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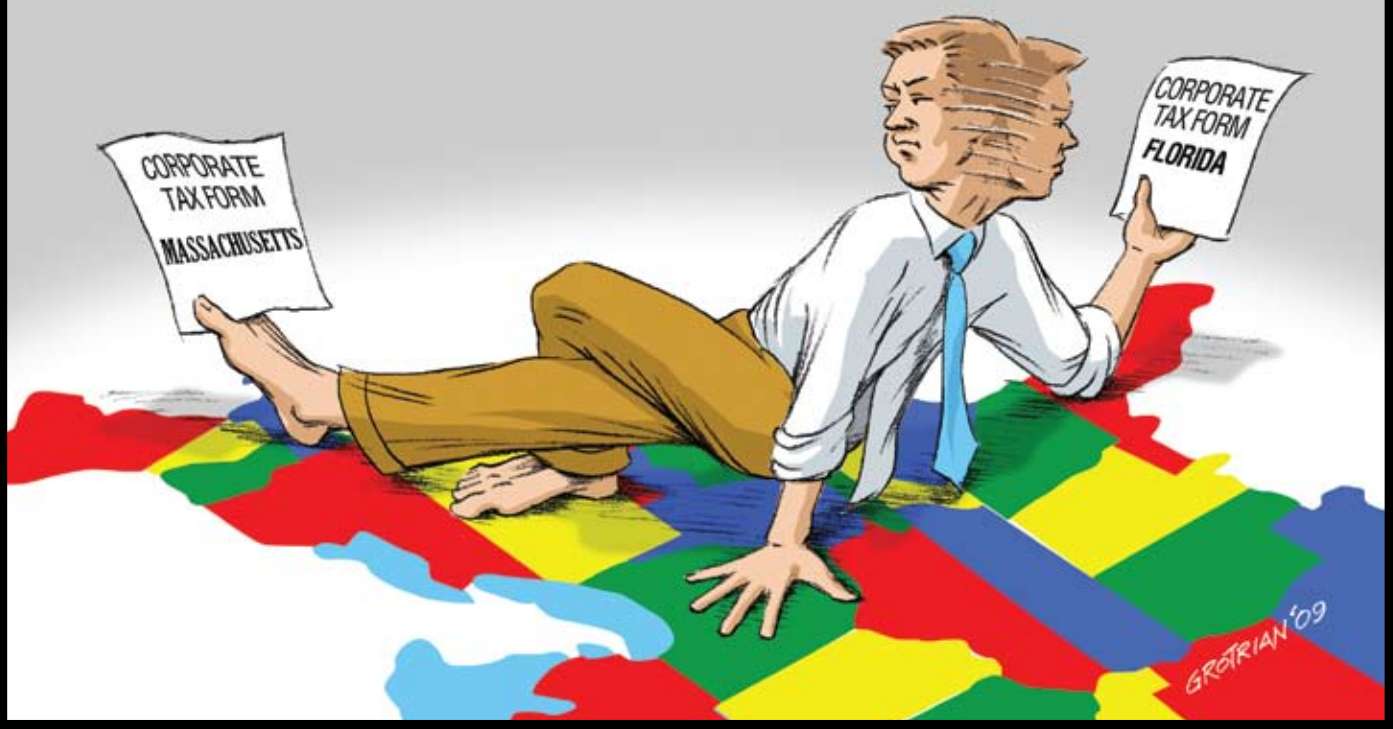

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E-Discovery practice alert: Massachusetts litigators must be prepared to address the inevitable intersection of electronically stored information, recently issued Superior Court Standing Order 1-09 and amended Rule 9-A

By Daniel K. Gelb

Issues concerning electronic discovery ("e-discovery") and its associated electronically stored information ("ESI") are not concerns for litigants appearing only before the federal courts which follow the Federal Rules of Civil Procedure.[1] Massachusetts litigators must also be aware of how to properly handle pre-trial discovery challenges relating to ESI even though Massachusetts has not codified rules relating to e-discovery.[2]

On Jan. 12, 2009, the Massachusetts Superior Court officially adopted Standing Order 1-09 ("standing order"), directing litigants in all counties in the Commonwealth of Massachusetts to adhere to new standards concerning written discovery.[3] In addition to the standing order, on Jan. 22, 2009, the Supreme Judicial Court approved an amendment to Superior Court Rule 9A ("Rule 9A") that the Superior Court submitted for approval on Nov. 19, 2008. The amended version of Rule 9A became effective on March 2, 2009.[4]

The following discusses the standing order and why it should raise the awareness of litigators as to the handling of ESI, especially when complex discovery issues in the Massachusetts courts arise. The article also discusses why counsel must be cognizant of how e-discovery may affect the *practice* of litigation in light of the newly amended directives contained in Rule 9A.

New Superior Court Standing Order 1-09

Scope of discovery. Section 1(b) of the standing order states that, "[t]his rule is not intended to broaden or narrow the scope of discovery permitted by the Massachusetts Rules of Civil Procedure." Although the standing order is not intended to impact the *scope* of the discovery permitted, it is likely to impact the scope of *knowledge* expected of counsel relating to ESI. Section 2 of the standing order states that after having asserted an objection "… the answer shall state either: (a) notwithstanding the objection no information has been withheld from the answer, or (b) information has been withheld from the answer because of the objection. Where information has been withheld from the answer, the objecting party shall describe the nature of the information withheld and identify each objection asserted to justify the withholding."

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Interrogatories. Litigators must be prepared to respond to interrogatories seeking information involving ESI substantiating an answer. If an answer places a client at risk of breaching the attorney-client privilege or a privacy statute (e.g., HIPPA, Gramm-Leach Bliley Act, laws governing trade secrets, etc.), counsel must be aware of (1) the ESI at issue; (2) whether such ESI is included in the answer to the interrogatory to properly substantiate it; and (3) if inclusion of statements concerning ESI in the answer would cause a client to violate a legal obligation.

Counsel must be able to *explain the basis* for an objection where ESI is sought as part of an answer to an interrogatory. The standing order calls for the objecting party to *describe* the nature of the information withheld and to *identify* each objection asserted to justify the withholding. The current litigation climate has become accustomed to broadly asserting unnecessary objections upon which the standing order has now placed limitations. Knowing how to articulate e-discovery in order to satisfy the discovery obligations under the standing order (and Mass. R. Civ. P. 33) is essential.

Document requests. Section 3(a) of the standing order states that, "[w]here a party serves a response to a request for production of documents and things under Mass. R. Civ. P. 34 before production is completed, the response may include general objections." Counsel should not find too much comfort in this wording since the standing order continues: "… where general objections are made, the responding party shall prepare and serve a supplemental response no later than 10 days after the completion of production."

Massachusetts does not have codified rules of court procedure dedicated to the discovery of ESI; however, it is beneficial for counsel to consult the National Center for State Courts' Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information ("the guidelines").[5] The reality for Massachusetts practitioners is that the standing order will force litigators to become more knowledgeable about what objections are considered appropriate when responding to requests for production of documents or to interrogatories — even in the absence of a specific

rule relating to ESI codified into the Massachusetts Rules of Civil Procedure.

Section 3(c) of the standing order does address an obligation to search for relevant ESI to properly supplement an objection to production:

> … In the initial written response, the responding party shall articulate with clarity the scope of the search conducted or to be conducted. If the scope of the search changes during production, the responding party in the supplemental written response shall articulate with clarity the change in scope. If 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. ***(Emphasis added.)***

Counsel will benefit from consulting The Sedona Principles[6] and the Rules Relating to Discovery of Electronically Stored Information authored by the National Conference of Commissioner on Uniform State Laws.[7] Similar to the spirit of the guidelines, The Sedona Principles and the Rules Relating to Discovery of Electronically Stored Information offer litigants practical guidance on "best practices" when handling pre-trial challenges relating to ESI. The Sedona Principles, the Guidelines and the Rules Relating to Discovery of Electronically Stored Information are very helpful when articulating the review and production of ESI. These resources help determine what is "reasonable" conduct during discovery of ESI, and whether a good faith objection exists. Asserting blanket objections could result in a violation of Standing Order 1-09. Counsel must *explain* the search and review of responsive documents. Practitioners should be weary of both *how* and *who* reviewed a client's ESI so counsel is not placed in the position of an "e-discovery witness" or compromising a legal privilege.

The standing order does not differentiate hard copy documents from ESI. As hard copy documents become more obsolete, modern-day litigation will inevitably involve discovery disputes over ESI. E-discovery issues can be more complicated because discovery existing beyond the four corners of a document may be responsive. Unlike hard copy documents, ESI possesses certain characteristics such as meta data (i.e., data about "data") and ephemeral or dormant data (e.g., information requiring digital forensics to excavate).[8] The more complex electronic evidence becomes, the more likely counsel will be required to determine whether such information is subject to production. This review process will require articulation of activity undertaken to ensure compliance with the standing order.

As mentioned above, counsel should be careful as to whether such explanation may result in divulging work product or attorney-client privileged communications. Therefore, litigants that become aware that ESI will likely be involved in a litigation should immediately enlist the assistance of an e-discovery expert to determine the protocol of review so counsel is not stuck between complying with the standing order and breaching a privilege or violating a statute. One possible mechanism to avoid such conflicts may be to meet and confer with opposing counsel early on to develop an "e-discovery action plan" similar to that contemplated under Fed. R. Civ. P. 26(f). In addition, if the parties cannot determine a "protocol" for review of document and e-discovery that is mutually satisfactory, counsel may want to consider addressing these concerns with the court in a Mass. R. Civ. P. 16 conference or through motions (e.g. for a preservation order or a protective order); however, opposing counsel should be diligent about not burdening the court with concerns that could be narrowed and resolved by seeking out the appropriate resources (e.g., e-discovery expert or consultant).

Recently amended Superior Court Rule 9A

The concept of e-discovery as a general proposition is unique inasmuch as it is inextricably tied to the procedural, substantive and management aspects of practicing law. The recently amended Rule 9A invokes this concept.

Rule 9A has been significantly amended, in particular, with the inclusion of provisions governing the use of technology *between* parties to litigation. As of March 2, 2009, Rule 9A now requires litigants to include e-mail addresses (provided one exists) for counsel or *pro se* litigants on papers pursuant to sub-section (a)(6). Moreover, subsection (b)(5)(i) governing *Summary Judgment* (which should be read in its entirety) states, in part, as follows[9]:

> ***… the statement of material facts shall be contemporaneously sent in electronic form by email to all parties against whom summary judgment is sought in order to facilitate the requirements of the following paragraph. The statement of material facts in electronic form shall be sent as an attachment to an email and shall be in Rich Text Format (RTF)[10] unless the parties agree to use another word processing format.***
>
> ***(Emphasis added.)***

Counsel must be conversant with the procedural, substantive and practice management interplay with Rule 9A. Counsel should also be familiar with rules that are particular to the court's Business Litigation Session ("BLS") where large volumes of ESI will likely become central to litigation (e.g. opposing counsel's obligation to prepare a proposed joint tracking order for the court's consideration and endorsement).

