" reports of abuse and neglect under chapter 119, §§ 51A and 51B and 46 children had been placed in the custody of the DSS.

Of the 401 children in this study, 129/ 32% were found to be in the DSS database *after* the filing of the guardianship petition in the Probate and Family Court. 76 of the 129 children were the subject of supported reports of abuse and neglect and 51 children had been placed in the custody of the DSS.⁷

It is of particular concern that such a high percentage of children have been the subject of supported reports of abuse and neglect *after* they have been placed under a guardianship. This outcome suggests that the guardianship statute has provided inadequate safeguards for these children.



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The study reported that many guardianship petitioners stated that they sought guardianships at the Probate and Family Court at the express instigation of DSS.⁸ The common practice of DSS referral to the Probate and Family Court was noted in the Massachusetts Court Improvement Reassessment report to the Massachusetts Supreme Judicial Court, which stated that “DSS itself frequently refers potential guardians (usually family members) to Probate and Family Court to prevent the agency from having to file a C&P (care and protection) case in the Juvenile Court.”⁹ Many of the petitioners who were directed to the Probate and Family Court by DSS also reported that their DSS services were terminated as soon as they obtained temporary guardianship in the Probate and Family Court.¹⁰

The Protecting Children study indicates that seeking a guardianship in the Probate and Family Court may have had the unintended consequence of actually preventing the parties to guardianship petitions from receiving much needed services. The practice of DSS terminating its services upon the Probate and Family Court issuing a guardianship is particularly problematic in that the guardianship cases that have had DSS involvement often have issues of parental substance abuse and mental illness indicating that the children involved are among the most vulnerable and at the highest risk.¹¹

To avoid this problematic situation, in cases where DSS is involved at the time of the filing of the guardianship petition, the department should be joined as a third party to the guardianship action. Alternatively, guardianship can be granted temporarily on the condition that DSS continue to provide services to the family. As a third party to the action, DSS can have the role of providing a service plan for the family as it does in care and protection proceedings. The continued involvement of DSS in the case may prevent some of the most vulnerable children from “falling through the cracks” by providing them with ongoing services that may result in safer and more stable placements.

Establish a *Nisi* period after the guardianship decree has issued

The Protecting Children study also reported several findings that give rise to concerns regarding the safety and permanency of guardianship placements. The study attempted to contact the 401 subject cases for feedback and the whereabouts of many petitioners was unknown.¹² Of the 401 cases, the study was only able to conduct follow interviews with 113 petitioners.¹³ The inability to contact the petitioners questions the stability of the guardianship placements.

It is also of concern that a significant number of petitioners themselves were found to be abusive and neglectful of their children after the filing of the guardianship petition.¹⁴ The involvement of DSS in connection with the abusive and/or neglectful conduct of petitioners calls into question the safety of the guardianship placements.

The court does not have to approve the petitioner seeking guardianship. The court should take certain steps to ensure that the petitioner is suitable and will provide a stable and safe environment for the child.

A *nisi* period should be imposed after the guardianship decree has issued. The petitioners should be required, prior to the guardianship decree becoming absolute, to provide certain documentation with regard to the well-being of the ward, including verification

of school enrollment, including attendance records, compliance with the DSS service plan, and verification from a physician that there are no concerns with regard to the well-being of the child. The Probation Department should also verify that there has been no DSS involvement since the filing of the guardianship petition, and run Criminal Offender Record Information (CORI) checks on the petitioners and the other members of the ward’s household.

If the petitioner cannot provide sufficient documentation of the child’s well-being or has had DSS involvement or criminal activity since the filing of the guardianship petition, permanent decree should not issue and the matter should be referred to DSS.

Require the permanent guardianship decree to include specific written findings

The guardianship of a minor statute pertains to both unfitness and assented to petitions. The petitioner may seek guardianship for many reasons, some that implicate the fitness of the parent, some that do not. The reason may be an allegation of unfitness based on mental illness or drug abuse, or it may be a fit parent that cannot currently exercise custodial duties due to military service, job relocation or medical illness. The court should issue specific written findings that determine the “fitness” of the parent and address the other issues concerning the ward such as visitation, support and health care.

Petitions involving “unfitness”

The permanent guardianship decree may result in the complicated scenario of a natural parent declared unfit and deprived of custodial rights, but leaving intact that unfit parent’s fundamental right as a parent. The standard of unfitness, by specifically characterizing unfitness as current, anticipates that the parent may become fit.¹⁵ Our courts have been careful to distinguish guardianship petitions from those actions that result in a permanent severance of the parent-child relationship.¹⁶ The court should issue findings that are consistent with the nature of the parent-child relationship under the guardianship.

Our courts have found that “[a] finding that a parent is unfit to further the welfare of the child must be predicated upon parental behavior which adversely affects the child.”¹⁷ If the court determines that a parent is unfit, it should make specific written findings as to both the nature of the parental behavior and the negative impact of that behavior on the child.

In recognition of the fact that the parent-child relationship continues to exist, the court should make findings with regard to the appropriateness of visitation between the parent and child. If the court terminates visitation between the parent and the child, the judge is required to “make specific findings that parental visits will harm the child” on the basis of clear and convincing evidence.¹⁸ The court should also make findings with respect to visitation between the ward and his or her siblings, if any.¹⁹

The court should also make findings with regard to child support and medical insurance for the ward.

By issuing specific written findings on the nature of the parental fitness, visitation and support issues, the court may avoid some unnecessary future litigation with regard to these matters. Addressing these issues should also help promote a more stable environment for the child.

“Assented to” petitions

The guardianship of minors form contains a section whereby the parent(s) of the minor can assent to the petition. The signature is not currently required to be notarized.

Where a fundamental right is at issue, the court should make specific findings with regard to the nature of a parent’s assent to the petition. It is of particular concern that parents that may be “unfit” may be assenting to guardianships without fully understanding what it is that they are assenting to. The parent should be given notice of the hearing date and should be required to attend the hearing on the permanent guardianship and testify that the petition was signed freely and voluntarily, that the parent hasn’t taken any drugs or alcohol that may impede his or her ability to understand the petition, that it is fair and reasonable, and that he or she understands that by signing the petition, he or she is giving up their rights to a trial on this matter. If the parent is unable to do this, the guardianship should not proceed as an assented to petition. The record should, at a minimum, reflect the presence or absence of the parent at the hearing.

Summary

Guardianship of minor actions implicate both the fundamental rights of parents and the compelling state interest in protecting children from harm. The current guardianship of minor practice is insufficient to protect these interests.

To protect the parental liberty interest, heightened pleading standards should be required under guardianship actions. The court should also make specific findings with regards to parental fitness, and whether contact with the parent is appropriate.

To protect the welfare of the child, a *nisi* period should be required to ensure that the guardianship placement is suitable. In cases where DSS is involved, DSS should be joined as a third party to ensure that the child continues to receive needed services and to promote the success of the placement.

Endnotes

1. Virginia G. Weisz & Barbara Kaban, *Protecting Children: A Study of the Nature and Management of Guardianship of Minor Cases in Massachusetts Probate and Family Court*, 5 (Aug. 2008).
2. *Opinion of the Justices*, 427 Mass. 1201, 1203 (1998).
3. *See Guardianship of Clyde*, 44 Mass. App. Ct. 767, 773 (1998).
4. *Blixt v. Blixt*, 437 Mass. 649, 665-66 (2002).
5. *Id.* at 666.
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7. Weisz & Kaban, *supra* note 1, at 13.
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10. Weisz & Kaban, *supra* note 1, at 26.
11. Weisz & Kaban, *supra* note 1, at 23.
12. Weisz & Kaban, *supra* note 1, at 11.
13. Weisz & Kaban, *supra* note 1, at 11.
14. Weisz & Kaban, *supra* note 1, at 14.
15. *See Petition of Dep’t of Pub. Welfare to Dispense with Consent to Adoption*, 383 Mass. 573, 589 (1981) (parental unfitness standard remains the same whether applied in parental rights termination, care and protection, or guardianship of minor actions).
16. *Id.*; *See also Adoption of Gillian*, 63 Mass. App. Ct. 398, 405-06 (2005)(discussion of the relationship between termination of parental rights and permanent guardianship).
17. *See Bezio v. Patenaude*, 381 Mass. 563, 579 (1980).
18. *Custody of a Minor*, 22 Mass. App. Ct. 91, 93-94 (1986).
19. *See Care and Protection of Three Minor*, 392 Mass. 704, 717-18 (1984).

DON'T GET STUCK: MASSACHUSETTS AND NEW HAMPSHIRE REQUIRE "ACTUAL EXPOSURE" TO MAINTAIN A CAUSE OF ACTION FOR HIV/AIDS-PHOBIA

By Martin C. Foster, Stephen M. Fiore and Kerry A. Sousa

Introduction

A majority of jurisdictions in the United States, including Massachusetts and New Hampshire, strictly limit a plaintiff's ability to maintain a cause of action for emotional distress resulting from fear of acquiring HIV or AIDS, otherwise known as "HIV/AIDS-phobia," by imposing an objective "actual exposure" standard for determining the cause of the emotional distress. To meet this standard, a plaintiff who has not tested seropositive must prove both a scientifically accepted method of transmission of the virus *and* that the source of the allegedly transmitted blood or fluid was in fact HIV-positive.



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Silverware, handshakes, and toilet seats, oh my!

Objective standard guards against compensation for unrealistic fears

In the 2001 Massachusetts Appellate Division case *Cole v. D.J. Quirk, Inc.*, 2001 WL 705730 (Mass.App.Div. 2001), a husband and wife who purchased a used car brought claims against the dealership for negligent infliction of emotional distress after the husband pierced his finger on a pair of surgical tweezers left in the car by its previous owner. The plaintiffs subsequently learned that the previous owner was a physician and found prescription scripts in the car with the words "viral," "ELISA," "antibodies" and "specific toxicity," causing them to fear that the surgical tweezers had been contaminated with HIV. The husband never tested positive for HIV, and the plaintiffs never had the tweezers tested to determine the presence of HIV. The trial judge directed a verdict in favor of the defendants. The Massachusetts Appellate Division, in a well-written opinion authored by former Justice Daniel B. Winslow of the District Court's Southern Appellate Division, adopted the objective actual exposure standard of causation. The court, affirming the directed verdict, determined that the plaintiffs failed to meet their burden of proof at trial because they did not show that the source of the allegedly transmitted blood or fluid was in fact HIV-positive.

Rest easy — Pandora's box remains locked and guarded

As *Cole* was a case of first impression in Massachusetts on this issue, the court analyzed the holdings of other jurisdictions and considered the two competing views regarding the proof of causation necessary to establish a claim for HIV/AIDS-phobia: the objective "actual exposure" standard and the subjective "reasonable fear" standard. Under the minority reasonable fear standard, adopted in only a handful of jurisdictions, a plaintiff who has not tested seropositive may recover damages for emotional distress by proving a specific incident of potential exposure sufficient to create a reasonable fear of having contracted the AIDS virus, even in the absence of a proven source and channel of exposure.

The court recognized that many lay persons, despite scientific proof to the contrary, continue to believe that HIV can be transmitted through food, silverware, handshakes and toilet seats. With this understanding, *Cole* explicitly rejected the minority view because the reasonable fear standard weighs heavily against public policy by stigmatizing persons infected with HIV, and it fails to guard against claims for HIV/AIDS-phobia that are "trivial, evanescent, temporary, feigned, or imagined." Therefore, *Cole* does not preclude a plaintiff's recovery for emotional distress arising out of fear of acquiring HIV/AIDS, but it limits a plaintiff's ability to recover by objectively deciding which fears are compensable in HIV/AIDS-phobia cases. By rejecting the subjective reasonable fear standard, Massachusetts, like the majority of other jurisdictions that have addressed this issue, has appropriately thrown away

the key to Pandora's Box, along with the potential of stigmatizing persons infected with HIV.