Given the risks associated with electronic transmission of legal documents, counsel must isolate the *final* version of a pleading issued to opposing counsel. This is extremely important given that subsection (b)(5)(i) calls for transmittal of a summary judgment submitted to the opposition in Rich Text Format "… unless the parties agree to use another word processing format." Furthermore, subsection (b)(2)(ii) directs parties opposing summary judgment to transmit their pleadings electronically to the moving party with the following proviso: "Where the obligation to send the statement of material facts in electronic form has been excused, the response to the statement of material facts may be in a separate document."

Counsel should recognize that subsections (b)(5)(i) and (b)(5)(ii) differ from the format of filing pleadings electronically in federal court matters. In federal court, the case management/electronic case filing ("CM/ECF") system managed by PACER calls for the portable document format ("PDF") created by Adobe Systems (and other software vendors) to be uploaded to the system. Once the PDF formatted pleading is uploaded to the ECF system, the court then electronically executes the service of the electronic file(s) to all electronically registered parties to the respective litigation.[11]

Rule 9A calls for parties to electronically transmit files to one another on their own. Counsel, therefore, should become familiar with how to appropriately and prudently handle the transmission of electronic documents when following Rule 9A to avoid potentially legal exposure for a client by way of inadvertent production of ESI

containing attorney-client privileged information or work product.

First, it is imperative to realize that *all* electronic files have "digital fingerprints" associated with them. Every edit, deletion, change and the like is recoverable from a file unless one "scrubs" this confidential work product from the document. Therefore, counsel must be sure to put protocols in place in one's law practice that assures client confidences and work product are not transmitted to opposing counsel in an attachment to an e-mail transmitting a pleading pursuant to Rule 9A. However, the *only* ESI counsel should scrub is related to counsel's *own* work product and nothing else which could otherwise result in spoliation of evidence.

Counsel must also be aware of ESI that exists in electronic files such as text or images that have been copied, cut and pasted into documents; and, the identities of those who authored or last modified a file (e.g. in Microsoft Word, Corel WordPerfect or another word processing software application). ESI may be transmitted without counsel being aware of it. For example, one may accept track changes or "redlines" in a summary judgment brief created by using MS Word and then e-mail the same to opposing counsel.

It is important to bear in mind that the opposition may attempt to excavate data associated with a particular electronic file transmitted by counsel. Counsel should be aware of how to proactively prevent such conduct. This may entail appropriate use of data "scrubbing" software. Scrubbing can be explained as "… the process of taking a data set with individually identifiable information, and removing or altering the data in such a way that the usefulness of the data set is retained, but the identification of individuals contained in that data set is nearly impossible." [12]

Scrubbing or "wiping" software should *never* be utilized to engage in the spoliation of ESI — or any evidence for that matter — with the intent of, or even inadvertent result of, gaining an unethical advantage in any dispute or legal matter. Data or memory scrubbing software should only be used to wipe out ESI that counsel or a party has *the right* to scrub, such as track changes contained in an attorney's *own* work product being prepared for transmission to opposing counsel.

Conclusion

The standing order is likely to influence the way counsel approach asserting and challenging objections related to document review and production. Moreover, the amendment to Rule 9A creates a heightened duty of care when litigants communicate to one another via e-mail (e.g. so that there is no inadvertent disclosure of privileged and protected information to opposing counsel).

The proliferation of ESI's involvement in modern-day litigation requires that litigants and their lawyers take steps to act reasonably in order to avoid unnecessary burden and expense. Counsel's understanding of e-discovery and ESI will facilitate the e-discovery process, including properly responding to discovery requests, asserting objections and effectively moving for court orders.

Notes

1. *See* for example, Fed.R.Civ.P. 16, 26, 33, 34, 37 and 45.

2. ESI resides in locations in addition to emails (e.g. cell phones, PDAs, GPS).

3. *See* Massachusetts Superior Court Standing Order 1-09 ("Written Discovery") found at www.mass.gov/courts/courtsandjudges/courts/superiorcourt/standing-order-1-09.pdf.

4. *See* Massachusetts Superior Court Rule 9A ("Civil Motions") found at www.mass.gov/courts/sjc/amend-sup-ct-r-9a.html.

5. *See* generally, the *Guidelines* at www.ncsconline.org/images/EDiscCCJGuidelinesFinal.pdf.

6. *See* www.thesedonaconference.org.

7. *See* www.law.upenn.edu/bll/archives/ulc/udoera/2007_final.htm.

8. *See Columbia Pictures Indus. v. Bunnell et al*, No. CV 06-1093FMCJCX (C.D. Cal. May 29, 2007).

9. *See* sub-section (b)(5)(i) of Rule 9A and other subsections governing email transmission of pleadings found at www.mass.gov/courts/courtsandjudges/courts/superiorcourt/rule9a.pdf.

10. *See http://en.wikipedia.org/wiki/Rich_Text_Format* ("Rich Text Format (often abbreviated "RTF") is a document file format developed by Microsoft in 1987 for cross-platform document interchange.").

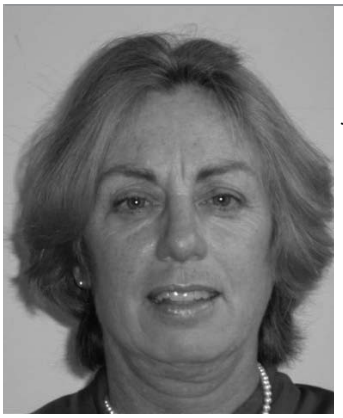
11. For information on PACER and the CM/ECF system, see http://pacer.psc.uscourts.gov/cgi-bin/cmecf/ecf-links.pl.

12. *See* "Data Scrubbing" *Wikipedia.org* at http://en.wikipedia.org/wiki/Data_scrubbing

"Retained control" and enterprise liability: managing the risk of harm to independent contractors

By Barbara L. Horan and Carissa L. Prosnitz

In a recent opinion, a federal district court judge, ruling on principles of Massachusetts law, granted summary judgment to the defendant commercial property manager, Equity Office Management, in a $5 million negligence action brought by an employee of an independent contractor who fell while washing exterior windows of an office building. *Lopez v. Equity Office Management, LLC*, 597 F. Supp. 2d 189 (D. Mass. 2009) (Stearns, J.). The plaintiff, Carlos Lopez, whose claimed injuries included fractures, nerve damage and brain trauma, contended Equity should have supervised him and taken action to ensure that his window washing work complied with OSHA standards. Lopez claimed that Equity breached its duty by failing to supervise him, by failing to take action to protect him from injury, and by deviating from the established standard of care of customary industry and trade practices.



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The court's opinion reiterates Massachusetts' bright-line rule for determining when a landowner will be liable for personal injuries sustained by independent contractors or their employees performing contracted services on the owner's property. In brief, liability will not attach unless the owner retained control over the contractor's work and failed to exercise that control with reasonable care. The purpose of this article is to examine the concept of "retained control" to clarify the boundaries of this important rule.

I. Duty to protect employees of independent contractor arises only through "retained control" over contractor's work.

Massachusetts courts agree that the duty and standard of care a property owner owes to the employee of an independent contractor is the same as that owed to all lawful visitors. *Poirier v. Town of Plymouth*, 374 Mass. 206, 228 (1978). The landowner owes the contractor only the duty to maintain the premises in a reasonably safe condition and to warn of dangers of which the owner is or reasonably should be aware. *O'Sullivan v. Shaw*, 431 Mass. 201, 206 (2000). In granting summary judgment to Equity in the *Lopez* case, the court found no evidence that Equity had deviated from ANSI I-14.1, the industry standard for designing, installing, inspecting, testing and maintaining a certified roof anchor system used to tie back portable outriggers. *Lopez,* 597 F. Supp. 2d at 196. The court rejected Lopez' claim that by identifying the location of the roof anchors to be used in exterior window washing operations, Equity had "controlled" the means and methods of his work. *Id.*

Under Massachusetts law, a landowner who hires an independent contractor to perform work on his or her property cannot be held *vicariously liable* for injuries due to the contractor's negligence. *Lyon v. Morphew*, 424 Mass. 828, 834 (1997); *Corsetti v. Stone Co.*, 396 Mass. 1, 9 (1985). This rule applies even where the work performed under the contract is deemed to be "inherently dangerous." *Vertentes v. Barletta Co.*, 392 Mass. 165, 168 (1984).

A property owner may incur *direct liability,* however, for its own negligence in connection with work performed by an independent contractor, if it has "retained at least some degree of control over the manner in which the work is done." *Lyon,* 424 Mass. at 834. This principle is well-established in Massachusetts. For example, the Restatement (Second) of Torts § 414, provides that "[o]ne who entrusts work to an independent contractor, but who retains the control of *any part of the work*, is subject to liability for physical harm to others … caused by his failure to exercise his control with reasonable care." (emphasis added). The SJC appears to have adopted this articulation. *See Corsetti*, 396 Mass. at 9-10, quoting Prosser, Torts § 71 at 469 (4th ed. 1971) and Restatement (Second) of Torts § 409, Cmt. b (1965).

The Superior Court applied the corresponding principle in *Bayliss v. Hannan Construction Corp.*, finding that a homeowner with no construction experience owed no duty to direct or super-

vise the work of an independent contractor roofer, and thus could not be liable for injuries sustained by the contractor's employee. *Bayliss v. Hannan Construction Corp.*, No. 0404636J, 2007 WL 738925 (Mass. Super. Feb. 14, 2007). This is consistent with the District Court's decision in *Bouchard v. General Elec. Co.*, 849 F. Supp. 103, 107 (D. Mass. 1994) where the court found that for tort liability to attach, a premises owner must exert "operational control" over the area in which an accident occurs. In *Bouchard*, the court rejected the idea that the owner's general right to order that work stop or resume, to inspect the progress of work, or to receive reports, meant that the owner controlled the "operative detail" of the contractor's work. *Id. See also Farren v. General Motors Corp.*, 708 F. Supp. 436, 446 (D. Mass. 1989) (maintaining *in dictum* that "If the only evidence produced were that [the property owner] had the right to point out safety violations and to remove any contractor that did not take care of a safety problem, [the owner] would be entitled to summary judgment on the issue of its liability under § 414").