Questions still remain, however. The Massachusetts Appellate Division explained in *Cole* that both the reasonable fear and actual exposure views are "tempered" in some jurisdictions by application of a "window of recovery" that limits damages for emotional distress. This limitation allows for recovery only until the plaintiff has had a sufficient opportunity to determine with reasonable medical certainty that he or she has not been exposed to or infected with HIV. The *Cole* court did not address whether a claim for HIV/AIDS-phobia would be subject to this type of limitation in Massachusetts.

Cole also left open the issue of how to handle HIV/AIDS-phobia cases where the defendant destroys key evidence, such as a potentially-contaminated needle, prior to the evidence being tested. The court in *Cole* did note, however, that some courts would apply spoliation principles to presume that the alleged source of transmission was in fact HIV positive and leave it to the defense to prove otherwise.

It's objective! New Hampshire adopts "actual exposure" standard in 2008

As recently as Sept. 12, 2008, New Hampshire Grafton Superior Court, in *Brocklehurst v. Dartmouth-Hitchcock Medical Center*, addressed the HIV/AIDS-phobia issue and also adopted the actual exposure standard. There, the court granted summary judgment

against a plaintiff who claimed emotional distress resulting from a fear of acquiring HIV and/or hepatitis. In adopting the actual exposure standard, the court agreed with the reasoning of the Missouri Court of Appeals in *Pendergist v. Pendergrass*, 961 S.W.2d 919 (Mo. Ct. App. 1998), which when grappling with this issue offered several reasons for preferring the actual exposure test: (1) it ensures that a genuine basis for the fear exists and that the fear is not premised on public misconceptions about AIDS, thereby preventing plaintiffs from opening 'a Pandora's Box of AIDS-phobia claims'; (2) an actual exposure rule preserves an objective component in emotional distress cases necessary to ensure stability, consistency and predictability in the disposition of those cases; and (3) the rule ensures that victims who are exposed to HIV or actually contract HIV as a result of a defendant's negligence are compensated for their emotional distress.

Conclusion

The overwhelming majority of jurisdictions (including Massachusetts and New Hampshire) require that a claimant prove actual exposure to HIV in order to make out a *prima facie* case involving incidents of "needle sticks" or other penetrations of bodily integrity. Consequently, when such events occur, care should be taken to identify and test source instruments that caused the insult. In the absence of such evidence, it will prove difficult or impossible for a plaintiff to recover.

ETHICAL ISSUES IN EMPLOYMENT AND FAMILY-BASED PRACTICE

By Marisa A. DeFranco

I. Establishing the attorney-client relationship

An attorney must always be cognizant of the fact that the people on the other side of the desk will think of you as their lawyer from the moment they walk in the door, and you must avoid a casual attitude towards initial consultations. An attorney-client relationship can be established at that first consultation, and the attorney is responsible for making the existence or nonexistence of such a relationship clear to the client/potential client. Attorneys must incorporate the use of declination letters into their practices. In order to avoid any confusion or misunderstanding on the potential client's part, an attorney should develop a practice of memorializing the consultation, either in the form of an engagement or declination letter. Otherwise, the person may leave your office believing that you have agreed to show up at his next court date or CIS interview. Of course, confidentiality attaches regardless of whether or not your services are engaged.

- Decide if you will represent the person.
- If you decline representation, promptly send a letter.
- If accepting representation, promptly draft a detailed and comprehensive Representation Agreement and spell out in the agreement when your representation officially begins.
- ALWAYS send a closing letter upon completion of the case. Failing to send a closing letter fails to meet the standard of good ethics, and is also just plain dumb. Clients must have a clearly defined relationship with their attorney, with a definitive beginning and end.
- Bookmark the Massachusetts Rules of Professional Conduct ("MRPC") at www.mass.gov/obcbbbo/rpcnet.htm

A. BEWARE: The "Can't you just tell me what to do" person on the other end of the line

Every attorney has the daily experience of people calling in, desperate for advice. The temptation to help and dispense advice on the spot is strong — resist it. Intake calls should not last more

than 10 to 15 minutes, and the attorney should be asking the questions, not vice versa. The goal of the intake call is for the attorney to establish whether or not she can help the caller. A good attorney should be able to extract enough information from the caller in order to determine whether she wants to proceed with the client. At that point, the attorney should state, *in general terms*, what the course of action might be for the caller, but she must emphasize that she cannot dispense direct advice on the phone and should then invite the caller to schedule a consultation. If the caller persists in trying to get a black-and-white answer from the attorney, the attorney should courteously end the call.

B. BEWARE: The "I'm Emma's cousin" caller

Immigration lawyers sometimes represent people who speak limited English. This fact can be a challenge in a representation. An attorney must have a reliable interpreter, or she should decline such a case. Often, a good solution is for a sister or brother to serve as the interpreter — however, the attorney should include a clause in her retainer agreement naming the individual as a liaison, and expressly indicating that the client approves of the communication through the third party. However, even when an attorney has a designated liaison, often the client's friends or other relatives will call when the liaison isn't available. This author had no less than five people call for a client in the span of one week: "Hi, I'm Emma's cousin, and she just wants to know when her interview is again because she forgot." While the caller may indeed be Emma's cousin and no foul play is afoot, and giving the information to the person on the phone may be convenient, attorneys must be vigilant and *never* give out any information. Not only is disclosure a violation of the rules of professional conduct, but it is also dangerous for immigration clients who are vulnerable to ICE, domestic violence and hostility from every corner.

C. BEWARE: The "will you be my notario" client

Some people will seek out an attorney to only fill out forms for them in order to save on fees. While some accredited agencies and nonprofits may legitimately pursue this course of action, a private attorney should not. We are not notarios. If an attorney engages in form filling but fails to attach her signature to these forms, she is committing a misrepresentation to CIS. "I declare that I prepared this document at the request of the person above and that it is based on all information of which I have any knowledge." This statement is at the end of every CIS form. In essence, the attorney who does not sign a form that she prepares is failing to declare an actual fact, which could amount to an allegation of misrepresentation or even fraud. Keep in mind that if an officer challenges anything on the form, the first response from the applicant will be, "But attorney Newstead filled this form out for me."

The Board of Bar Overseers Office of the Bar Counsel Web site has an article addressing the issue of "ghostwriting." While the article focuses on lawyers who prepare litigation documents, the lessons are applicable to forms-based immigration petitions as well. "If the case presents complicated legal issues, it is imprudent for the lawyer to agree to draft a pleading without entering an appear-



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ance....A lawyer should disclose to the court and the opposing party his or her preparation of any litigation documents.”¹ Best practice dictates that an attorney should either undertake to represent the client completely or turn down the request to act as something less than an attorney engaged in full and zealous representation.

D. *BEWARE: The “cocktail party” question*

Often, in social settings or in e-mail conversation, friends, family and other lawyers will ask your opinion and advice on a legal matter. Do not be free and easy with advice, because the consequences of establishing a relationship where you had no such intention will fall upon you, not the “client.” The most trouble can come from other lawyers. Look what happens to generous attorney Lai when she helps another lawyer.

Attorney Lazy Bones meets Lai, an immigration expert, at a bar dinner. She picks Lai’s brain regarding a matter for a friend of hers, Juliana, and, as a matter of professional courtesy, Lai shares her expertise with Lazy. Naturally, ultra-competent Lai gives the standard disclaimer that her remarks are only preliminary and general.

The next morning, before Lai can even get her first sip of espresso, she’s reading an e-mail from Lazy to Juliana, with a cc to her. Lazy starts several sentences with, “Attorney Lai says to do this....” and “Attorney Lai says file this form....” Lai is mortified. Lazy has violated the attorney “code” — *represent or refer*. Lazy either needs to give advice directly to Juliana or refer her to Lai. You can’t second-hand the information; do the research, advise the client directly and take responsibility for the advice dispensed, or send the person to the attorney who knows what she is doing. Lazy made a serious weasel move that no self-respecting bar member, green or not, should ever make.

Lai immediately sent an e-mail to both Lazy and Juliana repeatedly emphasizing that the information she had given to Lazy was a professional courtesy, that no attorney-client relationship formed with either Lazy or Juliana, and that the information was not advice. And she promptly resolved to eat more shrimp cocktail at the next dinner.

II. Dual representation

The concept of limited representation, or the idea of “primary” or “secondary” clients is a recipe for disaster. No attorney who strives for the highest level of ethics can pursue this fabled arrangement. When an attorney files an H-1B Petition, or a PERM Labor Certification or a Family-Based application, she is seeking a benefit that accrues to both parties’ interests. You can attempt to limit the scope of your representation and call one client “primary” and the other “secondary,” but it is a game of semantics and not substance. Such clauses or terms won’t necessarily release you from the obligation you have to each party. You cannot contract yourself out of a responsibility that attaches to you by virtue of the service you are providing. The one exception where you may represent only one party is if the other party is also represented by separate counsel.

Well, some practitioners argue, “I work for the person who pays my bills.” Oh, you just so don’t. The rules could not be more clear. In

Massachusetts, attorneys are governed by Supreme Judicial Court Rule 3:07, the Massachusetts Rules of Professional Conduct. Specifically, Rule 5.4(c) Professional Independence Of A Lawyer states: “A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.” Questions?

Even if you don’t have a formal representation agreement with one of the parties, an implied attorney-client relationship may exist. “The critical question is whether the lawyer gives the person or institution legal advice or accepts confidential information.”² Furthermore, an analysis under tort theory results in the determination that, again, an attorney-client relationship exists despite the attorney’s claims to the contrary. The crucial element is whether a reasonable person would believe that the attorney is her attorney. “An implied lawyer-client relationship exists whenever the lay party submits confidential information to an attorney whom he reasonably believes is acting to further his interests.”³ In the immigration context, an attorney cannot complete an employment-based or family-based petition without gathering information from two different parties. Before you can file either type of case, you must determine the status of the beneficiary, whether unlawful presence is an issue, criminal violations are involved, and the exact nature of the beneficiary’s immigration history. Once an attorney has taken that necessary step, she has created a duty of loyalty to the client.

In addition to tort theory, the rules of agency apply, and an attorney should know the consequences of creating an agency, either explicit or implied. “The lawyer’s many duties of loyalty derive from the common and statutory law of agency, which generally prohibits agents from taking actions disloyal to the interests of a principal, or from exploiting a principal’s confidences for self-gain or the gain of third parties. Even if legal ethics rules did not exist, lawyers would still be subject to civil actions for breaches of the duty of loyalty.”⁴ To operate under the misapprehension that you represent only one party is imprudent and puts you at risk. Your livelihood is your license — avoid vulnerability and follow the more prudent course of action: include a Dual Representation Clause and a Conflict of Interest Clause in your Representation Agreement, placing the “Dual Representation Clause” at the top.

III. Confidentiality and secrets

A. *No secrets*

Stated simply, in a dual representation situation, you cannot keep the secrets of one party from the other. One limited exception may apply to a corporation’s finances, but you would need to obtain a specific waiver from the beneficiary client that she agrees to such limitation.

Family secrets? No such thing exists in a marriage-based petition, which an attorney has undertaken as a dual representative (as she should). In a dual representation, an attorney commits to representing both parties and should clearly state in the agreement that disclosures made by one party to the attorney will be disclosed by the attorney to the other party. Furthermore, the Office of the Bar Counsel has a good article on the issues of confidentiality in the context of a joint representation.

When the lawyer has provided this advice to all jointly-represented clients at the outset of the representation and they have agreed that the lawyer can make full disclosure, the lawyer is almost always obligated to

disclose material information to all of them. There are limited circumstances where joint clients may agree in advance that the lawyer not share certain types of confidential information with the other clients. See Mass. R. Prof. C. 1.7, Comment [12D].... However, it is only in rare circumstances that a lawyer may agree to such an arrangement without creating a conflict requiring separate representation.⁵

B. Reporting clients?

I almost fell out of my chair when I read the following exchange on a Listserv:

Lawyer #1: Many nurses visa process, enter the US and don't honor their contract. Often they never appear for employment. Would a request to a consulate to revoke the non immigrant visa or to ICE to commence removal proceedings be successful?