II. Retained control as assumption of enterprise liability

The concept of retained control in these decisions may be explained in terms of the modern enterprise theory of liability and the "resource-allocation" principles thought to justify it. According to enterprise theory, the economic loss (cost) resulting from personal injuries should be borne by the individuals or entities (the "enterprise") best able to pass the loss forward to consumers or backward to the factors of production employed in making a product or providing a service.[1] This distributes the risk according to enterprise theory. G. Calabresi, *The Cost of Accidents: A Legal and Economic Analysis,* 53 Yale University Press, 1970.[2] The central tenets of enterprise liability are, first, that the losses flowing from accidents should be "internalized" or borne by the enterprise supplying the goods or services causing the loss, thereby allowing the price of the goods or services to reflect their real cost. Second, where several individuals or entities are engaged in an enterprise, liability for personal injuries is best borne by the individual or entity able to control the price of goods and services by managing the risk of injury created in producing and offering them. When prices reflect actual costs (including accident costs), products and services that are dangerous will be more expensive relative to market alternatives, and the resulting decrease in demand will serve as a general deterrent to their being offered. Consumers' choices of products and services will be maximized relative to their own desires, and each enterprise will assume all and only those costs associated with it, regardless of fault. G. Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts,* 70 Yale L.J. 499, 514 (1961) ("Proper resource allocation militates strongly against allocating to an enterprise costs not closely associated with it …. But it also militates for allocating to an enterprise all costs that are within the scope of that enterprise").

The Restatement (Second) of Torts § 409 links retained control and enterprise liability:

> [t]he general rule stated in this Section, as to the nonliability of an employer for physical harm caused to another by the act or omission of an independent contractor, was the original common law rule. The explanation for it most commonly given is that**, since the employer has no power of control over the manner in which the work is to be done by the contractor, it is to be regarded as the contractor's own enterprise,** and he, rather than the employer, is the proper party to be charged with the responsibility of preventing the risk, and bearing and distributing it.
>
> Cmt. b (emphasis added).[3]

However, if a landowner who has engaged an independent contractor retains the right to control any of the contractor's work, the landowner becomes a participant in the enterprise, and as one who assumes a share of the responsibility for managing the risk of the enterprise, he or she becomes a potential bearer of loss caused by his or her failure to manage it.

The series of exceptions to this rule spelled out by the Restatement (Second) of Torts in §§ 410-429 further illustrates how one who retains control over the work of an independent contractor is brought into the enterprise and thereby becomes potentially liable for the negligent exercise of that control. In particular, § 414 provides that "[o]ne who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." As explained in Comment C, liability will not attach where one retains merely a general right to order to stop or resume the work, to inspect the progress of the work or to receive reports on it, to make non-binding suggestions or recommendations, or to request alterations and deviations. "Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way." *Id.*

III. Understanding *Lopez v. Equity*

The general enterprise liability principles governing the liability for physical harm to others caused by acts or omissions of landowners retaining control of the contractor's work can be found in the cases on which the District Court relied in granting summary judgment to Equity on Lopez's negligence claims.

In *Corsetti,* subcontractor Salvucci Construction Company employed a mason who sued the general contractor, the Stone Company, for injuries he sustained in a fall from scaffolding. 396 Mass. 3. By contract, the Stone Company assumed responsibility for initiating, maintaining and supervising job site safety. *Id.* at 12. The control the Stone Company retained over Salvucci's work put it in a position to manage the risk of harm to Corsetti, and it owed a duty to Corsetti to require that he use safety equipment. *Id.* Thus, the court found, the Stone Company could be liable to Corsetti for its own negligent exercise of that control. *Id*. at 24.

By contrast, in *Foley v. Rust Intern.,* 901 F.2d 183, 185 (1st Cir. 1990), the First Circuit affirmed the trial court's grant of j.n.o.v. following a verdict for the plaintiff, an apprentice boiler-maker. *Id.* at 183. Foley was employed by subcontractor Riley-Stoker Corp., which the general contractor, Rust International Corp., had retained. *Id.* In that case, the court found that based on the facts, "[t]here was no evidence that Rust retained a right of supervision over Riley such that Riley was not entirely free to do the work in its own way." *Id.* at 185. In other words, Rust did not retain such control over Riley's work that it brought itself into the enterprise in a way that made it reasonable for Rust to assume liability for failing to manage the risk of Foley's work.

The Massachusetts Appeals Court's ruling in *Kostrzewa v. Suffolk Constr. Co.*, illustrates how control retained by Suffolk, the general contractor, brought it into the asbestos removal enterprise of the plaintiff's employer, sub-subcontractor, Superior Abatement, Inc.[4] 73 Mass. App. Ct. 377 (2008). Suffolk retained control over means and methods of all work subcontractors performed under the contract. *Id.* at 379-80. The contract called for Suffolk to take responsibility for initiating and maintaining all safety precautions, for protecting workers and others from injury, and required Suffolk to designate an on-site safety manager. *Id.* "These various provisions of the contract," wrote the Appeals Court, "indicate that Suffolk was to control the project, including all aspects of safety." *Id.* at 380. Thus, by contractual obligation, Suffolk brought itself into the enterprise, according to enterprise theory, and agreed to liability for any subsequent failure to adequately manage the enterprise's risk.

By contrast in the *Lopez* case, Equity's responsibility to window washers working on its property was limited to providing a reasonably safe place for the work to be done, and to warn of any hidden dangers. *Id.* at 196. Equity satisfied its duty as a landowner by creating, testing and maintaining a certified system of roof anchors for use in exterior window washing work. *Id.* However, it otherwise retained no operational control over Lopez' window washing work, and thus, Equity was not part of the window washing enterprise. The court rejected Lopez' argument that Equity retained control through a contract provision requiring written confirmation from the contractor that it was in compliance with governmental safety regulations. *Id.* at 197. Rather, the court concluded, retention of the right to be assured that safety guidelines were being followed did not bring Equity into the window washing enterprise for which the contractor was hired.[5]

IV. Conclusion

Under an enterprise liability/resource allocation theory, unless allocated differently by contract or where it is unfeasible to do so, the cost of injuries should be borne by the enterprise whose activity creates them. That cost then should be distributed among all those in a position to manage the enterprise's risk because "the injury is a real cost of those activities." Calabresi, *Risk Distribution*, 70 Yale L.J. at 505. By definition, an independent contractor is not a landowner's employee; therefore, other than the general duty to maintain his or her premises in a reasonably safe condition, a landowner hiring an independent contractor to perform work will not manage the risk of physical harm to the contractor or its employees. To the extent that the landowner does retain control over the contractor's work, he or she may adjust the price for the contractor's services to reflect the true cost because the landowner then becomes part of the enterprise, and assumes liability of one in a position to manage the risk of physical harm.

As Calabresi noted, independent contractor cases may be situations in which the pure loss-distribution theory applies. In such cases, it does not matter who bears the loss initially in the sense that risks are assignable by either contractual party to the activities that create them. Calabresi, *Risk Distribution*, 70 Yale L.J. at 506.[6] "However," Calabresi observed, "whenever one party is *in fact* in a better position to allocate the cost of the particular loss to the appropriate activity or merchandise, allocation of resources requires that party to bear the original burden of the loss." *Id.* (emphasis added).

As the *Lopez* court made clear, contract provisions are critical evidence regarding a property owner's participation in the enterprise for which the contractor was retained. For risk management purposes, property owners who do not wish to assume liability for harm to independent contractors should execute appropriate contract documents. Those documents should explicitly and unequivocally disclaim a duty to supervise the means and methods of the contractor's work, and clearly assign all responsibility for operational control of the work and adherence to safety regulations to the contractor. Although courts will look beyond the contractual language to the actual conduct of the parties, contracts are critical evidence of a property owner's intent to manage the risk of injury to the contractor or its employees, and may tip the scales in legal disputes over liability when independent contractors or their employers are injured.

Notes

1. This is so unless otherwise provided by contract, or where indemnification or exculpatory agreements are unfeasible.

2. "One cannot conceive of a driver seeking indemnification agreements from every pedestrian he may hit, or, for that matter, a pedestrian seeking an agreement to bear accident loses from every driver who may hit him. In such situations, the law cannot avoid determining how the losses will be divided among the parties to an accident."

3. Cmt. a of § 409 makes clear that the use of "independent contractor" in this context does *not* include individuals performing work for another under conditions that would render them servants or employees. By extension, the use of "employment" does not have its usual meaning, but instead indicates the hiring or retaining the services of another, e.g., by contract.

4. As noted by the Appeals Court, so long as the control retained by a general contractor puts it in a position to manage the risk of loss, it is irrelevant how many layers of subcontractors are involved in the enterprise. 73 Mass. App. Ct. at 379 n. 5.

5. Lopez appealed the District Court's ruling to the First Circuit. On June 3, 2009, on joint motion of the parties, Lopez' appeal was voluntarily dismissed.

6. In a pure loss-distribution situation, every consumer has perfect knowledge and is perfectly rational, either contractual party can assign risk, and the cost of insurance does not vary from one consumer to the next. Thus, if the risk is borne by the contractor, the contractor's price for his or her services includes accident costs; if the risk is borne by the landowner, the price he or she pays for the contractors' services is reduced by the anticipated accident cost.

Thinking outside the box: A review of innovations in trial practice

By Christopher A. Kenney

Trial practice in state and federal court has evolved to include innovative techniques to enhance advocacy and assist the jury in understanding the evidence. Jurors are no longer passive observers to the trial process. Juror questioning of witnesses, interim commentary by lawyers during trials, and substantive preliminary jury instructions are all growing trends in trial practice.

Substantive preliminary jury instructions

Traditionally, jury trials have had the peculiar characteristic that jurors are not instructed on the substantive law they must apply in the case until the end of the trial, after the presentation of all the evidence and the arguments of counsel. This practice has been criticized for decades as being out of touch with the natural way in which jurors process information. These criticisms have led to an increased use of preliminary instructions to jurors on the substantive principles of law they will be asked to apply at the onset of trial, rather than just the end.

At present, most states allow, and a few states even require by court rule, that judges instruct the jury on substantive legal principles before opening statements in addition to final instructions at the end of trial. These substantive instructions typically include matters such as the nature of the plaintiff's claims, the elements of such claims, the burden of proof on the issues in the case, and the defendant's affirmative defenses. On average, substantive preliminary instructions are still only given in less than 20 percent of cases in jurisdictions where such instructions are not required. Endorsement of the practice by numerous jury reform commissions throughout the country and increased experimentation with the technique has, however, led to a trend of increased use in recent years.

Instructing jurors on substantive legal principles early in the trial can significantly benefit juror understanding and recollection of both the legal principles they must apply and the facts of the case. Research on human information processing predicts, and studies confirm, that providing a prior cognitive structure, or "schema," for the evidence presented to a jury can influence the selection of evidence that is entered into memory and how that evidence is recalled. The framework provided by substantive preliminary instructions has been shown to focus juror attention on legally relevant evidence and to facilitate juror recollection of probative facts and statements. This enhanced focus also aids jurors in making credibility assessments and drawing reasonable inferences during trial.

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Providing substantive instruction early on, rather than after weeks of testimony, also takes better advantage of the freshness and attentiveness of the jury early in the trial which enhances the jury's comprehension of the applicable legal principles. The repetition involved in providing substantive instructions both at the beginning and end of trial can likewise help the jury remember and process these instructions as they begin their deliberations. Substantive preliminary instructions can also help jurors resist biases they may bring to the courtroom by grounding them, from the onset, in a legal framework for the case rather than leaving them unguided until the end of trial.

Substantive preliminary instructions also provide a host of benefits for trial attorneys. Having the judge instruct the jury on legal principles before opening statements allows counsel an early opportunity to further explain the law in a way favorable to their clients, and to advocate a view of how the facts of the case will fit within the legal framework the judge set forth. Further, it allows counsel to preview their case while knowing the precise wording that the judge has used in setting the legal framework of the case, rather than being forced to speculate beforehand on the judge's choice of language for final instructions. This also incidentally creates a natural outline for the trial itself. Attorneys can use this outline as an organizational tool for the effective and efficient presentation of their arguments and evidence.

One difficulty that arises with substantive preliminary instructions is that, as a trial progresses, the instructions given at the beginning of trial may need to be changed or supplemented based on the evidence presented. Therefore, the trial judge should stress that it is the final instruction to the jury that they should base their deliberations on. Instructions often change as a result of rulings on legal issues during trial. Consequently, counsel should proactively address legal issues through motions *in limine* before trial starts.

As more judges come to appreciate the value of preliminary substantive instructions, it is important for attorneys to incorporate them into their trial strategy. By doing so, lawyers can effectively shape the jury's understanding of the issues in the case.

Juror questioning

The Supreme Judicial Court of Massachusetts has joined the

growing number of states that have approved the use of juror questioning, subject to some restrictions. Trial judges are generally given discretion about whether to permit jury questioning, and vary greatly in the procedure they employ by which the jurors' questions are posed to witnesses at trial. Questions from jurors pose the unhealthy prospect of trial counsel being forced to object to a juror's question. Many trial judges guard against the prejudicial effect of such an objection by reviewing with counsel at side bar the juror's proposed questions before posing them to the witnesses. If one or more attorneys object to the question, the objection can be made in the anonymous safe harbor of sidebar far outside the juror's hearing.

Counsel should ask the judge at the pre-trial conference about the judge's particular practice regarding juror questioning. Confirm up front whether questions will be previewed with counsel at sidebar, and whether any objection to the question will preclude the question or simply be ruled on by the judge at sidebar. Counsel should also determine whether questions from jurors posed at the conclusion of a witness's examination will reopen re-direct and re-cross examination of the witness depending on the testimony elicited by the juror's question.

"Interim commentary"

Innovative trial judges are allowing counsel to make "interim commentary" to the jury during trial. This technique is a hybrid of opening statement and closing argument that counsel may use during trial to explain or advocate interpretation of evidence. The trial judge may give each counsel a limited bank of time for interim commentary during the trial (e.g. seven to 10 minutes for each party) which is to be used sparingly. Interim commentary is most effectively used just before commencing cross examination where you can explain/argue that the witness's direct testimony under direct examination was false, or inaccurate, and then proceed to prove the point on cross examination. It is also effectively used after a break in trial to reorient the jury before resuming a witness' ongoing testimony.

Be creative and collaborative when it helps your case presentation

Don't be afraid to consult with opposing counsel and seek the court's guidance on creative changes with regard to the "sacred cows" of evidence and trial practice. For example, as a general rule, a plaintiff's receipt of workers' compensation benefits is collateral source income and, therefore, inadmissible at trial. Nevertheless, sophisticated jurors are frequently aware of the existence of workers' compensation insurance. This is particularly true in personal injury cases, where the hospital records in evidence may include references to workers' compensation insurance benefits, the existence of an "industrial accident" causing the injuries, or billing information to a claims representative. Evidence of collateral source income creates the risk that the jury might erroneously conclude that the plaintiff will get a "double recovery" if they award plaintiff tort damages at trial. Under these circumstances, counsel can submit for the court's consideration a proposed jury instruction informing the jury that the plaintiff has received workers' compensation insurance benefits for the injuries sustained in the accident, and that the benefits will need to be repaid if, but only if, the jury awards the plaintiff damages at trial.

Conclusion

The 21st century courtroom is open to change, however slow or small. Trial lawyers must be in the vanguard of proposing and implementing innovative trial techniques to improve advocacy and the administration of justice.

Employability and hireability in Massachusetts

By Sally R. Gaglini

As the economy continues to slope, an assessment of a party's employability used to calculate child support guidelines and/or spousal support requires greater scrutiny and evaluation. The issues of employ**ability** and hire**ability** are intrinsically related to vocational skills, amounts and sources of income together with the opportunity of each for future acquisition of capital assets and income. It remains a mandatory statutory factor in accordance with M.G.L. c. 208, § 34 (2006) that must be considered relative to asset division and alimony. This same analysis applies to child support orders in the context of both divorce and paternity actions (in addition to modification cases). As with M.G. L. c. 208, § 34, the same basic evidentiary foundation should be laid in matters of child support awards pertaining to divorce and paternity. Consideration of employability and hireability, vocational skills, amounts and sources of income together with assets, current and future, substantiates a finding of earning capacity from which the court may attribute income. Section II (H) of the new Child Support Guidelines entitled "Attribution of Income" allows a court, once the evidentiary groundwork has been laid, to make a finding that either party is capable of working and is unemployed or underemployed. The court must consider all relevant factors, including the education, training, health and past employment history of the party, and the age, number, needs and care of the children covered by this order. Now that the Child Support Guidelines Task Force has eliminated the provision of precluding attribution of income for a custodial parent with children who are under the age of six, it will very likely expand the necessary inquiry to include both parties.

To lay the aforementioned foundation, identifying a vocational expert to offer consulting services during the pendancy of the litigation or to be hired as an expert witness is preferable in lieu of the facetious declaratory charge, "The wife can work at McDonalds, your honor."

The role of the vocational expert

The role of a vocational expert or consultant, also known as employability experts and/or employability and/or rehabilitation consultants, varies depending upon case facts. Before a practitioner engages the expert, it is important to understand his or her field, which may be distinguished from others holding a similar title. Attorneys advancing or disputing workers' compensation claims have consistently relied upon this testimony. Attorney Michael Walsh of Westwood provides historical context:

> The use of vocational counselors has become an intrinsic part of representing injured claimants in the workers compensation system, especially employees who suffer career-changing injuries. Such expert testimony can persuade judges (and insurers) of the likelihood that an individual will be able to return to, and more importantly, sustain a successful return to the workforce.

Certain vocational consultants measure a party's physical and mental abilities to perform tasks, determining their level of aptitude and skill by measuring current or residual ability. A person with little experience playing football, for example, who recently suffered a foot injury would not be a prospective recruit as placekicker for the New England Patriots. These professionals measure a person's capacity to perform specific tasks as well as a person's capacity to sustain the performance. A person's age, education, prior work history and current physical and emotional capacity are reviewed. A skills assessment may be included. If one party places his health before the court claiming a diminished earning capacity due to a purported disability, medical testimony and/or testimony of rehabilitation specialists becomes relevant and material. Once a foundation is established to show the basis for employability, the right field expert can make or break a case.

Real time jobs

Professionals with years of experience in employment, recruiting and job placement can be invaluable to practitioners, locating actual jobs and compensation packages for discovery and trial. For litigants who maintain they cannot find employment commensurate with their past experience, can only work below their level, or who claim injury but have the earning capacity, accessing open positions can be extremely helpful, not only to his or her spouse and/or support obligor, but also to the court. Key to proving a person's earning capacity is to focus on a realistic match between that person's knowledge and education, skills, abilities and experience, and employability with the needs of employers in today's marketplace. The contemporary job search has become multi-dimensional due to the shifting economy, the speed of decision making and the influence of a person's interest in and commitment to the employment process. According to studies conducted by the *Wall Street Journal*, the U. S. Bureau of Labor Statistics and Drake Beam Morin, 60 to 90 percent of all jobs are found through networking. Locating a dozen positions that loosely match someone's previous job title does not translate into a productive job search. It requires a greater dimension. Today, dour headlines regarding job loss can mislead. Tracy Jan's article in *The Boston Globe*, Jan. 29, 2009, reported that Northeastern University was actively seeking 46 professors from nanotechnology to public health, Tufts was seeking 52 faculty members and Emerson, Holy Cross and Amherst were creating teaching positions. As of April 19, 2009, *Fortune* Magazine posted 28 companies, each offering 150 available positions, others posting thousands of opportunities.[1] For the express purpose of finding employment for a party embroiled in litigation, successful researchers require the expertise to navigate the employment marketplace, utilizing professional networks and proven skills in

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recruiting, placement and career management. This process also addresses the spouse who has no intention of working, conducting a half-hearted effort instead.

An employability consultant should demonstrate the skills and industry knowledge to reach beyond classified ads and job boards to explore additional marketplace opportunities, utilizing up-to-date research tools and tapping into active recruitment networks. Consultants active in the employment field are ideal. Aggressive job searches focus on current functional skills, compensation potential and industry requirements, e.g., academic degrees, credentials and experience. Although a person may appear outwardly qualified based upon prior experience, the current market drives her value (compensation/perquisites) and hireability (likelihood of landing the position now) as opposed to substantial reliance on dated census data. Locating open and available positions in companies actively hiring and income potential within a targeted geographic area remains key. This offers practitioners and courts evidence of a party's true employability/hireability now and in the near future. According to David E. Cherny, Esq., of Boston, "employability is a statutory factor. Consequently, use of a vocational expert in a divorce case can be critical, providing the judge with evidence he or she needs to hang their hat on a finding of earning capacity, employability and hireability."

Such "real time" information would directly assist the court, assessing the quality and integrity of a party's job search. All too often, probation officers are asked to make a determination without any reliable foundation. With specific findings, however, relevant information to assess job prospects of a party who remains, over time, both jobless and purportedly without an earning capacity sufficient to support children and/or spouse becomes available. Once that information leading to a finding of earning capacity has been discovered, a spirited contest of admissibility and challenge may arise. Consequently, sufficient preparation is critical.