Lawyer #2: I see this as a growing problem. I doubt CIS would revoke a petition, short of clearly documented fraud. But it should be reported to CIS, in the event the nurse applies for naturalization. According to "Recruiter A," there is an officer at CIS who takes this seriously and wants violations reported to him so he can follow up on them: [CIS Officer name and number provided].

My response to the above "dilemma" is: you can't report your former client nurse. Period. Unless you want to relinquish your license. The employer is free to pursue any course it wishes, but your last communication to them should be "I must withdraw, please consult with other counsel if you wish." While the MRPC does require reporting in order to rectify a fraud, fraud is subjective, and you should not engage in trying to parse whether the nurse had the intent to join the sponsor when she signed the documents, because, if you guess wrong, it may mean your license.

IV. Conclusion — pitfalls to avoid

Everyone is extended and sometimes the caseload is unforgiving, but whether an ethical lapse is the result of bad intent or ignorance or being overwhelmed, the resulting devastation to the client is still the same. No matter the voluminous amounts of paperwork and the ever-changing laws and rules, "busy" is never an excuse. Immigration attorneys should not practice to the lowest common denominator; we should hold ourselves to the standard of "no excuses, no mistakes." In a world of strong ethics, there is no such thing as being overwhelmed — be vigilant about your caseload, and if you can't handle the work, don't take it.

Money should *never* be a factor in your decision to engage a client. Passing on cases when you are financially strapped is not easy, but if you want easy, find a different job. You must be your hardest critic, and you must constantly educate yourself, and organize, and reorganize your cases, and review your clients' histories until they are second nature, as if their memories were your own memories. The rewards of a successful outcome and a relieved client are incomparable.

Endnotes

1. Grace M. Jones, *Ghostbusters*, (2001), <http://www.mass.gov/obcbbo/ghostbusters.htm>.
2. Bruce Hake, "Dual Representation in Immigration Practice," *Ethics in a Brave New World*, p. 30 (2004).
3. *Ibid*, at 31.
4. *Id* at 34-5.
5. Daniel Crane, Bar Counsel. "What's Confidential When There is Joint Representation?" <http://www.mass.gov/obcbbo/joint.htm> (July 2004).

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POST-TRIAL JUROR CONTACT IN MASSACHUSETTS: A HISTORY, SOME PROBLEMS AND A PROPOSAL FOR REFORM

By Andrew Perlman

I. Introduction¹

Massachusetts Rule of Professional Conduct 3.5(d) ("Rule 3.5(d)") regulates a lawyer's communications with jurors after a trial. The rule is considerably more restrictive than the equivalent rule found in most other jurisdictions and in the ABA's Model Rules of Professional Conduct. This article examines why Massachusetts adopted a more restrictive rule, describes some of the problems associated with these restrictions, and summarizes a proposed pilot program that the Massachusetts Bar Association recently submitted to the Supreme Judicial Court for consideration.

II. History of the current rule

Until 1991, Massachusetts Disciplinary Rule 7-108(D) permitted attorneys to communicate freely with jurors after a trial so long as the communication was not calculated merely to harass or embarrass the juror or influence the juror in future jury service.

The current and more restrictive rule was adopted due to an unusual procedural history that began in 1979 with the Supreme Judicial Court's decision in *Commonwealth v. Fidler*, 377 Mass. 192, 385 N.E.2d 513 (1979). In *Fidler*, the Court set out in *dictum* some guidelines for questioning a juror after trial. In particular, the Court explained that questioning (1) must be by court order only, generally under the supervision of a judge, (2) may be initiated only upon a preliminary showing of extraneous influence, and (3) may not involve the jury's thought processes. *Id.* at 201-04. DR 7-108(D) was not amended at that time to reflect the *Fidler* guidelines.

The potential for confusion over the liberal DR 7-108(D) and the more restrictive *Fidler* guidelines became clear in *Commonwealth v. Solis*, 407 Mass. 398, 553 N.E.2d 938 (1990), where the SJC held that a lawyer had obtained information from a juror in contravention of the *Fidler* guidelines, but not in violation of DR 7-108(D). *Id.* at 399. *See also id.* at 402-03 (explaining the differ-

ences). The Court granted a new trial in that case as a result of the information that the lawyer had learned, *Id.* at 401-02, but the Court also stated its inclination to amend the disciplinary rule to comport with the *Fidler* restrictions. The Court recognized that such an amendment would make the Massachusetts rule "more rigorous than those generally in effect elsewhere in the country," *Id.* at 403, and expressed concern that "there will be no process, within the defendant's control, by which the defendant can seek to discover whether there were extraneous influences on the jury..." *Id.* at 404. Despite these concerns, the SJC amended DR 7-108(D) in 1991, essentially codifying the *Fidler* procedure and establishing the rule that exists to this day.²

In 1996, the SJC's Committee on Rules of Professional Conduct recommended the adoption of most of the ABA's Model Rules of Professional Conduct. The Court, however, did not adopt the more permissive ABA Model Rule 3.5, and instead retained the substance of the more restrictive Massachusetts Rule 3.5, which remains in effect. It states:

A lawyer shall not ... after discharge of the jury from further consideration of a case with which the lawyer was connected, initiate any communication with a member of the jury without leave of court granted for good cause shown. If a juror initiates a communication with such a lawyer, directly or indirectly, the lawyer may respond provided that the lawyer shall not ask questions of or make comments to a member of that jury that are intended only to harass or embarrass the juror or to influence his or her actions in future jury service. In no circumstances shall such a lawyer inquire of a juror concerning the jury's deliberation processes.³

Thus, Massachusetts continues to impose strict regulations on post-trial juror contact despite a clear trend towards the adoption of the more permissive Model Rule 3.5(c), which provides as follows:⁴

A lawyer shall not ... communicate with a juror or prospective juror after discharge of the jury if:

- (1) the communication is prohibited by law or court order;
- (2) the juror has made known to the lawyer a desire not to communicate; or
- (3) the communication involves misrepresentation, coercion, duress or harassment

In 2006, a Massachusetts Bar Association Task Force studied Rule 3.5 to determine whether Massachusetts should join the increasing number of states that permit more post-trial juror contact. The task force, which consisted of lawyers, judges and law professors from around the commonwealth, unanimously concluded that the rule is indeed unnecessarily restrictive and should be re-examined.⁵ To that end, the MBA submitted a letter to the SJC on



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June 6, 2008, which highlighted many of the problems with the current rule and proposed a pilot program that would permit more post-trial contact with jurors.

III. Problems with the current rule

The task force identified numerous problems with the restrictive Massachusetts rule. First, Rule 3.5 is ambiguous and poorly understood. Many attorneys and judges believe the rule does not allow any contact between counsel and the discharged juror, or any questioning of the juror by counsel. What the language apparently prohibits, however, is for counsel to initiate contact or to inquire about the “jury’s deliberation processes.” Thus, the area of inquiry that is “off-limits” is ambiguous.

Second, Rule 3.5 makes it more difficult for criminal defendants and civil litigants to discover illegal extraneous influences or other similar improprieties that occurred during deliberations. If counsel must wait for a juror to come forward and volunteer such information, lawyers may be unable to discover improprieties and challenge tainted verdicts. Although judges frequently speak privately with jurors after a verdict and occasionally allow the attorneys to speak with the jury in a supervised setting, it is unlikely that juror improprieties would be revealed in such a setting.

Third, the current rule takes away from jurors a valuable opportunity to discuss their experiences. Many jurors are eager to discuss their experiences as jurors with the lawyers, but Rule 3.5 discourages such communications.

Finally, Rule 3.5 tends to inhibit the development of trial techniques designed to increase juror comprehension. Much work is being done to find new trial techniques to help juries better understand the facts and the applicable law in a trial. Rule 3.5(d), however, makes it more difficult for judges and lawyers to find out if these techniques have helped, and the rule limits the feedback that trial lawyers need to improve their skills. Again, judges occasionally allow attorneys to speak with the jury in a supervised setting, but jurors may be reluctant to offer the needed feedback in such a formal and public environment.

IV. Concerns about a change

The task force and the MBA’s proposal for a pilot program addressed three concerns that are typically raised to explain the need to limit post-trial contact with jurors: preventing juror harassment, maintaining secrecy of deliberations to encourage candid expression, and promoting finality of verdicts. *See, e.g., Commonwealth v. Fidler*, 377 Mass. at 195.

The MBA’s pilot program proposal addressed the first concern, possible harassment, by explicitly prohibiting harassing conduct and making clear that a lawyer must stop all communications with a juror as soon as a juror indicates a desire to be left alone. Thus, a lawyer who engages in harassment risks bar disciplinary proceedings. Moreover, the absence of recorded complaints prior to 1991,⁶ during which time Massachusetts lawyers operated under a less restrictive rule, demonstrates that the concern about harassing conduct may be largely unfounded.

With regard to the concern for secret deliberations, secrecy certainly encourages candor, but jury deliberations are not private, except to the trial lawyers. Jurors may be questioned about their deliberations by the news media, by police, by insurance company investigators or even by the parties or their friends. If lawyers are permitted to ask the same questions as everyone else and to learn

the same information, jurors are unlikely to alter the way in which they currently deliberate. Moreover, even though jurors should deliberate with some confidentiality, there does not appear to be any legitimate interest in keeping secret any significant extraneous influences that the jury experienced.

Finally, although there is a valid interest in the stability of verdicts, this interest was not intended to protect verdicts that were tainted by extraneous influences. The system’s overarching goal is to provide a just and accurate result in accordance with the law. That goal is inconsistent with leaving tainted verdicts intact. Indeed, some states have identified this concern as the very reason for permitting lawyers to communicate with jurors following a trial.⁷

V. The MBA’s pilot program proposal

The MBA’s proposal to the SJC treats civil and criminal cases separately and suggests two alternative proposals for each. In both sets of proposals, the MBA encourages the adoption of a pilot program that would allow the state trial courts to determine whether any of the concerns that have been expressed would, in fact, materialize.

The MBA’s proposal also addresses two additional concerns that were not addressed by the task force. First, there is the possibility that a lawyer’s post-trial communication with jurors will make them concerned for their safety, especially in criminal cases, and thus make the public less willing to serve as jurors in those cases. Second, there is a concern that a more permissive rule would produce a significant increase in post-trial motions based on jury misconduct, thus adding to the state judiciary’s already heavy workload. The MBA expressed optimism that these concerns would not, in fact, arise, but the MBA’s proposals sought to incorporate the concerns that had been raised by some members of the bar and the judiciary.

A. Civil cases

Both civil case proposals would allow post-trial contact with jurors in ways that are similar to the more permissive ABA Model Rule 3.5(c). The civil case proposals differ from each other in only one material respect. One proposal suggests an opt-in procedure, where during an initial two-year pilot period, trial judges can in their discretion and on a case-by-case basis allow post-trial contact. The second proposal, the one preferred by the MBA, offers an opt-out procedure, where during an initial two-year pilot period, lawyers would presumptively be allowed to engage in post-trial communications with jurors unless the trial judge affirmatively specifies otherwise, either through an order in each individual case or through a standing order. The MBA endorsed the latter approach and proposed the following text for Pilot Rule 3.5(d):

Massachusetts Rule of Professional Conduct Pilot Rule 3.5(d)

(d) A lawyer shall not communicate with a juror or prospective juror after discharge of the jury in a civil case if:

- (1) the communication is prohibited by court order;
- (2) the juror has made known to the lawyer a desire not to communicate; or
- (3) the communication involves misrepresentation, coercion, duress or harassment.

This opt-out proposal has a notable advantage over an opt-in procedure. Because of the extra work required to issue an order permitting post-trial contact, it is likely that fewer judges will experiment with post-trial jury contact under an opt-in framework. Thus, at the end of the two-year period, an opt-in proposal may not generate sufficient data to evaluate the concerns that have been raised. In either case, the MBA's proposed pilot program is limited to two years so that the SJC can assess whether any actual problems have materialized.