Admissibility and challenge

In order for the court to properly allow an expert to testify at trial, the party seeking admissibility of the expert's testimony must satisfy a two-pronged test: (1) relevancy and (2) reliability.[2] Beyond scientific testimony, courts have applied *Daubert* standards in *Kumho Tire Co., Ltd. v. Carmichael*,[3] *Santos v. Chrysler Corp.*[4] and most recently in *Salvas v. Wal-Mart Stores, Inc.*[5] The primary subject of judicial inquiry is to assess whether the expert's opinion is sufficiently reliable and relevant to assist the trier of fact.[6] For example, testimony substantially based on aged employment data may be justifiably attacked.

The court, when considering the inclusion or exclusion of expert testimony, remains the gatekeeper of the proffered expert opinion. Case law indicates that application of *Daubert* factors are fact dependent, flexible and relate to the nature of the inquiry at bar. The *Kumho Tire* case expanded *Daubert*'s scope to include nonscientific expertise, further emphasizing that "[t]oo much depends upon the particular circumstances of the particular case at issue."[7] *Kumho* ruled that it is up to the judge's broad latitude whether *Daubert*'s list of specific factors necessarily or exclusively applies to all experts or in every case.[8] The consistent theme throughout the case law is that no single test of relevance or reliability applies to every situation, and that the judicial inquiry is "a flexible one."[9] The court has broad discretion when ruling on the admissibility of evidence based on its relevance and reliability.[10] In *Beaupre v. Cliff Smith & Assocs.*, the court distinguished the case from those involving a challenge to a medical opinion that lacked a basis in reliable scientific methodology. The court underscored "the extensive discretion of trial judges with respect to both the process of discovery and the admission of evidence, particularly expert testimony and the great deference appellate courts accord the rulings of trial judges in these areas … . "[11] In sum, decisional (and statutory) laws in Massachusetts as regards the admissibility of evidence in addition to evolving case law regarding foundational requirements support findings of earning capacity and income attribution.

Decisional law

Where a party has manipulated their employment status by divestment or otherwise, the courts in those circumstances have often looked to the assets retained when fashioning an award. In the case of *Commonwealth v. Howard*,[12] for example, the wife testified that her former husband told her he would never pay, whereupon he voluntarily left his position of employment. The lower court found ample evidence to substantiate that the defendant's earning capacity was sufficient to comply with the support order, and that he willfully failed to meet those obligations by manipulating his earnings in an attempt to fabricate an inability to pay. The appeals court affirmed. Even more recently in *Smith v. Edelman*,[13] the wife filed a Complaint for Modification of a Divorce Judgment, seeking additional contribution toward private school tuition costs and an increase in child support, based principally on a substantial increase of defendant's husband's income. The probate court (Harms, J.) ordered the husband to make additional contributions toward tuition costs but denied the wife's request for an increase in child support. On review, the appellate court upheld Judge Harms' finding that there was no material disparity in living standards in the parents' homes, and even if the court accepted the wife's contention that the husband was capable of providing a greater financial contribution toward the children's needs by reason of his increased income, the court rejected her suggestion that his increased capacity compelled a child support increase, at least where the increased capacity had not resulted in a material disparity in the parties' lifestyles. The court went on to rule that to the extent there was evidence to suggest that the wife struggled to maintain her elevated status, in comparison to the relative ease with which the husband was able to maintain his lifestyle, the court was within its discretion to attribute the wife's strain principally to her election not to obtain more lucrative employment. The wife chose not to work for a period of time, and when she began working again, she began working an 18-hour workweek at $15 hourly. At trial, the wife, a college graduate who had not worked after the first year of the parties' marriage, was found underemployed by choice. By implication, the court made clear that the wife's earning capacity should have been greater. However, because she was the recipient and not the obligor, the court did not further address the issue of attribution.

In many cases, earned income cannot be viewed in a vacuum. Where there are resources to meet obligations, the assets the parties hold must be considered part of the formula.[14] In particular, the appeals court in *Barron v. Barron* vacated the judgment of divorce as it pertained to health insurance and alimony for the wife and remanded the matter to the probate court.[15] The circumstances before the court included a 12-year marriage, second marriages for both parties. Other than a $40,000 award to the wife, the court left the parties' individual estates intact. The court ordered the hus-

band to contribute to the wife's legal fees together with $300 weekly in support for five years. The appeals court held that "it does not take great business acumen to understand that the husband virtually gave a profitable successful business to his son, thereby divesting himself of the means by which to meet his support obligations," concluding that the court is not restricted by an obligor's ability to manipulate his resources to avoid his legal obligations, describing that any limits on the husband's ability to provide support to the wife were self-imposed. Citing *Krokyn v. Krokyn*,[16] *Pagar v. Pagar*[17] and *Wolfe v. Wolfe*,[18] the court stated plainly that which cannot be misconstrued. "These cases stand for the proposition that one cannot alienate assets while continuing to enjoy their fruits and expect the court to hunt for an unencumbered source of income to satisfy obligations."[19]

Contrary to *Barron*, the appeals court upheld the probate court's award in *Crowe v. Fong*, properly taking into account the father's present and future earning capacity, including his demonstrated ability to earn income and acquire assets by employment, business investments and by the acquisition of capital assets.[20] The court (McGregor, J.) ruled that the trial court gave appropriate weight to the fact that the father's testimony was fraught with deception in an attempt to hide his net worth and his ability to pay child support. With particularity, the court found that Fong's testimony (and that of his parents) was not credible, and that "through maneuvering of … assets, the family had arranged it such that with minimal reported income, Fong and his household were able to live in a large waterfront home, drive a Volvo, spend $7,500 for wedding rings and allegedly dispose of approximately $115,000 in a three-year period."[21]

Distinguished from cases involving asset manipulation, probate courts have made findings based directly on a party's election to forebear in seeking employment or more lucrative employment.

Notes

1. *See* Christopher Tkaczk, *They're Hiring!,* Fortune, *available at http://money.cnn.com/galleries/*2009/fortune/0904/gallery.F500_hiring.fortune/index.html.

2. *Daubert* v. Merrill Dow Pharmaceuticals, 509 U.S. 579, 595 (1993). *See also* Canavan's Case, 432 Mass. 304 (2000) and Commonwealth v. Lanigan, 419 Mass. 15 (1994) for the application of the *Daubert* standard in Massachusetts.

3. 526 U.S. 137 (1999).

4. 430 Mass. 198 (1999).

5. 452 Mass. 337 (2008).

6. Cetrulo & Capone, LLP., Lecture at Massachusetts Continuing Legal Education: *Daubert*-The Fundamentals of an Expert Challenge (Jan. 28, 2009).

7. *Kumho Tire,* 526 U.S. at 150.

8. *Id.* at 142.

9. *Daubert*, 509 U.S. at 594.

10. *Beaupre v. Cliff Smith & Assocs.*, 50 Mass. App. Ct. 480 (2000).

11. *Id.* at 485.

12. 62 Mass. App. Ct. 422, 423-24 (2004).

13. 68 Mass. App. Ct. 549, 550 (2007).

14. *See* Katz v. Katz, 55 Mass. App. Ct. 472 (2002).

15. 28 Mass. App. Ct. 755 (1990) (citing Shuler v. Shuler, 382 Mass.366, 373-375 (1981)).

16. 378 Mass. 206, 210 (1979).

17. 9 Mass. App. Ct. 1, 5-7 (1980).

18. 21 Mass. App. Ct. 254, 257 (1985).

19. *Barron*, 28 Mass.App.Ct. at 759-60.

20. 45 Mass. App. Ct. 673 (1998).

21. *Id.* at 676.

A guide to some of the more substantive changes in the new Massachusetts Child Support Guidelines

By Gayle Stone-Turesky and Katherine E. Garren

The revised Massachusetts Child Support Guidelines, implemented by Chief Justice for Administration and Justice Robert A. Mulligan on Jan. 1, 2009, represent the most significant revisions to the guidelines since they were first introduced to Massachusetts in 1987. While federal law mandates that a review of the guidelines occur every four years, the latest revisions are the product of the hard work of the Child Support Guidelines Task Force that met over a period of two years.[1] The goal of the task force was to carefully review, analyze and debate every aspect of the guidelines. The 2009 guidelines have been in use for approximately six months, and while family law practitioners are familiarizing themselves with the new guidelines, it is useful to identify and clarify a few of the most significant changes embodied in the new guidelines.

The most significant substantive changes to the guidelines came in 1) the shift towards an income share method of calculating child support, 2) the elimination of the income disregard, 3) the ability to attribute income to any parent where there is a finding that one party is capable of working and is either unemployed or underemployed, 4) utilizing two guidelines in cases of shared and split custody, 5) the implementation of a hypothetical guideline for those parties with a legal obligation to support additional children, and 6) the "circuit breaker"[2] as set forth in 2(h) of the Child Support Guideline Worksheet. These alterations were intended to ease and simplify the implementation of an appropriate presumptive order that would insure the smallest economic impact on the child's standard of living and help to encourage joint parental financial responsibility.[3]

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Income share

In November of 2006, during the second meeting of the Child Support Guidelines Task Force, Dr. Jane Venohr, an economist with PSI, presented an overview of the various methods that other states use in calculating child support. According to Venohr, the majority of states use a method referred to as "income share," whereby all child-related expenditures are estimated based on both parents' combined incomes. The payor is then ordered to pay support based on his or her proportion of income to the combined income of the parties.[4] Alternatively, a few states use a percentage of income approach, calculating child support orders based solely on a percentage of the payor's income, without ever considering the income of the recipient.

Massachusetts has long been considered a "hybrid state" when calculating support orders. Until the 2009 revisions, child support orders in Massachusetts were calculated by first using a percentage of the payor's gross income, less prior orders of child support, and then reducing that order based on percentage of the recipient's income to the parties' combined income. The recipient's income was arrived at by disregarding a portion of their income and the cost of child care. Massachusetts will now for the first time join the majority of states to use an "income shares" approach rather than a straight percentage of income when calculating child support. The new guidelines eliminated the calculation of the initial support order based solely on a percentage of the gross income of the payor. Now, the initial support order considers the gross income of both the payor and the recipient, less the cost of child care, health, dental and vision costs and other support obligation.

Elimination of income disregard

The task force also eliminated the income disregard from the recipient's income. The support order is then calculated based on the combined available income of both the recipient and the payor. Once the initial order is established based on the amount of combined income of both parties, the recipient's percentage of the combined income is then deducted from the initial order and the remaining order represents the payor's child support obligation.[5] This methodology is consistent with the "income share" approach rather than a straight "percentage of income" method of calculating child support. These revisions support the need for and encourage joint responsibility for child support in proportion to, or as a percentage of, income.[6]

Attribution of income

Prior to the 2009 revisions, the guidelines specifically indicated that attribution of income was not intended to apply to a custodial parent with children who were under the age of six living in the home. Now, the guidelines allow for attribution of income for any party where there is a finding that the party is capable of working and is unemployed or underemployed.[7] The task force was mindful that each family has its own particular set of facts and circumstances that would contribute to the employability of the recipient. For example, it might be easier for the recipient caring for a 5-year-old to return to work than it is for a parent caring for a 10-year-old with special needs.

The new guidelines now provide the court with a list of nonexclusive factors that the court should consider when using an attributed amount of income in determining a child support order. These nonexclusive factors were without limitation, education, training, health, past employment history of the party and the age, number, needs and care of the children covered by the order. If the court determines that one of the parties is earning less than he or she could, the court should then consider potential earning capacity rather than actual earnings in calculating support.[8] By removing the prohibition of attribution of income for a caretaker with children under the age of six, the court must now consider a variety of essential factors and arrive at an order that is far more just and appropriate.

As a practice tip when attribution of income is a relevant factor in setting child support, due consideration should be given to the specific facts of the case. For example, determine the past work history and income of the party. What is the age of the party and will the age of the litigant affect his or her ability to obtain suitable employment? Under the 2009 revisions, the court is still required to consider the age, number and needs of the children. Will the cost of day care outweigh the practicality of finding suitable employment? Explore whether or not any of the children have special needs that require a parent to be at home. Remember to bring proposed findings with you to present to the court, along with a guideline worksheet using the attributed income.

Shared or split custodial arrangements

Another major change in the 2009 revision was the manner in which to calculate child support in those instances where there is a shared or split custodial arrangement. Previously, the guidelines stated that where the parties agreed to shared physical custody or the court determines that shared physical custody is in the best interests of the children, these guidelines do not apply.[9] Under federal and state law, the guidelines should apply to all cases and provide a presumptive amount of support required to meet the financial needs of the child. Under the old guidelines, physical custody of the child was at times made a contested issue, since it heavily influenced the amount of support that one party would have to pay or receive from the other parent. As a matter of public policy, the physical custody of children should not be adjudicated primarily on the financial support either paid or received by the parents, but rather, it should be determined based on the history of the caretaking provided by each of the parents taking the best interests of the child into consideration. The 2009 revisions to this section of the guidelines support this public policy approach to adjudicating custody.

In order to eliminate the use of support as a reason to request physical custody but still recognize that shared or spit custody must be calculated differently, the task force redrafted the guidelines to read that where two parents share equally or approximately equally the financial responsibility and parenting time for the child(ren), the child support shall be determined by calculating the child support guidelines twice, first with one parent as the recipient, and the second with the other parent as the recipient. The difference in the calculations is paid to the parent with the lower weekly support amount.[10] The same methodology for determining support is to be applied in cases where there is more than one child and each parent has a child in his or her care full time. This arrangement is otherwise known as split custody, where both parents have the financial responsibility and parenting time with one of the children. The benefit of this change is to eliminate the protracted custody battles that are highly influenced by monetary support obligations.

As a practical matter, always be prepared for court by presenting proposed guideline worksheets. One worksheet should be with your client as the payor and the other with your client as the recipient. Always check whether or not there are any special circumstances that the court should take into consideration when making an order for child support.

Prior support orders and voluntary support payments

Another area of the guidelines that witnessed substantial changes was the section on "Other Orders and Obligations." The 2006 guidelines maintained the reduction of a party's gross income by a previous support order issued by a court of competent jurisdiction. Similarly, the 2009 guidelines maintained this reduction but recognized that there were many litigants that were making voluntary support payments to other children who they had a legal obligation to support but where there was no actual support order issued by a court. In order to ensure that all children are able to have their basic needs met, the task force implemented the hypothetical guideline to be used to decrease a litigant's gross income when a payor is making voluntary payments for another child who he or she is legally obligated to support.

The idea of creating a hypothetical support order was first addressed by the Massachusetts Supreme Judicial Court in the decision of *Department of Revenue v. Mason M.,* 439 Mass. 665 (2003). There, the court dealt with a child support order where the payor in the paternity action was married and supporting two other marital children. Although the court endorsed the idea of a hypothetical order, the case was remanded to the lower court, indicating that the litigant's gross income was not correctly used in calculating the support order. In a footnote, the *Mason* Court indicated that the confusion regarding hypothetical guidelines would be eliminated if the guidelines were amended to explicitly detail the methodology for drafting a hypothetical guideline for a pre-existing family not the subject of a prior order of support.[11]

The task force recognized the need to codify the request of the court and revised the guidelines to include the capability of preparing a hypothetical guideline to be used in cases where there is a legal obligation absent a prior court order to support children not a party to the case. The guidelines now provide that to the extent that prior orders for spousal and child support are actually being paid, the court should deduct those payments from the party's gross income before applying the formula to determine the child support order. Voluntary payments for other children a party has a legal obligation to support may be deducted in whole or in part to the extent the

amounts are reasonable. It is the party's obligation to provide evidence and payments of prior orders or voluntary payment.[12]

The task force wanted to promote voluntary payments of child support and recognized that there was a need to accommodate payors who were legally obligated to support their intact family. Notwithstanding this revision, the task force made it clear that additional support paid to subsequent families had to be reasonable and they could not be used as a means to modify downward an already existing support order but could only be used to defend against an increase in the existing order. The task force maintained the "shield and sword" approach for meeting the financial needs of subsequent families.

Circuit breaker

On its face, the calculation as set forth in lines 2(g) and 2(h) of the guidelines worksheet seems to be far more complex and challenging for those of us suffering from math phobias. However, an understanding of the underlying reasoning as to why this circuit breaker was put into place will help to simplify the mechanics of the calculation. The premise of the circuit breaker was to prevent the support order from exceeding a certain percentage of the payor's income.[13]

The task force identified a dilemma with the guidelines when the payor's income was substantially smaller than the income of the recipient. The problem emerged when the amount of the support order was less than 10 percent of the recipient's income. The amount of the support was so minimal in comparison to the recipient's income that it would have an inconsequential affect of the financial needs of the children. Conversely, the payor with such a high child support order as compared to their limited income would not have sufficient funds available to meet their own basic financial needs. This resulted in the so-called circuit breaker that would allow for the reduction of support in instances where the support order was less than 10 percent of the recipients' income. This would provide the payor with additional funds to ensure that he or she could still meet their own financial needs.

Deviation from the guidelines: A call for advocacy

While the Child Support Guidelines have been revised and overhauled, the need for advocacy is still alive and well in Massachusetts. A careful practitioner should be cognizant of the individual facts of each case and be prepared to advocate for his or her client. Use the guidelines to create several different child support scenarios and present the court with a variety of proposed worksheets that support your theory of the case. Carefully assess whether or not the case merits a deviation from the guidelines. Be familiar with Section IV of the guidelines (entitled "Deviation") and apply the laundry list of circumstances that the task force created that could be used to justify a deviation. Remember to consider whether or not the order, according to the guidelines, would be unjust or inappropriate. Prepare findings for deviations and present them to court when necessary.

In drafting arguments on behalf of our clients, we will often go back and reread the principles of the guidelines. The task force spent many hours revising these principles and they serve as a basis for why certain revisions were necessary. These principles always seem to provide us with guidance on how to apply the guidelines to the specific facts of a case. We strongly encourage all practitioners to keep these principles in mind when asking the court to enter an appropriate and just child support order.

Notes

1. Author Gayle Stone-Turesky had the honor of serving as a member of the Child Support Guidelines Task Force along with Chief Justice Paula M. Carey, Marilynne R. Ryan, Esq., Hon. Anthony R. Nesi, Fern L. Frolin, Esq., Richard Gedeon, Esq., Ned Holstein, M.D., John Johnson, Christina Paradiso, Esq., Robert J. Rivers, Jr., Esq., Mark Sarro, Ph.D., and Marilyn Ray Smith, Esq.

2. A term artfully created by the Hon. Anthony R. Nesi, a fellow member of the Child Support Guidelines Task Force.

3. *See* Commonwealth of Massachusetts, Administrative Office of the Trial Court, Child Support Guidelines, Preamble, page 2, Jan. 1, 2009.

4. *See* Report of the Child Support Guideline Task Force, page 19. October 2008.

5. *See* Child Support Guidelines Worksheet.

6. *See* Commonwealth of Massachusetts, Administrative Office of the Trial Court, Child Support Guidelines, Principles, page 2, Jan. 1, 2009.

7. *See* Commonwealth of Massachusetts, Administrative Office of the Trial Court, Child Support Guidelines, Section IIH. Attribution of Income, page 6, Jan. 1, 2009.

8. *Ibid.*

9. *See* Commonwealth of Massachusetts, Administrative Office of the Trial Court, Child Support Guidelines, Feb. 15, 2006.

10. *See*, Commonwealth of Massachusetts, Administrative Office of the Trial Court, Child Support Guidelines, Section II d. Parenting Time, page 4, Jan. 1, 2009.

11. *See* the *Department of Revenue v.Mason M*, 439 Mass. 665 (2003), citing *Doe v. Roe* (footnote 11).

12. *See* Commonwealth of Massachusetts, Administrative Office of the Trial Court, Child Support Guidelines, Section II.I. Other Orders of Support, page 6, Jan. 1, 2009.

13. *See* Report of the Child Support Guideline Task Force, page 50. October 2008.

Corporate shareholder divorce

By Thomas V. Bennett

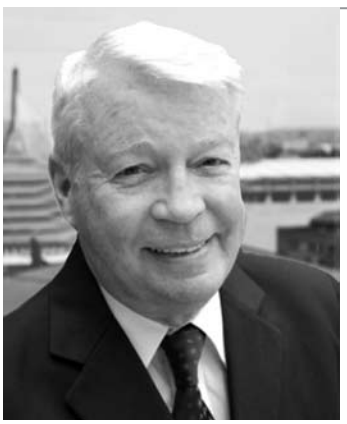
The Supreme Judicial Court in the case of *Donahue v. Rodd Electrotype Co. of New England, Inc.*[1] established law that in a "close corporation," the stockholders owed each other a fiduciary duty in the operation of an enterprise that partners owe to one another. The duty is of the "utmost good faith and loyalty." In a recent case, *Brodie v. Jordan,*[2] the SJC looked at what the remedies are for a breach of that duty.

In this case, a corporation started in 1973 had three shareholders. One of the shareholders (Walter) became inactive in the company's business and he proposed in 1989 that his shares be purchased and he provided a draft agreement. He also proposed Keyman Life Insurance to buy out a shareholder who might die. Those negotiations went nowhere, and in 1992, Walter was removed as a director. Although he received notices of annual meetings in the year 1993 and 1997, he did not attend the meetings. He did meet with the other two shareholders two or three times each year.