B. Criminal cases

In light of the concerns raised about juror safety in criminal cases, the MBA offered two alternative and more restrictive rules for criminal cases. The MBA's first proposal applies the old version of Rule 3.5(d). However, because the MBA is not aware of any juror safety issues related to this rule in other states, the MBA endorsed the second approach, which clarifies what a lawyer is allowed to do in criminal cases. The language for that proposed pilot Rule 3.5 is as follows:

(e) A lawyer shall not, after discharge of the jury from further consideration of a criminal case with which the lawyer was connected, initiate any communication with a member of the jury without leave of court. If a juror initiates a communication with such a lawyer, the lawyer may communicate with that juror in a manner consistent with pilot Rule 3.5(d).

The MBA preferred the latter approach because it allows a conversation with a juror after the conclusion of a criminal case if the *juror* initiates the contact. The primary concern about making post-trial contact more available in criminal cases is that jurors might be fearful about their safety if they are contacted by the lawyer for the criminal defendant. Such a concern would not be present when the juror initiates the contact with the lawyer. Under those circumstances, the lawyer's conversation would have to comply with the requirements of the proposed pilot Rule 3.5(d) for civil cases.

VI. Conclusion

Most states, and the American Bar Association in its Model Rules, have resolved the valid governmental concerns concerning post-trial jury contact without dramatically curtailing contact. A pilot program, such as the one that the MBA is proposing, would allow Massachusetts courts to determine whether a more permissive rule would have any negative consequences and whether Massachusetts should join the majority of other states in permitting more post-trial juror contact.

Endnotes

1. Significant portions of this article are drawn directly from the Massachusetts Bar Association's June 5, 2008, letter to the Supreme Judicial Court seeking an amendment to Rule 3.5 and from the 2006 Report of the MBA's Jury Communications Task Force. The Task Force Chairs were former Chief Justice Herbert Wilkins and Attorney Kathy Jo Cook; the principal drafter of the report was Professor Timothy Wilton of Suffolk University Law School. Professor Perlman was a member of the task force and was the principal drafter of the MBA's June 5, 2008, letter.

2. Justice Wilkins, the author of the *Solis* opinion and a co-chair of the MBA's recent task force, joined by then Chief Justice Liacos, issued a *Statement of Opposition to the Adoption of Revised Supreme Judicial Court Rule 3:07, DR 7-108(D)*. On Aug. 26, 1991, *Massachusetts Lawyers Weekly* published their concerns about the new rule:

I decline to join in the promulgation of a rule that apparently is intended to deal with a problem that is not shown to exist. For almost twenty years we...have never had a discipline problem with a lawyer speaking to a juror after the jury's discharge. The new rule will inhibit counsel's attempts to discover flaws in the administration of justice...[and] may impinge on rights of free speech,...the effective assistance of counsel, and...due process... It will surely tend to inhibit the appropriate disclosure of misconduct in the administration of justice.

3. The Massachusetts Bar Association, the Boston Bar Association, the Massachusetts Attorney General and the Committee for Public Counsel Services, among others, opposed the adoption of this rule.

4. The majority of states, 32 in total, have adopted the ABA rule, some variation of it, or no rule whatsoever. At the time of the task force report, these included: Alaska, Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Minnesota, Nebraska, Nevada, New York, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Wisconsin, and Wyoming.

5. A number of organizations endorsed the task force's conclusions, including the Massachusetts Association of Criminal Defense Lawyers, the Massachusetts Defense Lawyers Association and the Massachusetts Academy of Trial Attorneys.

6. See *supra* note 1.

7. The comments to the New York rule, for example, state: "Were a lawyer to be prohibited from communicating after trial with a juror, he could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected." Note, N.Y. DISCIPLINARY RULE 7-108 [1200:39]. See *also*, Nev. RULE 176(3).

NAVIGATING THROUGH THE DOWNTURN

By *Matthew Goldsmith*

“Disaster!” “Meltdown!” “The End of Capitalism!” As we all celebrate the beginning of the new year, those headlines will endure as a reminder of how the last part of 2008 came to a close. While the daily stories about the newest drop in the market or the latest economic turmoil gripping the world have subsided, we still find ourselves living in a world where economic conditions are less certain and nobody is sure what the future holds.

For the self-employed lawyer or small firm owner, the economic situation can be a real concern. All business owners have questions about how the downturn may affect their business, but for the small firm owner, those questions can be more intense and personal. How long will the recession last? If it hasn't yet affected your practice, will it? Will it affect your lifestyle? Can your firm or practice survive a recession?

These are all important questions not only to ask, but to plan for. Navigating your practice through difficult economic times isn't easy, but it can be a lot easier and less uncertain when you take steps to ensure that you have a solid financial forecast and budget to help you make the right choices. Many small businesses don't take the time to put together financial reporting until something inspires them to do it, and the recent economic turmoil is the perfect reason to start. There are several basic but very important things that every firm should do in order to ensure consistent financial health.

Have a plan

The most important tool in your arsenal is also the simplest tool — a plan. Many small firms have never had a reason to put together a financial forecast or budget. These two things are among the most basic and important financial tools you have at your disposal in managing the business side of your practice, and in making decisions about how and what to change when those decisions need to be made. A financial forecast and budget is basically a plan of how much revenue your firm will make over the next one to two years, and what expenses you will incur. A good plan should take your last two to three years of financial performance into account, and then look one to two years into the future. It can also be helpful to create two to three scenarios, or at least a best and worst case

scenario. This planning will not only help you better understand your firm's financial performance and health, but will also help you develop strategies to deal with different situations before they happen. Once you have these in place, tracking the performance of the firm to that budget or forecast can provide you with early warning signs that things may not be going as planned, allowing you to make important changes before it's too late. Conversely, if things are going as or better than planned, it can help you capitalize on that success.

Be ready to reduce expenses

Layoffs are one of the most common occurrences as soon as the economic environment becomes uncertain, and the biggest corporations are always the first to announce them. Why? Large corporations know that one of their greatest financial management tools is control over their expenses, and labor is one of the largest expense items in any company's financials. Many corporations will announce layoffs as a precautionary measure to reduce expenses even before they need to. For the solo practitioner or small firm, layoffs may not be an option, and even if they are, you may not want to let key people go before you need to. What is important, however, is to have a complete picture of your firm's expenses, when they will be incurred and what category they fall into. It's critical to determine which expenses are absolutely necessary to keep your firm operating, and which ones could be reduced or eliminated if needed. Having this information at the ready makes it easy for you to make quick decisions when you need to, and can also generate significant savings for your firm.

Increase revenues

Wait a minute, aren't we talking about planning for difficult times, and preparing for less revenue? It's important to remember that just because the economy is in recession, many firms will continue to do well and even grow. Your firm can be one of them. Consider your clients or the industry you serve the most — how will the economy impact them? Can you position your services to assist them with the challenges they might be facing as a result of a recession? By changing or adding to your marketing and matching your offerings to the economic times, you can better serve your current clients while potentially attracting new ones. After all, the best defense against any recession is to increase business!

OK — so now you know what types of tools you need in order to protect yourself and be prepared for an uncertain economy. The question now is, how do you put this information together? Larger companies and firms of course have a full-time CFO or financial analyst who can help put these things together. For the small firm or solo practitioner, it usually makes sense to seek the help of a professional who can help put together these tools and provide advice on how to move forward. There are some companies that provide outsourced “CFO” assistance, accounting firms that can put together the numbers into a digestible format, or small business consultants who can give you insight on how to move forward. While all of these options require some initial investment, it is a wise one in order to ensure you are protecting your business for



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the future. Most costs are incurred in the initial development of a budget or forecast, and the initial analysis that goes along with that. Once that is complete, the maintenance of that information is usually easier and much less expensive to keep up with.

Having a solid plan and being ready to react are your best tools to successfully navigate your practice through difficult economic times. Not only does it relieve you of concerns about the economic health of your firm, but it also allows you to focus your energy on what you do best — practicing law! Once you have these in place, you may also find yourself yawning as you sit down to read the latest disaster headline about the market, as there's no need to worry — you're ready for anything.

TRUSTEES TAKE NOTE: IN *O'CONNOR V. REDSTONE*, THE SJC EXPLORES A SUCCESSOR TRUSTEE'S OBLIGATION TO SEEK REDRESS FOR A PREDESSOR'S MISCONDUCT

By Patricia L. Davidson

In *O'Connor v. Redstone*, 1110 Mass. 129 (2008), the Supreme Judicial Court pondered the latest high-profile billionaire family squabble. In the decision, the SJC considered a variation of the discovery rule and held if a trustee had a conflict of interest that interfered with the initiation of a claim for breach of fiduciary duty against a former trustee, the claim is tolled until a beneficiary learns of the wrongdoing. The SJC also explored the duty of a successor trustee to bring claims against a predecessor and reaffirmed the concept that parties' interactions may create a fiduciary duty even in the absence of a formal fiduciary relationship.

In the case, media mogul Sumner Redstone and his brother, Edward Redstone, were sued by Edward's son, Michael Redstone, and the current trustees of three trusts that held shares in National Amusements, Inc. ("NAI") for the benefit of Sumner and Edward's children. The action was commenced in 2006, although the alleged breaches of fiduciary duty occurred in 1972 and 1984. The SJC granted direct appellate review after the Superior Court (Van Gestel, J) granted summary judgment in favor of the defendants on the grounds that the statute of limitations barred all claims. The case contains extensive analysis of whether or not the usual three-year statute of limitations was tolled in the decades between the alleged wrongful conduct and the commencement of litigation.

The factual history of the case is lengthy and complex, traced to 1959 when Sumner and Edward's father, Mickey, registered 100 shares of NAI in both Sumner and Edward's names. Mickey and Sumner contended Sumner and Edward each owned 50 shares of NAI and each held 50 shares in oral trusts for the benefit of their four children; contrary to Mickey and Sumner's position, Edward denied the existence of the oral trust for the benefit of his children, Michael and Ruth Ann, and claimed that he was entitled to the entire 100 shares of NAI in his name.

In 1968, Mickey established a formal trust for the benefit of his grandchildren funded with an additional 50 shares of NAI (the

"Grandchildren's Trust"). The beneficiaries were Michael, Ruth Ann and Sumner's two children. Sumner was a trustee.

In the early seventies, disputes arose between Edward, on one hand, and Mickey, Sumner and NAI, on the other. Litigation ensued. As part of the litigation, the parties disputed the number of NAI shares Edward owned.

In 1972, Edward entered into a settlement agreement with Sumner and NAI. A key provision of the agreement included a written assertion that Edward had been holding shares of NAI in trust for his children but that he disputed the percentage of shares. The agreement also included a statement that Mickey asserted that at least 50 percent of the stock (*i.e.* 50 shares) in Edward's name was for benefit of his children. The agreement ultimately provided that Edward owned 66 2/3 shares of NAI, which he would redeem for \$5 million. With the remaining 33 1/3 shares of NAI, Edward agreed to establish irrevocable trusts for his two children (the "Michael Trust" and the "Ruth Ann Trust"). Edward agreed to appoint Sumner as the sole trustee of these trusts. During the litigation and settlement negotiations, Edward was represented by attorney James R. DeGiacomo.

In 1984, Sumner and Edward's children pushed for redemption of their shares of NAI held in the Grandchildren's Trust, the Michael Trust and the Ruth Ann Trust. As part of the redemption process, Sumner appointed DeGiacomo as "independent counsel" on behalf of the Michael Trust and the Ruth Ann Trust. DeGiacomo appeared to engage in significant due diligence to ascertain the true value of the shares. Evidence of his good faith included his rejection of a value of \$9 million from Sumner's accountant; his hiring valuation experts; and his insistence upon the inclusion of previously unconsidered NAI real estate holdings. After purportedly hardball negotiations, DeGiacomo and Sumner agreed to redeem the grandchildren's NAI shares for \$15 million.

After the redemption, Sumner appointed DeGiacomo trustee of the Michael Trust and the Ruth Ann Trust, the trusts established as part of the 1972 settlement agreement. Thus, Edward's former lawyer became trustee of the trusts for the benefit of Edward's two children.

Fast forward to 2006. Michael and the current trustees brought claims against his father, Edward, for breach of fiduciary duty as trustee of the oral trusts Mickey allegedly created in 1959 and for converting, through the 1972 settlement agreement, 16 2/3 shares held in the oral trusts (50 shares that Mickey allegedly allocated to the oral trust less the 33 1/3 shares that Edward allocated to the Michael Trust and the Ruth Ann Trust in 1972). Michael alleged that Sumner and NAI aided and abetted Edward's wrongdoing. Michael also claimed that Sumner, when he was trustee of the Michael Trust, the Ruth Ann Trust and the Grandchildren's Trust, breached his duty to the grandchildren by causing the NAI shares to be redeemed for inadequate consideration in 1984. Mi-



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chael claimed that the NAI shares redeemed in 1984 were actually worth three to five times \$15 million.

To counter a statute of limitations defense, Michael implicated the discovery rule and claimed that he did not have actual knowledge that Mickey and Sumner asserted that his trust share might actually be higher until 2004. Michael stressed that in 1972, when Edward entered into the settlement agreement, Michael was a minor and not represented by independent counsel or a guardian *ad litem*.

The SJC's analysis focused on whether the statute of limitations was tolled during Sumner and DeGiacomo's tenures as trustees of the trusts. Sumner, Edward and NAI seemed to concede that the statute of limitations was tolled while Sumner was trustee. The Court stressed that even though Sumner knew that via the 1972 settlement agreement Edward ended up owning shares of NAI that Sumner and Mickey actually believed belonged to Edward's children, the 1972 settlement agreement furthered Sumner and NAI's own interests. Citing another epic family dispute, the Court stressed that the statute of limitations is tolled while a fiduciary "either benefited from, or acquiesced in, the activities that are the basis of the plaintiff's claims. . ." *Demoulas v. Demoulas Super. Mkts., Inc.*, 424 Mass, 522-523 (1997).

The Court next considered Sumner, Edward and NAI's argument that the statute of limitations began to run when DeGiacomo became trustee of the Michael Trust and the Ruth Ann Trust. They argued that DeGiacomo knew of Mickey and Sumner's contention that Edward actually held 50 shares of NAI in an oral trust for his children notwithstanding the settlement agreement that established trusts with only 33 1/3 shares. They argued that armed with this knowledge, DeGiacomo had a duty to initiate a claim for the misappropriated 16 2/3 shares.

But, stressing that DeGiacomo was Edward's agent, the Court concluded that statute of limitations had not run. DeGiacomo agreed with Edward that no oral trust ever existed. Without belaboring the obvious conflict of interest, and without imputing any wrongdoing to DeGiacomo, the Court concluded that DeGiacomo's prior position as Edward's counsel tolled the statute of limitations.

The Court remanded to the Superior Court the issues of whether oral trusts were created in 1959; whether they could be revoked or modified; how many shares were held in the trusts; and who was appointed trustee and when. The Court expressed skepticism about whether the plaintiffs could prove the establishment of the oral trusts, but noted that damages could include the value of the shares in 1984, when the other NAI shares were redeemed.

The Court then considered Michael's claim that Sumner caused the NAI shares to be redeemed for inadequate consider-

ation in 1984. Michael alleged that Sumner concealed from DeGiacomo NAI's true value. On this claim, the Court agreed with the defendants that the statute of limitations had run.

The Court concluded that DeGiacomo, appointed successor trustee of the Michael Trust and the Ruth Ann Trust in 1984, had the obligation to bring any claim against Sumner for breach of fiduciary duty. The Court noted that a successor trustee has a duty to initiate a claim against a predecessor trustee when the successor knows or should know of the breach. The Court found that because DeGiacomo had intimate knowledge of the transaction when he became a trustee in 1984, the statute of limitations began to run with respect to any action against Sumner.

In addition to DeGiacomo's knowledge, the Court also considered his status. Unlike the claim related to Edward's actions in 1972, DeGiacomo had no "disqualifying agenda" or relationship to Sumner. Although DeGiacomo was entwined with the Redstone family in many ways, he never represented Sumner and was not paid by him.

Interestingly, the Court also found that the Grandchildren's Trust's claims related to the 1984 redemption were also time-barred. The Court stressed that the beneficiaries of the Grandchildren's Trust requested the redemption. And although DeGiacomo was not a trustee or "independent counsel" of the Grandchildren's Trust, he believed that the redemption was in the beneficiaries' best interest and knew that his determination of fairness on behalf of Michael and the Ruth Ann Trust would also impact the other beneficiaries of the Grandchildren's Trust. The Court thus concluded that DeGiacomo was a fiduciary as a matter of law of the Grandchildren's Trust. The Court focused less on the title of DeGiacomo's role and more on the *de facto*, trusting nature of the parties' relationship.

O'Connor v. Redstone explores and expands the discovery rule. If a trustee has a conflict, the statute of limitations is tolled until the beneficiary or a successor trustee has the requisite knowledge and impartiality to commence suit. While the case presents a very fact-intensive analysis, it provides several considerations for any successor trustee. Successor trustees are often family members or, in the case of institutional trustees, a corporate acquirer. Such relationships create conflicts of interest that not only can toll the statute of limitations, but also can create liability for the successor trustee if he breaches his duty to initiate a good faith claim for breach of fiduciary against a predecessor. The case highlights the duty of successor trustees to scrutinize potential actions against their predecessors. This duty is yet another aspect of the obligation of good faith and loyalty owed to beneficiaries.

COMMUNITY MEDICAID PROGRAMS: ALTERNATIVES TO NURSING HOMES

By Alex L. Moschella and Neal A. Winston

I. Introduction

Approximately one in 10 people over the age of 65 and one in four people over the age of 80 will be cared for in a nursing home at some time in their lives. Many people, particularly aging adults, are frightened and anxious at the prospect of institutionalized care. Such long-term care is extremely expensive and can drain a family's resources. People also want to live in the comfort of their own home and be surrounded by their families and loved ones.

Many low- to medium-income individuals, particularly elders, can rely on Medicaid (known as MassHealth for Massachusetts residents) to cover their health care, and particularly, long-term nursing home care. Sometimes the only option for elders is to enter long-term nursing home care because their needs may be too great

to be cared for at home. MassHealth, however, offers an increasing multitude of publically funded programs to seniors who can be adequately cared for outside of a nursing home. Because of the extraordinary private pay cost of nursing home care and the toll it takes on the elders and their families, it is usually in everyone's best interest to provide care in the community if medically and financially possible. It is critical that all families are aware of the programs available to them and of the elder law attorneys who can assist them in obtaining eligibility and the right level of care.

II. Basic MassHealth eligibility in the community

There are basic eligibility requirements for MassHealth programs. The applicant must have a Social Security number and live in Massachusetts with the intent to live here indefinitely. There is no residency time limit if moving from another state. Applicants are also subject to asset and income limitations. Eligibility for the "community" level MassHealth program differs significantly from the "institutional" level program.

"Community" level MassHealth is any environment of care short of long-term care in a skilled nursing home or medical institution. There are several MassHealth programs for which eligibility can be obtained. For the "standard" program, for example, individuals over age 65 years of age living in the community must have countable income less than 100 percent of the federal poverty level, which until mid 2009, will be \$867, plus a \$20 a month disregard of "unearned" (pension or Social Security) income. For a couple, the income level is \$1,167 plus the \$20 per month unearned income disregard.

If the countable income exceeds that amount, the individual or couple can spend down the excess income on medical expenses each month, but once exceeded, the spend down limit is \$522 for an individual and \$650 for a couple. Individuals under age 65 have different income criteria and an unlimited asset allowance. There are also community MassHealth "waiver" programs, such as "Frail Elders" for individuals at risk for institutional care that allow even greater levels of income.

III. Programs for elders who could be institutionalized but remain in the community

MassHealth supports several community residency based service programs. Many programs use MassHealth eligibility as its gateway to services. Most are based on managed care models. For example, the PACE Program, also called an Elder Service Plan, is administered by agencies that use MassHealth coverage to provide "soup to nuts" care. Group Adult Foster Care (GAFC) for group living and Senior Care Organizations (SCO) for at-home and assisted living are other models of community care based upon MassHealth eligibility. This article is not a complete list of all of the programs available.



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A. Home and community-based services waiver

The Home and Community Services-Based (HCSB) Waiver is a MassHealth eligibility procedure that allows for higher income and other expanded eligibility criteria for individuals who might otherwise end up in an institution without the care. Waiver programs exist for older individuals, the mentally retarded and younger children with autism.

For the “Frail Elders” MassHealth waiver program, an applicant must be at least 60 years of age or meet disability criteria under age 65, require basic care services based upon medical need, be at risk for nursing home care, and meet the waiver’s income and asset limitations. For individuals, the 2009 Frail Elders countable income limit is \$2,022, and asset limit is \$2,000. For couples, the income and assets of the healthy spouse are not counted. The assets of the ill spouse can be transferred to the healthy spouse without penalty.

All waiver programs require a need for assistance in “activities of daily living” (ADLs)¹ and the individual must be medically at risk for nursing facility care. To meet this criteria, the applicant must require at least one skilled nursing or therapist daily or require a nursing service at least three times per week plus two other services for ADLs. For some programs, Aging Services Access Point (ASAP) agencies determine if the applicant is medically eligible and a care plan must be drawn up and budgeted for feasibility.

B. Community choice

Community Choice is a more care-intensive program for needier frail elder community waiver members. To be eligible for Community Choice, the individual must already be enrolled in or eligible for the waiver.

This program provides extensive home and community-based services to elders who require nursing home level of care and exhibit additional criteria, including a minimum of one out of four indications of frailty and at least one out of five that demonstrate risk. Services include personal care, homemakers, skilled nursing, companions, chore assistance, delivered meals, grocery delivery, laundry, transportation, home based wander response system, transitional assistance and adult day health.

C. Program for All-Inclusive Care for the Elderly (PACE) or Elder Service Plan (ESP)

The PACE program provides private agency-based coordinated living and health related services to persons age 55 and older who might otherwise require institutional care without community-based medical and social services. Individuals under 65 must meet the Social Security disability definition. PACE applicants usually have MassHealth coverage, which is often provided through the MassHealth Frail Elders waiver, although individuals can private pay for PACE services if they can afford it. MassHealth has a special exemption for Frail Elders criteria down to age 55 if enrolled in the PACE program. The recipient must agree to receive all services through the managed care program, which coordinates Medicare, MassHealth and all other available medical providers. Once in the program, coverage continues even if the individual advances into an institution.

IV. Other community programs for elders supported by MassHealth

A. Home Care Program

Home care services are the traditional “ala carte” services for seniors who require some level of care but do not need or desire a full managed care community program. They are designed to ensure a level of independence and dignity with the elder with care choices. Home care services can be fully paid by individuals with enough income, but lower income individuals can get services that are partially subsidized through the Executive Office of Elder Affairs (EOEA) or fully by MassHealth. Subsidized and MassHealth coverage has income limits, and the elder must demonstrate that he or she requires a need for services. This program may work with other home-based programs, such as Caregiver Homes, described below.

To be eligible for the EOEA subsidized Home Care program, the individual must be 60 years of age or older, and not residing in a nursing home or assisted living facility. The individual must also meet the financial eligibility guidelines, and not receiving services from all-inclusive programs such as PACE or Group Adult Foster Care. The individual must have been assessed by an ASAP case worker and found to be in need of services. The maximum gross annual income for the program is \$23,475 for a family of one and \$33,217 for a family of two. Services include medical assistance, Adult Day Health Services, homemaker services, laundry, transportation, companion services, food shopping and other services. The program will also offer respite services to give the caregiver time off. If the elder requires additional help, he or she may be eligible for the Enhanced Community Options Program, described below.