Walter died in 1997. After his death, his widow became the owner of his shares in the company. She sought a special meeting of the shareholders and information on the financial affairs of the company. The other two shareholders refused to purchase her shares in the company. They also refused to provide her with financial information about the company. Ultimately, she brought suit.

The trial court found that the widow was frozen out where the controlling shareholders acted in concert to deny her the office of director; declined essentially all of her requests for financial information; failed to provide audited annual statements; failed to comply with the obligation to hold an annual meeting; refused to pay dividends; and refused to complete in good faith an arbitration process that the minority shareholder invoked pursuant to a provision in the corporation's Articles of Organization regarding the transfer of shares.

The widow asked as a remedy that the corporation buy her out. The trial judge found that the defendants' actions left the widow shut out of the corporation and that she was given no true opportunity to dispose of her shares.



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The judge exercised the court's equitable power to put the widow in the position she would have been if there had been no wrongdoing by the defendants and ordered the defendants to purchase the plaintiff's shares. The court found that while no appellate decision existed ordering the purchase of a minority shareholder's shares, the remedy was not inappropriate given that there is rarely a market for small close corporation shares that bears any relationship to the shares' true value. In addition to awarding the remedy of a purchase, the court gave the widow prejudgment interest from the date of her claim.

A divided Appeals Court agreed with the trial court. On further appeal, however, the Supreme Judicial Court did not agree with the remedy. The Court pointed out that the proper remedy for a freeze out is to "restore [the minority shareholder] as nearly as possible to the position [s]he would have had, had there been no wrongdoing," quoting from *Zimmerman v. Bogoff.*[3]

The Court gave examples of some other cases of what that restoration might be: If a minority shareholder had a reasonable expectation of employment and the corporation terminated wrongfully, the remedy might be reinstatement, back pay or both;[4] if a shareholder had a reasonable expectation of sharing in the company's profits and had been denied the opportunity, [s]he might be entitled to participate in the favorable results of operations to the extent those results were wrongfully appropriated by the majority.[5]

The Court in this case found that the remedy that the Superior Court chose placed the plaintiff in a significantly *better* position than she would have enjoyed absent the wrongdoing and well exceeded her reasonable expectations of the benefit of her shares. The Court noted that the remedy of a forced buyout may be an appealing one for a court of equity in that it results in a "clean break" between the acrimonious shareholders, yet the Court found that this rationale would require a forced share purchase in virtually every freeze out case given that resort to litigation is in itself an indication of the inability of shareholders to work together. The Court suggested that the court below on remand have an evidentiary hearing to determine the plaintiff's reasonable expectations of ownership; whether such expectations had been frustrated; and, if so, the means by which to vindicate the plaintiff's interests. The Court suggested that if the breaches visited upon the plaintiff resulting in deprivations can be quantified, the appropriate remedy may be money damages.

Given the fact that the Court has legislated, through case law, these substantial rights between shareholders, it may be appropriate for the Court to decline to further extend the remedies in a failed relationship among stockholders of a small business corporation, but it seems to me that where the Court has left the disgruntled shareholders of a small business corporation is between a rock and a hard place.

The Court's finding that a fiduciary relationship exists between the shareholders of a close corporation is like that of a partnership is an appropriate identification of that relationship. Small business

corporations are like a partnership. In fact, when people ask me what a law partnership is all about, I tell them it is like a family business where you get to pick your family members. When people join in a business enterprise, it is to make money, sure, but it is also about trust; the collaborative effort to achieve business goals which will result in financial reward; it is about going somewhere everyday and feeling good about people you work with and the work that you are doing and how you feel about yourself.

Although the Court has analogized a small business corporation to be like a partnership, a partnership can be terminated by the decision of any partner. Where the Court has left the shareholders of small business corporation now is like saying you can get married, and if the relationship gets abusive, you can go to court and the court will assist you in remedying the relationship, but you can't get divorced. It is time for the Legislature to address this problem.

When the Legislature passed the Limited Liability Company Act, it provided that a member could resign and if a member did resign, the member would be entitled to receive within a reasonable time after resignation the fair value of his limited liability company interest as at the date of resignation based upon his right to share in the distributions of a limited liability company, unless there is a different provision under a written operating agreement.[6]

Similarly, the Limited Liability Partnership Act is governed by the provisions of general partnership act which gives a partner the benefit of the unilateral ability to call it a day.[7]

Ironically in another recent case of the SJC, *Bernier v. Bernier*,[8] the Court, in addressing the division of assets with respect to a business enterprise owned by a divorcing couple, laid out a thoughtful blueprint on what factors should be taken into account in determining the buyout value of a small business where it is determined that one shareholder will buy out the other.

Below is a suggested addition to Massachusetts General Laws, Chapter 156D, which borrows heavily from Chapter 208, Section 34, as a possible mechanism for shareholders to part:

> "**Forced Shareholder sale.**
>
> Upon a complaint in an action brought at any time by a shareholder of a close corporation, provided there is personal jurisdiction over both shareholders, a court may make a judgment for either of the shareholders to buy out the interest, directly or through a stock redemption, of the other for either cash or over time based upon the circumstances of the corporation, including, but not limited to, the profitability of the corporation and the cash flow availability of the corporation. In addition to or in lieu of a judgment for payment, the court may assign to either party all or any part of the assets of the corporation, including but not limited to, hard assets, receivables, good will, all other intangible assets of the corporation. In determining the amount of money, if any, to be paid, or in fixing the nature and value of the property, if any, to be so assigned, the court, after hearing the witnesses, if any, of each party, shall consider the length of the shareholders' association with the corporation, the conduct of the shareholders during the corporate relationship, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the shareholders, and the opportunity of each for future acquisition of capital assets and income. The court may also consider the contribution of each of the shareholders in the acquisition, preservation or appreciation in value of their respective stock ownership and the contributions of each of the shareholders to the success of the corporation. When the court makes an order for payment on behalf of a party, said court shall determine whether or not the party leaving the corporation has health insurance or other health coverage available at reasonable cost that may be extended to cover the departing party as part of the compensation package.
>
> A close corporation is a corporation that (1) has a small number of stockholders, (2) no ready market for the corporate stock, and (3) a substantial majority participation in the management, direction and operations of the corporation. The rights of a shareholder under this section shall be personal to the shareholder and may not be reached by a spouse or creditor of such shareholder."

One of the most destructive pieces of litigation of recent memory is the Demoulas[9] family fight, which seemed to be all about who was "right." However, the byproduct of that legal warfare was that legal careers were destroyed and reputations tarnished. Clearly, there should be a more constructive way for people to go their own way in a business setting without the need to prove "fault." Although a forced sale of a business or parts thereof, like that of a divorce, can be a costly and bitter experience, it is generally thought to be a better course of action than requiring people to stay indefinitely in a destructive relationship.

Notes

1. 367 Mass. 578, 328 N.E.2d 505 (1975).
2. 447 Mass. 866, 857 N.E.2d 1076 (2006).
3. 402 Mass 650, 661, 524 N.E.2d 849, 855 (1988); *Shulkin v. Shulkin*, 301 Mass. 184, 192-93; 16 N.E.2d 644 (1938).
4. *See Wilkes v. Springside Nursing Home, Inc.* 370 Mass. 842, 353 N.E.2d 657 (1976).
5. *Crowley v. Comm'cns For Hosps., Inc.* 30 Mass. App. Ct. 751, 573 N.E.2d 996 (1991).
6. Mass. Gen. Laws ch. 156C, § 32 (2007).
7. Mass. Gen. Laws ch. 108A, § 31 (2007).
8. 449 Mass. 774, 873 N.E.2d 216 (2007).
9. *Demoulas v. Demoulas Super Market, Inc.,* 424 Mass. 501, 677 N.E.2d 159 (1997).

Superior Court Standing Order 1-09: Assessing and avoiding risks in a new age of discovery

By Scott Douglas Burke and Anthony E. Abeln

Effective Jan. 12, 2009, the Massachusetts Superior Court adopted Standing Order 1-09 for written discovery. Order 1-09 states that it is not "intended to broaden or narrow the scope of discovery" permitted under the Rules of Civil Procedure, but rather to promote openness and transparency in the written discovery process. Counsel should take note of Order 1-09 for several reasons.

- Written discovery will be more time-consuming, the number of disputes overall may increase, and a new type of discovery dispute may emerge;
- Failure to make carefully considered and well-timed disclosures may result in erosion of the work product protection; and
- Violations of the order can result in sanctions, such as the preclusion of evidence at trial.

Order 1-09 contains the following three subsections: Uniform Definitions in Discovery Requests; Objections to Interrogatories; and Objections to Requests for the Production of Documents and Things. Section one creates nine standard definitions for use in discovery requests and redefines contention interrogatories. However, parties are not precluded from defining terms specific to the litigation or narrowing these standard definitions. Sections two and three expand disclosure requirements for interrogatories and document requests, and eliminate general objections. Although the impact of Order 1-09 will become clearer during the order's implementation in the coming months and years, litigators must actively adjust their litigation strategies, review their procedures for responding to discovery and supplementing responses, and advise clients of these new disclosure requirements and their ramifications.

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Contention interrogatories redefined

The definition most likely to spawn confusion and generate discovery disputes concerns the ever-popular contention interrogatory. Consider, for example, an employment dispute in which the defendant asks the following contention interrogatory: State the basis for your claim that the defendant intentionally interfered with your employment contract with Company ABC, Corp. Order 1-09 requires that counsel responding for the plaintiff now provide a "substantial summary" in its answer that:

- Identifies the essential acts or failures to act that form the basis of the claim or defense;
- Identifies the individuals or entities who either are in "possession of documents" or who have "firsthand information" regarding the claim or defense; and
- Identifies the documents (or produces the documents) that form the basis of an allegation or defense.

When plaintiff's counsel drafts a response containing this information, he or she has a duty to protect work product information. However, Order 1-09 requires disclosure of work product information, irrespective of whether it was obtained in anticipation of litigation, "*if* the party intends to offer this information at trial." See Section (l)(c)(9)(c).[1] Careful thought must go into the timing of decisions to use at trial information that would otherwise be subject to work product protection. A hastily made decision to disclose work product information early in discovery because counsel believes it will be used at trial, could prove damaging if the litigation strategy changes due to the evolving nature of ongoing discovery. On the other hand, if counsel doesn't disclose information timely, he or she risks having critical factual information being excluded at trial. At least in the early stages of discovery, a reservation of right to further supplementation may be prudent. Such decisions, however, must be re-evaluated as discovery unfolds and responses must be supplemented timely.