B. Enhanced Community Options Program (ECOP)

Enhanced Community Options (ECOP) is a program within the Executive Office of Elder Affairs (EOEA) Home Care program that provides an enhanced level of care. Similar to other programs, the applicants must demonstrate that they are medically eligible for nursing facility care. ECOP members receive at least twice the amount of services as Home Care. In order to be medically eligible for ECOP, the applicant must require at least one skilled nursing or therapist daily or require a nursing service at least three times per week plus two other services for activities of daily living. Seniors do not have to be eligible for MassHealth in order to be eligible for ECOP. Both the EOEA Home Care program and ECOP are administered locally by ASAPs.

C. Caregiver Homes

Caregiver Homes is a relatively new program that allows the elder to hire a live-in individual, either certain family members or any non-family member, to provide care giving services to the elder. It works in a partnership with the PACE program and also works in conjunction with the Executive Office of Elder Affairs (EOEA) Home Care program. Caregiver Homes will place seniors into other senior care programs, such as the PACE program, as they see fit.

An elder’s spouse, parent or legal guardian is ineligible to be paid as a caregiver under this program. However, the individual’s children, unlike other programs, can be paid caregivers. The elder must meet the financial requirements of MassHealth. The elder

must also require assistance with at least three Activities of Daily Living. The caregiver will provide 24-hour supervision by providing assistance with the daily activities and personal care services which other programs do not offer. The maximum total caregiver payments for an applicant is \$18,000 per year.

In order to become a caregiver, an individual must be at least 16 years old and interview with a placement coordinator. There is also a care management team that provides full support and supervision to the caregiver. Caregivers are required to take periodic days off, and during this time respite care will be provided.

D. Personal Care Attendant (PCA) program

The PCA program is completely funded by MassHealth. An elder can qualify if the individual meets the financial criteria and needs assistance with at least two Activities of Daily Living. The individual would be in charge of hiring his or her own caregivers, but cannot hire a child, parent, spouse or guardian. The elder is not responsible for the burden of payroll and taxes because it is handled by an outside agency. This program is different than the previously mentioned home health care programs because the elder is responsible for the hiring of the PCA, as opposed to an agency. It gives the elder a greater sense of control.

The elder must be enrolled in MassHealth in order to be eligible. This program can take a few months to implement because a nurse occupational therapy team performs a formal evaluation to determine the needs of the elder and they would send the evaluation to MassHealth for approval.

E. Group Adult Foster Care (GAFC) and SSI-G

Group Adult Foster Care is a MassHealth program that pays for care and services for seniors and disabled individuals who live in GAFC-approved homes. GAFC homes typically are assisted living facilities, but also include group housing. GAFC is designed, like other programs, to keep seniors in the community who are in imminent risk of institutionalization at a nursing facility. There are now more than 80 facilities in Massachusetts that offer GAFC services.

An individual must be at least 60 years of age, eligible for MassHealth, and require assistance with at least one Activity of Daily Living. The senior will need clinical approval from an Aging Service Access Point (ASAP). The senior will receive an individual care plan developed by a registered nurse and a case manager, personal care services in the home, medication management and two days of adult health services or eight hours of home health aide services. MassHealth pays a per diem care rate, but they will not pay for room and board. If the individual is also financially eligible for the Social Security needs-based program for assisted living called Supplemental Security Income in the "group living" category (SSI-G), then the facility will accept the individual's other income, GAFC and SSI-G as the total cost of care including room and board.

To obtain SSI-G, the individual must live in a certified assisted living facility, be eligible for or participate in GAFC, have count-

able unearned (fixed) income less than \$1,148 per month (in 2009), and assets under \$2,000 a month. Although an individual or couple must be eligible for GAFC in order to be eligible for SSI-G, SSI-G is not required for GAFC eligibility.

V. Veterans Affairs "Aid and Attendance Program"

A non-service connected disability pension under the Veterans Administration referred to often as "Aid and Attendance" is a benefit that falls outside of Community Medicaid, but may serve as a valuable tool in assisting veterans and their spouses or their widows to pay for medical costs. The monthly pension is not countable as income or an asset for Community Medicaid, so an elder can receive the pension and also still be eligible for Community MassHealth, including programs such as PACE. Aid and Attendance can provide additional income to a disabled veteran to assist them in securing a comfortable environment. The pension is also tax free. Certain service criteria as well as specific income and asset limitations apply so it is best to consult with an elder law attorney before filing an application. Eligible individuals must file an application for the pension with the Veterans Benefit Administration.

A veteran may be eligible for up to \$1,644 per month, while a surviving spouse is eligible for up to \$1,056 a month. A couple is eligible for up to \$1,949 a month. An applicant's assets are applied to an age vs. asset test in which it is subjectively evaluated whether or not the application has sufficient funds based upon their age and expenses to live without the pension for their life expectancy. This means that eligibility for a 99-year-old with the same assets as a 70-year-old will likely be determined differently. The asset test does not include a primary residence home or a car.

The program is also driven by a formula between income and the cost of the assistance the individual is in need of, whether at home, assisted living or a nursing home. For example, the rent for assisted living or a nursing home can be deducted against an individual's income to possibly qualify them for the full benefit they are eligible to receive. Note that only 'out of pocket' expenses are counted towards the medical expenses figure. A child caretaker contract may also be used as a medical expense for an elder to assist in making them eligible for the pension. These and other planning strategies may be available for an elder in planning for this pension but should only be pursued upon consulting with a knowledgeable attorney who is certified by the VA.

Visit Moschella & Winston LLP at www.moschellawinston.com to review detailed resource guides on these and other topics. See the MBA Elder Law monthly resource guide at the MBA Elder Law Education Program at www.massbar.org/for-the-public/public-information/elder-law-education-program.

Endnotes

1. Activities of daily living include such basic necessary self support activities such as bathing, toileting, dressing, walking, eating or getting in or out of a bed or chair.

RECENT DEVELOPMENTS IN THE FIELD OF REVERSE MORTGAGES

By Robert T. Cannon

Recent legislation has made the reverse mortgage less costly for most seniors, available for more types of property interest, and opened up a new area of financing for home purchases. This article will detail some history and be a primer of the reverse mortgage, including a summary of the recent legislative changes under the FHA Modernization Act.

The Home Equity Conversion Mortgage (“HECM”) reverse mortgage is nothing new. Reverse mortgages first came to the United States in 1961 but were not federally regulated, and were not favorable to borrowers. Congress created the HECM by passing the FHA Reverse Mortgage Legislation (Housing and Community Development Act of 1987-S. 825) on Dec. 22, 1987. For the first 10 years, the HECM was a pilot demonstration project limited to 2,500 mortgages.

Many nations have reverse mortgage programs designed to address the problems associated with a growing elderly population unable to be supported by a declining younger working population. There are reverse mortgage programs in the United Kingdom, Canada, France, India, Australia, Ireland, Spain, Japan, Germany and throughout Scandinavia.

In the United States, the public policy behind the HECM reverse mortgage is two-fold. The first is that it is less expensive for the government to insure a program that allows seniors to live in their homes for the rest of their lives than it is to pay for nursing homes.¹ The second is that the HECM program can be a source of income that baby boomers can utilize to make up for the projected shortfall in Social Security revenues beginning in 2019.² The expectation is that the HECM reverse mortgage will become a common retirement tool for baby boomers.

The HECM reverse mortgage is fairly straightforward. To qualify, a borrower must be at least age 62³ and own a home. There are no credit or income requirements. The home must be the borrowers’ principal residence. Reverse mortgages are available for single family homes, condominiums, manufactured homes, multi-family homes up to four units and, under the new regulations, cooperatives.⁴ Excluded are mobile homes, condominiums where the senior borrower’s unit consists of 25 or more percent of the condo-

minium complex and structures that are on leased property of less than 99 years (which would exclude homes in a number of retirement communities).⁵

All HECM applicants must have counseling from a HUD approved not-for-profit agency. A lender is not allowed to steer seniors to specific counseling agencies or pay for the counseling. It is paid by the senior either at the time of the counseling or as part of the closing costs.

With a reverse mortgage, a lender makes available to a senior a percentage of their home’s value. The percentage made available is a function of the senior’s age and the HECM interest rate. The older the senior and the lower the interest rate, the greater the percentage that is made available. A 72-year-old senior will have more funds available to them than a 62-year-old senior in a house of the same value. The home value is determined by an independent HUD licensed appraiser using a comparable value method. For purposes of calculating the funds available, the house value is capped at the HUD 203(b) limit now set nationally at \$417,000.

With a HECM, a senior does not make monthly payments. Instead, interest accrues on funds the senior actually uses and is paid back only from the sale proceeds of the home in three circumstances: (i) when all the borrowers have passed away; (ii) when all the borrowers have not lived in the home for 12 consecutive months (if a senior borrower returns home, then the time period for the 12 consecutive months is reset);⁶ and (iii) when the home is sold.

What is repaid from the sale of the home (or from other financing sources if the heirs wish to keep the home) are the funds the senior has actually used (which generally includes the closing costs) plus the interest that has accrued on that amount. The remaining equity goes to the borrowers or their heirs. If the amount owed is greater than the then house value, there is no deficiency. HECM reverse mortgages are non-recourse loans — there is no personal liability. In that situation, the lender will foreclose at 95 percent⁷ of the home value and forgive the deficiency.

The funds are available to a senior in three ways or a combination of those ways. The first is a lump sum where they take all the money at once to either pay off currently existing mortgages or “put it in their pocket.” Unless used to pay off a current mortgage, the lump sum is generally not the best idea since the interest will accrue on that whole amount. Interest on reverse mortgages accrues on not what is made available to the senior but on what they actually draw down.

The second is a monthly income either for as long as the senior continues to live in the home (the “tenure” plan) or for a term of years. The tenure plan makes sense for seniors who have certain budgetary requirements and know how much they need each month to make up any shortfall in their fixed income. With the tenure plan, a senior can draw down more than the home value. The term of years plan makes sense especially where the senior knows that they will be leaving their home at some set future date.



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The third option is a line of credit. Here, a senior draws down what they need when they need it. Interest will not accrue on the line of credit funds since the senior has not put that money in their pocket. Instead, the unused line of credit funds grow at a rate one half of one percent greater than the accruing rate of interest on the funds that are drawn down. The growth will be income tax free.⁸ This growth occurs regardless of the home's value. Even if the home depreciates below the available line of credit funds, those funds are still available to the senior homeowner. For example, after Hurricane Katrina, hundreds of seniors were able to use their line of credit funds for up to 12 consecutive months after their homes were destroyed. These seniors had the full amount of their line of credit for use to get back on their feet although their homes had no value. They were also not personally liable to pay back the funds used.

One interesting aspect of the HECM credit line is that full or partial prepayment is allowed at any time. Any prepayment made will not only pay down the reverse mortgage balance but will increase the line of credit on a dollar for dollar basis.⁹ As such, some seniors use the Line of Credit as an investment tool especially in that HECM funds are not a countable asset for Mass Health or Medicaid spend down requirements.¹⁰

HECMs are not "too good to be true" because they are not free. The closing costs are significant. Besides normal closing costs, a HECM has an origination fee paid to the lender. This is now calculated at 2 percent of the first \$200,000 of the home value or lending limit, whichever is less, and 1 percent thereafter. There is a cap of \$6,000 and a floor of \$2,500. A second cost is a HUD mortgage insurance premium (MIP) set at 2 percent, again of the home value or lending limit whichever is lower (the "maximum claim amount") plus an additional annual premium of 0.5 percent of the loan balance. Borrowers do not directly pay the insurance premiums. Instead, lenders make the payments to FHA on behalf of the borrowers and the cost of the insurance is added to the borrower's loan balance. That said, the closing costs on a \$400,000 home can be \$16,500.

The HUD mortgage insurance fund serves two purposes: (i) it protects lenders from suffering losses if the final loan balance exceeds the proceeds from the sale of a home;¹² and (ii) it continues monthly payments to the homeowner if the lender fails. All HECM lenders offer almost exactly the same terms since the federal government has removed their risk and, in exchange, the lenders strictly follow the federal regulations. As such, there is not a "no closing cost" HECM. Unlike traditional mortgages, where a lender can hide closing costs in a higher interest rate, HUD requires full disclosure. Finally, this means safety for the senior homeowners since HUD will step in for any lender who fails. The recent failure of Indy-Mac (the nation's second largest HECM lender through its Financial Freedom division) had no impact on its reverse mortgage lending. It was business as usual for Financial Freedom all throughout the FDIC receivership.

Although a senior borrower can pay the closing costs, the vast majority do not, meaning that interest accrues on that amount. Another closing cost is a servicing fee calculated commonly at \$35 per month.¹³ Interest does not accrue on the servicing fee charge calculated from the date of closing to the senior's 100th birthday. This sum is escrowed and reduces the net amount available to the borrower. If the senior permanently leaves their home before age 100, the balance is credited.

The interest rate on a HECM is typically a variable interest rate, although a fixed rate is available. The variable program is either monthly or annual. The vast majority of seniors opt for the monthly variable rate since it makes the most amount of funds available. The annual variable rate will mean greater equity remaining at the time of the loan termination. The interest rate is based on an index, typically the one year treasury rate, plus a margin set by the lender. The fixed interest rate program is rarely seen. First, the interest rate is higher.¹⁴ Next, unlike the variable programs, there is no line of credit available with the fixed interest rate since the borrower is required to take a full lump sum at the date of closing.¹⁵ Over the life of the loan, the interest paid will very likely be greater than with the variable rate programs.

The final major change to the HECM program is that a senior can now use a HECM to purchase a home. This could be a useful vehicle for seniors who are downsizing. Previously, a senior would sell the larger home and pay full cash for the new smaller home. Now they can use the HECM purchase mortgage to finance a substantial part of the new home price, pay less cash from the sale of the larger home and have no mortgage payments.¹⁶ Expect to see real estate brokers marketing "half price" homes.

HECM reverse mortgages, like all financial tools, are specific to the individual situation of a senior homeowner. They are one of many options that a senior should consider as part of their financial planning. The FHA Modernization Bill has increased the variety of options and property counsel, financial planners, divorce attorneys, estate planners and elder law attorneys should familiarize themselves with the program so that they can best represent the interest of their senior clients.

Endnotes

1. See Testimony of the National Council on Aging at <http://energy-commerce.house.gov/reparchives/108/Hearings/04272005hearing1487/Stucki.pdf>.

2. See Congressional Budget Office Report on Updated Long Term Projections for Social Security at www.cbo.gov/ftpdocs/96xx/doc9649/SSTOC.2.1.htm.

3. When there is more than one homeowner, the calculated funds are based on the age of the youngest homeowner.

4. Title can be held in a revocable trust so long as all beneficiaries are eligible borrowers and the trust instrument is amended to include certain HUD required language. Title can also be as a life estate. Property in irrevocable trusts are not eligible for a HECM.

5. Most of the regulations governing the HECM program can be found in 24 CFR 206; the HUD HECM Handbook (Rev. 4235.1) at www.hud.gov/offices/adm/hudclips/handbooks/hshg/4235.1/index.cfm and various HUD Mortgage Letters promulgated from time to time.

6. At the time of the loan termination, the borrowers or heirs are given a six-month period to sell the home with two automatically granted three-month extensions for a total of one year. For example, coupled with the twelve consecutive month rule, a home would not need to be sold until two years after all the borrowers have left the home.

7. The remaining 5 percent is allocated for foreclosure costs and brokerage fees.

8. All funds received from a HECM reverse mortgage are income tax free since they are not income but an advance on a loan. As such, the funds received do not affect social security benefits although they may af-

fect Medicaid or Supplemental Security Income (SSI) which uses a formula limiting applicants to no more than \$2,000 (\$3,000 for a couple) in countable assets one day out of the month. If a Medicaid applicant draws \$4,000 from the reverse mortgage line of credit and spends it the same calendar month, Medicaid is not affected. However, if the applicant does not spend most of the money and the amount left in their bank account exceeds \$2,000 at the end of the month, the applicant will become ineligible for Medicaid.

9. A strategy for financial planners is to use mandatory distributions from tax deferred accounts to make a prepayment on a HECM reverse mortgage. This has three effects. It offsets the income tax paid on the distribution by creating a mortgage interest deduction. It pays down the HECM mortgage balance and it increases the funds available to the HECM borrower in the line of credit only now those funds are not countable assets.

10. See MGL Ch 19A § 36 and 130 CMR 520.015.

11. The amount of the closing costs is the single greatest criticism of the HECM program but the expectation is that the costs will decrease as the secondary market for HECMs develops. Currently, HECM securitization and loan pools are in their infancy. Costs should come down as the investor base grows which will be assisted with a new HECM product indexed to the LIBOR.

12. The lenders of the HECM borrowers affected by Hurricane Katrina were made whole by HUD through the mortgage insurance fund.

13. For the HECM annual variable interest rate and the HECM fixed interest rate programs, the servicing fee is typically \$30 per month.

14. As of the date of this article, the HECM monthly variable interest rate was 2.45 percent based on the 1 year CMT plus 2.0 percent. Since 1989, the 1 year treasury (CMT) has varied from 0.90 percent to 8.53 percent. All variable HECM interest rates have a lifetime cap. For the monthly program, it is 10 percent above the initial interest rate. For example, a reverse mortgage beginning at 2.45 percent will never exceed 12.45 percent. The annual variable rate is also tied to the one year treasury bill but has a higher margin. The interest rate increase for the annual rate is no greater than 2 percent per year with a lifetime cap of 5 percent. The fixed HECM interest rate as of the date of this article is 5.68 percent.

15. HECM reverse mortgages have a right of rescission where a borrower can cancel the mortgage, with no financial cost, for a period up to three business days after the date of the closing.

16. Today, a 62-year-old selling a home for \$600,000 and purchasing a downsized \$400,000 home would pay cash (assuming they did not get a regular mortgage with attendant monthly payments) and have remaining reserves of \$200,000. With the HECM purchase, they would receive \$238,472 in HECM loan proceeds meaning cash disbursement of \$161,528 with no monthly payments and a remaining reserve of \$438,472.

THE CONTINUING METAMORPHOSIS OF 40B REVIEW

By Mark A. Kablack

The Massachusetts Supreme Judicial Court has issued its latest ruling on matters involving the interpretation of Chapter 40B, and there is significant impact for projects with locally imposed conditions. The recent ruling in the case entitled *Board of Appeals of Woburn v. Housing Appeals Committee*, 451 Mass. 581 (2008), is the latest in a string of SJC decisions issued this spring involving 40B. Contrary to many earlier decisions which were, on the whole, supportive of the 40B program, the current decision upholds the Town of Woburn's position requiring a substantial reduction in unit density over that proposed by the developer and supported by the Housing Appeals Committee (HAC).

The *Woburn* case has a complicated procedural history and is probably a classic situation of how unusual facts can result in questionable law. The project as originally proposed called for the development of 640 residential units on a 74-acre parcel in Woburn owned by Northeastern University. The residential units were initially proposed in 32 buildings, each with 20 units, together with accessory structures and amenities, including a 5,500-square-foot recreation center. The initial proposal was reviewed by the Woburn Board of Appeals over the course of 12 months, and nine public hearings, and resulted in an approval with more than 50 enumerated conditions. One of the conditions was a requirement that the project be limited to just 300 units (less than half of what was originally proposed).

In light of the conditional approval, including the drastic reduction of unit density, the developer pursued an appeal to HAC. HAC conducted an intense factual investigation of the project, and concluded that the 640-unit proposed development was "too large [and] impos[ed] significant burdens on the surrounding community." HAC looked to the underlying agreement of sale between Northeastern University and the developer, including a provision regarding the carrying capacity of the project site, and concluded that a 420-unit project was more in keeping with local needs.

HAC's ruling resulted in successive appeals to Superior Court by both the developer and the Board of Appeals over the density issue and the ability of HAC to establish a different unit count from what was proposed (640 units) or approved (300 units). The Superior Court ultimately ruled that while HAC had the ability to prescribe a new unit density, the decision in favor of 420 units was unsubstantiated. The case was remanded to HAC for further analysis on unit count, at which time the developer proposed two different design alternatives, each with 540 units of development. In 2005, now almost five years after the initial application to the Board of Appeals, HAC ruled that a 540-unit plan was consistent with local needs. HAC ordered the board to issue a comprehensive permit for a 540-unit plan, not specifying which of the two alternatives proposed by the developer was to be permitted.

The second HAC decision resulted in further appeals by both the developer and the Board of Appeals to Superior Court. The board argued in part that the alternative plan proposals for 540 units constituted a "substantial change" under the applicable regulations in effect at the time, which substantial change required a threshold hearing and board review that could not be usurped through the appeal process. The Superior Court rejected this argument, and concluded that HAC had gotten it right. The Superior Court found that the 540-unit proposal was reasonable and consistent with local needs, supported by substantial evidence, and that the board could (under the remand order) determine which of the two developer proposals it would permit.

When further appeals were requested, the SJC assumed direct appellate review of the final Superior Court decision in early 2007. The core of the case before the SJC regarded whether HAC exceeded its statutory authority when it revised the conditions imposed by the Board of Appeals, increasing the unit density from 300 units to 540 units. Specifically, the SJC examined whether HAC had such authority in the instant case where the reduction in unit density did not make the project, on the whole, uneconomic.

Chapter 40B provides that a developer may appeal to HAC when (i) a project is denied; or (ii) a project is approved with conditions that render a project uneconomic. If an appeal is brought under clause (i), HAC may explore whether the denial is supported by a local concern that outweighs the regional need for affordable housing. In other words, HAC may conduct a balancing test to determine whether an enumerated condition fulfills a proper local goal of securing public health, safety and/or welfare, and further, whether such goal trumps the stated need for more affordable housing. If an appeal is brought under clause (ii), HAC never gets to the balancing test, unless the developer first proves that the imposed conditions are uneconomic.

The distinction between clauses (i) and (ii), as noted above, can be blurred when, in the instant case, a developer argues that a conditional approval constitutes a *de facto* denial. In fact, HAC proceeded in its review in the *Woburn* case as if the project had been denied by the Board of Appeals, because it believed that the conditional approval, reducing the number of units proposed to less than half, was the functional equivalent of a denial. HAC argued,



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based on its position in an earlier decision entitled: *Settlers Landing Realty Trust v. Barnstable Board of Appeals*, HAC No. 01-08 (Sept. 22, 2003), that “an arbitrary reduction in the number of units may constitute a denial of a permit,” and that “when a developer challenges a board decision that significantly reduces the number of units in the development, the appropriate course is to review the decision to determine whether it manifests a reasonable basis for the reduction.”

In *Woburn*, the SJC ruled against HAC on its scope of review when there is *de facto* denial. While the SJC will defer to an agency’s interpretation of statutory and regulatory provisions, deference is limited when the law is unambiguous. In the SJC’s opinion, Chapter 40B is clear that a functional or *de facto* denial may only be successfully appealed by a developer when the developer is able to prove that one or more of the imposed conditions render the project uneconomic. Absent such proof, HAC is without jurisdiction to reach the balancing test of whether conditions are reasonably linked to proper local concerns, and whether such concerns outweigh the statewide need for affordable housing. The SJC ultimately held in *Woburn* that the original conditional approval, with reduction in density from 640 units to 300 units, should remain intact.

In a concurring opinion, SJC Chief Justice Margaret H. Marshall recognizes the potential for municipalities, in light of the *Woburn* decision, to attempt to “stymie the construction of an affordable housing project” by drastically reducing density or otherwise

imposing onerous conditions, without actually denying a project. According to the *Woburn* decision, such tactical behavior is practically “unfettered,” because, without an uneconomic finding, a developer’s appeal would be immune from review by HAC. Marshall continues by stating that HAC should properly have the authority to conclude that a “reduction is unjustified and that a project of a larger size than allowed by the board would be consistent with local needs.” However, such authority must be based squarely upon a regulatory framework that better defines “reasonable return” or when a project is rendered “uneconomic” or “effectively uneconomic.” Without such regulatory direction, a local board “remains free to impede the pace at which affordable housing units — so urgently needed — are constructed in the Commonwealth.”

It is interesting to note that *Woburn* was decided with full knowledge of the recently implemented DHCD regulations regarding Chapter 40B (760 MASS. CODE REGS. 56.00 (2008)). While the new regulations continue to provide for appellate review by HAC on the basis of a *de facto* denial (*see* 760 MASS. CODE REGS. 56.06(5)(b)(5)(2008)), such review is now clearly limited in light of the *Woburn* decision. Marshall strongly suggests, in her concurring opinion, that DHCD currently has the regulatory authority to further expound upon and define standards for economic return. Such authority should be exercised promptly, in order to re-establish the vital role of HAC in the review of overly burdensome and ill-intended conditions of approval. The development community is certainly hopeful that DHCD heeds Marshall’s suggestion.

THE MADOFF MESS AND THE DEDUCTIBILITY OF INVESTMENT THEFT LOSSES

By Kevin Diamond

Introduction

The “Madoff Mess” will challenge you to help your clients determine the best way to recover their losses. Where there are few or no viable sources of recovery, one method may be to have the government help your client with a tax refund and/or a reduction of their future tax obligations. This can be accomplished by maximizing tax benefits under Internal Revenue Code (IRC) Section 165(c)(2), the theft loss provision.

Background

All financial frauds start with a story that is too good to be true. Madoff and his alleged consistent rates of return are simply the latest example of that. The problem is that many frauds may leave your client with no money and no viable alternative sources of recovery.

We know that there will be no shortage of legal actions. There will be bankruptcy proceedings, class actions and plenty of third party litigation. Lawsuits will be abundant. What may not be abundant is any money left for the investor. Accordingly, the investor’s best chance for recovery may be from the theft loss provisions of the Internal Revenue Code.

Technical requirements

The “theft loss” provision, IRC Section 165(c)(2) may allow for a reduction of ordinary income. It will do this by allowing the client to recoup previously paid taxes and minimize future tax obligations.

That section has numerous technical requirements and certain “legal” determinations that may make the tax preparer reluctant to take, or defend the IRS response to, this type of claim. Further, most tax software does not properly handle this situation and is usually geared toward preparing the more common IRC Section 1211 deduction with its \$3,000 limitation.

The best course of action is for the tax preparer to take this to a tax attorney. An experienced attorney can help determine if the

legal requirement of a “theft” has occurred. Whether a loss constitutes a “theft loss” is determined by examining the law of the state where the alleged theft occurred. *Edwards v. Bromberg*, 232 F.2d 107, 111 (5th Cir. 1956).

Further, the attorney can help determine whether there was actual fraud with the necessary element of “scienter” which is a criminal intent. Thus, to claim a theft loss, the taxpayer must prove that the “loss resulted from a taking of property that is illegal under the law of the state where it occurred and that the taking was done with criminal intent.” Rev. Rul. 72-112, 1972-1 C.B. 60.

The investor *must* have bought the investment directly from a seller that committed fraud under a local law. This leads to a requirement of “reliance” that the investor relied on the fraudulent information when parting with his property. This means that the investor dealt directly with the person committing the fraud, as opposed to purchasing the stock through his broker on the open market. The courts have consistently disallowed theft loss deductions relating to a decline in the value of the stock that was attributable to corporate officers misrepresenting the financial condition of the corporation, even when the officers were indicted for securities fraud or other criminal violations. *Paine V. Commissioner*, 63 T.C. 736, 523 F.2d 1053 (5th Cir. 1975).

The IRS in Notice 2004-27, 2004-1 C.B. 782 advised taxpayers that the IRS will disallow (and may impose penalties) for theft losses claimed by taxpayers for the decline in market value of their stock caused by disclosure of accounting fraud or other illegal misconduct of the officers or directors of the corporation that committed the fraud.

These legal elements often deter the tax preparer from advising the client to use the “theft loss” and its added benefits to the safer and less imposing IRC 1211, which is limited to \$3,000 a year. Help your clients by dealing with a tax professional that will fight for your client’s best interests and the benefit that Congress intended they have.

The tax attorney can help the tax preparer and the client by using the IRC to possibly eliminate this year’s tax, but also by going back three years for refunds and forward for 20 years. This type of deduction can be used without triggering the Alternative Minimum Tax and is not subject to the 2 percent floor by IRC Section 67.

If there is no viable option for recovery, as there often aren’t in financial fraud matters, then IRC Section 165 may be the best alternative for the client.

Technical requirement and Madoff

It is clear that Madoff has been charged with “theft” and is likely to be convicted on those and/or related charges. Further, it is clear that he acted with the necessary element of “scienter” or evil intent, as is required by the IRS. The problem for many of Madoff victims is that there was no “reliance” as required. Remember that



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the reliance means that they dealt directly with Madoff or his company, Bernard L. Madoff Securities LLC.

One potential problem will be that many of the victims came to Madoff through one of the several dozen “feeder funds,” which were intermediary companies that stay in between the victim and Madoff and could end their ability to use the theft tax loss because the victim relied on their fund manager rather than Madoff personally. Further review by competent counsel should be arranged to determine the viability of all such claims.

When do you write off the loss?

The timing of the Section 165 loss can at first appear black and white. The IRC at 26 CFR 1.165-1 (d) (1) says “[a] loss shall be allowed as a deduction under section 165 (a) *only for the taxable year in which the loss is sustained.*”

However, the Code Section itself states at Section 165 (a) “*there shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.*”

So what does “compensated by insurance or otherwise” mean?

The issue of insurance is a question of fact for the bankruptcy trustee in the Madoff Mess.

And what is meant by “otherwise”? One could interpret that to mean litigation against the principal and other possible defendants who could be liable. Any litigation has a life of its own and could go on for a substantial period of time. So the question arises, does this preclude the taxpayer from writing off his losses while participating in the ongoing litigation?

This issue is further compounded by IRC Section 6511, which acts as a statute of limitations on these claims whereby the taxpayer must file within three years from the date that the return was required to be filed or two years from the time the tax was paid, whichever was later.

An extraordinary case

How do you reconcile these two positions? What is the rule for taking “theft losses”?

A recent U.S. Tax Court case was fueled by an extraordinary set of facts that will help shed light on how the U.S. Tax Court interpreted the timing of the claim.

The case of *Johnson and Johnson v. The United States*, US-CL-CT, 2008 -1 USTC 50, 142 (January 24, 2008), demonstrates how this court analyzed and ruled on the timing issue.

The Johnsons sold their Detroit-based television station for more than \$175 million in 1997. They then purchased \$83.5 million of jewelry from a well known Palm Beach jeweler named Jack Hasson. Late in 1997, the Johnsons discovered that the gems were worth only \$5.4 million. The result was that the Johnsons lost \$78,160,409 in this fraudulent scheme.

In 1998, the Johnsons took a deduction of \$58 million on their federal income tax return. The Johnsons had the assistance of their accountants and lawyers in estimating that there would be an approximate \$20 million recovery. Subsequently, Hasson was convicted of fraud in 2001.

To begin the analysis, the Johnsons met the three requirements of the IRS for Section 165 — theft loss to apply as they had already established: (1) *Theft*, as Hasson was indicted and later convicted under Florida state law; (2) *Privity or Reliance* — the Johnsons had bought the jewels directly from Hasson so that there was privity

of contract; and (3) *Scienter* — Hasson had the necessary “intent to deceive” as he knew at the time of the sale that he was deceiving and defrauding the Johnsons, who had relied on him about the value of the stones he sold them.

Armed with the three needed requirements, the Johnsons filed for their theft loss in 1998. The IRS objected to the deduction and off to court they went. It was not until January of 2008 that the matter was fully resolved as noted above in the case of *Johnson and Johnson v. The United States*, US-CL-CT, 2008 -1 USTC 50, 142 (January 24, 2008).

How do you write off Johnson’s \$78 million?

The Johnsons’ position

As previously mentioned, the plaintiffs initially sought the theft loss in 1998 with the loss carry back to 1997. The plaintiffs tried to rely on IRC at 26 CFR 1.165-1 (d) (1) which provides that “[a] loss shall be allowed as a deduction under section 165 (a) *only for the taxable year in which the loss is sustained.*”

In a revised complaint, the plaintiffs filed for the loss in 1998 and in the alternative, for the loss deduction in 1999, 2000 and/or 2001. The plaintiffs relied on the “year of discovery” rule for the timing of their deduction. The plaintiffs had established their damages based upon an estimate made by their lawyer’s and accountant’s experience using the “*reasonable prospect of recovery*” standard.

The IRS position

The IRS argued that the plaintiffs were not entitled to a theft loss deduction in any amount neither in 1998, nor 2001 but instead only in the year in which all of the claims for reimbursement were resolved. The government asserted that the plaintiffs were not entitled to a theft loss deduction until, at the earliest 2005, when the plaintiffs’ last recovery efforts were concluded. The IRS used Treas. Reg. Section 1.165-1(d)(2)(i) to support its “*reasonable certainty*” standard whereby it states that “whether or not such reimbursement will be received may be ascertained with reasonable certainty, for example, by a settlement of the claim, or by an adjudication of the claim, or by an abandonment of the claim”

The verdict

The court held for both the plaintiffs and the IRS in a split decision as follows.

The judge ruled against the plaintiffs for a theft loss in 1998 as he stated that the plaintiffs did nothing more than anticipate the recovery in the pending litigation against Hasson and his associates. He further stated that the plaintiffs’ reliance on the “*reasonable prospect of recovery*” standard was misplaced, as it only applies in the year a taxpayer discovers a theft loss. The court agreed with the IRS on the use and application of the “*reasonable certainty*” standard. The judge wrote “the requirement that a taxpayer ‘ascertain with reasonable certainty’ means that a taxpayer must obtain a verifiable determination of the amount she will receive based on a resolution of the reimbursement claim before taking a theft loss deduction.” Accordingly, the plaintiffs were not entitled to a theft loss deduction in 1998 for any portion of their loss.

However, the court ruled against the IRS’ position that no deduction could be taken until 2005. The government had argued that Treas. Reg. Section 1.165-(d)(2) states that “no portion of the loss with respect to which reimbursement may be received is sustained

... until it can be ascertained with reasonable certainty whether or not such reimbursement will be received ... [t]he government interprets the phrase 'no portion of the loss' to mean the regulation requires that a taxpayer refrain from taking any portion of a theft loss deduction until the taxpayer determines exactly how much of the entire loss the taxpayer will recover ... [h]owever contrary to the government's position the Court held that 'the regulation and the examples given therefore confirm the plaintiff's contention that once a portion of the recovery was established, they were entitled to take a theft loss deduction for that "portion" that they were reasonably certain they would never recover.' Accordingly, the court held that as of 2001, the plaintiffs had established with reasonable certainty that they had no prospect of recovering \$37,216,383 of the estimated \$78,160,409 loss.

Therefore, the court found that theft losses can be calculated as the loss becomes reasonably certain; and second, that those losses can be incurred over several years and not held back until the total of the loss is determined.

When do you write off the Madoff Mess?

This will be the hardest decision for you and your client/investor. The year of discovery is clear, however, is there insurance? Are

there viable sources of recovery? Will SIPC pay for your client's losses? We do not know the answers to these questions.

What we do know is that there will be: (1) litigation, lots of it; (2) class actions; and (3) bankruptcy proceedings. And, even with all of the above actions, there could be nothing.

If it appears that there will be nothing left, should your client just go for the theft tax loss now?

This is just one of the many issues that the victims of the Madoff Mess will have to consider. There should be an analysis of the viable options but one viable option might be to forego the years of participation in litigation that could lead to less than what might be available now under the theft loss provisions of the IRC.

Conclusion

Section 165(c)(2) Theft Loss of the Internal Revenue Code – is one of the best kept secrets of the IRS. The tax preparer has a duty to apply it to any client situation that meets the requirements, especially the victims of the Madoff Mess. Further, the use of the section of the code with the application of the above recent Tax Court case provides a new found flexibility for the tax practitioner to help his client recover theft losses from the only source remaining, Uncle Sam.

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