Prohibition on general objections to interrogatories

The most publicized change effected by the adoption of Order 1-09 is the elimination of the general objection. Prior to Jan. 12, 2009, when an objection to an interrogatory was made, the Massachusetts Rules of Civil Procedure required only that the reasons be stated.[2] The requirement to create a privilege log, found in Rule 26(b)(5), by definition relates only to documents being withheld.[3] As of Jan. 12, 2009, objections to interrogatory requests must be "spe-

cific" and accompanied by a statement that either, notwithstanding the objection, no information has been withheld, or that counsel has withheld information because of the objection. When information is withheld, Section 2 of Order 1-09 additionally requires the objecting party to "describe the nature of the information withheld."[4] The level of detail concerning the "nature" of the information "withheld," and whether counsel must now provide an interrogatory response akin to a privilege log, remains to be decided and will likely require a case-specific analysis. Asserting objections in compliance with this provision, while also protecting privileged and work product information, may prove complex post Jan. 12, 2009.

Assume that you represent a senior-level corporate manager. Her former employer (the plaintiff, OldCorp, Inc.) alleges that she and two of her co-workers violated the terms of their noncompete agreement by forming a new entity and wrongfully appropriating OldCorp's clients. Assume further that each co-worker has been sued and is represented by separate counsel. Plaintiff serves you with the following interrogatory:

> Identify the name and job title of all individuals with knowledge of the formation of NewCorp, Inc. and state for each all facts known to the individual regarding the circumstances surrounding the formation of NewCorp, Inc.

You draft a response in the context of ongoing discovery where you have not yet determined whether some of the information you have gathered will be offered at trial. You answer the interrogatory by naming three individuals, providing a "substantial summary" of their knowledge, and producing documents relevant to that knowledge. You are certain that this information will be offered at trial.

As part of your investigation, you had interviewed senior managers at many of OldCorp's current and former clients. Some of these clients have joined NewCorp and some have remained with OldCorp. Although most of your interviews had uncovered little more than background information on the relationship between the client and OldCorp, one conversation was particularly illuminating. You spoke with a vice president at LoyalWidget, who recalls a conversation that he had had with one of the co-defendants while the defendants were still employed by OldCorp. He had received a call from this co-defendant telling him about NewCorp, and inquiring whether LoyalWidget would be willing to "jump" to NewCorp when it was formed. While the vice president was friendly with this co-defendant, the vice president indicated that LoyalWidget would remain with OldCorp. The vice president recalled that the conversation had occurred well before NewCorp was formed, and that the call had originated from the offices of OldCorp. Your client claims to have no knowledge of this conversation.

Because the sole source of the information about this conversation comes from *your* investigation, not from any personal information offered by your client, prior to the institution of Standing Order 1-09, you might make the following objection and reservation:

> The plaintiff objects to the above interrogatory to the extent it requires the disclosure of attorney-client privilege and work product information. Discovery is ongoing and counsel has not yet determined what, if any, further information responsive to this interrogatory the defendant will offer at trial. The defendant will supplement its answer in accordance with the Massachusetts Rules of Civil Procedure prior to trial.

The nature of your investigation squarely places this information under the umbrella of attorney work product, and you were under no obligation, prior to Jan. 12, 2009, to reveal any aspects of your conversation with LoyalWidget. Moreover, your conversation with your client about this information is privileged.

However, as of Jan. 12, 2009, because you have answered this interrogatory and also made an objection, you are additionally required to either state that there is no responsive information in your file being withheld, or you must "describe the nature" of any information withheld, irrespective of whether you have withheld the information based upon a privilege objection or the work product doctrine. Does Order 1-09 require you to provide the name of LoyalWidget's vice president, along with the date of your conversation and the issues discussed? The names of all of OldCorp's current and former clients and their key employees, including this LoyalWidget vice president, constitute discovery information equally available to both plaintiff and defendant's counsel. Despite this fact, does Order 1-09 require you to catalogue each and every interview and oral communication that you have had with OldCorp's current and former clients during your investigation and to "describe the information" in the form of a privilege log?

If so, such a requirement would naturally cause defendant's counsel concern, because the selection and timing of witness interviews, from the "universe" of available witnesses, arguably constitutes protected work product.[5] Requiring opposing counsel to catalogue and disclose each and every conversation with OldCorp's current and former clients will allow an interrogating attorney to see the outline of opposing counsel's protected work product in a manner analogous to a viewing box for a solar eclipse; while you can't see it directly, you can see all of its contours.

Further, in this hypothetical, opposing counsel's client is unaware of the co-defendant's contact with LoyalWidget's vice president. Thus, such a disclosure in this instance would in essence be an interrogation of opposing counsel, not the client who is the proper target of plaintiff's interrogatory request.

Longstanding precedent has emphasized that properly preparing a client's case cannot be accomplished if attorneys are unable to "assemble information, sift what [they] consider[] to be []relevant … prepare [their] legal theories and plan their strategy without undue and needless interference."[6] Further, trial judges have recognized that "[i]f the privilege applies to a communication, it applies to the whole communication. The holder of the privilege is not required to disclose 'purely factual' portions of a communication covered by the privilege."[7] Requiring responding counsel to "describe" the nature of all information withheld pursuant to a privilege or work product objection to an interrogatory, could improperly allow "intrusions, interferences, or borrowings" by interrogating counsel as the [responding] attorney "prepares for the contest."[8]

Where protecting privileged or work product information, and in particular opinion work product, is a legitimate concern,[9] counsel may consider initially providing only a general description of the nature of the information withheld. For example, counsel for the defendant in this hypothetical could state:

> In answering this interrogatory, the paintiff has withheld information obtained through interviews and other communications which is protected by the attorney-client privilege and/or information that contains or reflects mental impressions, opinions, legal theories or conclusions of plaintiff's attorneys or agents.

Accordingly, if interrogating counsel moves to compel the names, dates and further detail relating to witness interviews or

other protected information, although responding counsel will have the burden in resisting that discovery, there will be an opportunity to fully present the arguments in favor of protection to the court where a Rule 9C conference fails to resolve the dispute. Otherwise, counsel's "intentional disclosure of presumptively privileged information may []waive the privilege."[10]

Increased disclosure requirement and elimination of general objections to the production of documents

Pursuant to Rule 34 of the Massachusetts Rules of Civil Procedure, a party that objects to a document request must only state the reasons for the objection.[11] Section 3 of Order 1-09 will now require counsel who makes general objections to provide a supplemental response "no later than 10 days after the completion of production."[12] Section 3(a). Once production is complete, "general objections to requests for production of documents and things are prohibited" and specific objections must be accompanied by a description of the "nature of all responsive documents" being withheld. See Section 3(b).

However, the most significant change is the requirement in Section 3 of Order 1-09 that counsel's initial response to a document request "articulate with clarity the scope of the search conducted or to be conducted" for documents responsive to document requests and, where "all locations" are not searched, to "explain" why these locations have been excluded.[13] Section 3, however, provides no definition for the term "location," other than including within its scope "electronic storage locations." At a time when electronic production is of paramount concern to practitioners and their clients, particularly to corporate parties, ambiguity in the definition of "electronic storage locations" is certain to spawn discovery disputes and potentially conflicting court rulings. Does counsel need to declare that the search included — or did not include — the personal laptop, PDA and hard drive of the corporate vice-president and every other officer, manager and supervisor of a defendant corporation? Again, the level of detail required to comply with Section 3 of Order 1-09 is likely to be resolved on a case-by-case basis through discovery disputes presented to the Court over the months and years ahead.

Conclusion

The Court's effort to create a more collaborative discovery process is to be applauded. Counsel however must refine discovery practices and procedures in light of this new standing order and carefully consider the timing and level of detail disclosed in discovery responses.[14] Clients must be educated on these updated procedures and additional disclosure requirements. Finally, until there is guidance on the level of detail required, counsel should be prepared to litigate discovery disputes over work product and privileged information where appropriate and necessary.[15]

Notes

1. *See* Superior Court Standing Order 1-09, § 1(c)(9) (2009)(emphasis added). Section 1(c)(9) provides the following definition:

> (9) *State the Basis or State all Facts.* When an interrogatory calls upon a party to "state the basis" of or "state all facts" concerning a particular claim, allegation or defense (or uses comparable language), the party shall provide a substantial summary of the factual basis supporting the claim, allegation, or defense at the time the interrogatory is answered. The summary shall: (a) identify the essential acts or failures to act forming the substance of the claim, allegation, or defense, (b) identify the persons and entities that, through firsthand information or possession of documents, are the sources of the party's information regarding the claim, allegation or defense, and (c) when one or more documents is the basis of the claim, allegation, or defense, such as a written contract in a contractual claim or defense, or a written misrepresentation in a misrepresentation claim, identify (or provide as part of the interrogatory a copy of) each such document. In stating the basis, a party may not withhold information from the interrogatory answer because it derives from attorney work product or was obtained in anticipation of litigation if the party intends to offer this information at trial.

2. *See* Mass. R. Civ. P. 33(a).

3. *Id*. at 26(b)(5).

4. Section 2 states:

> General objections to interrogatories are prohibited. Each objection to an interrogatory shall be specific to that interrogatory and shall have a good faith basis. If a party refuses to answer an interrogatory, the party shall so state and identify each objection asserted to justify the refusal to answer. If a party, after having asserted an objection, answers the interrogatory, the answer shall state either: (a) notwithstanding the objection no information has been withheld from the answer, or (b) information has been withheld from the answer because of the objection. Where information has been withheld from the answer, the objecting party shall describe the nature of the information withheld and identify each objection asserted to justify the withholding.

5. *Cf.* Salvas v. Wal-mart Stores, Inc., 17 Mass. L.Rptr. 387 (Mass. Super. 2004)(Brassard, J.)(court concluded that "the selection of a limited number of documents from the much greater universe of documents constitutes work product within the meaning of Rule 26 and Massachusetts case law.").

6. Commonwealth v. Bing Sial Liang, 434 Mass. 131, 138 (2001), *quoting* Hickman v. Taylor, 329 U.S. 495, 511 (1947).

7. Peter M. Lauriat, et al., *Discovery* 49 Mass. Prac. § 4:3, 345 (2008), *see also A.W. Chesterton Co. v. Allstate Ins. Co., 12 Mass. L. Rptr. 550* (Mass. Super. Ct. 2001) (McHugh, J.).

8. Ward v. Peabody, 380 Mass. 805, 817 (1980), *see also id*. at 364 ("purpose of this [opinion work product] protection is to ensure that attorneys can make candid analyses of cases and reduce unfavorable facts or conclusions to writing.").

9. *See* Mass. R. Civ. P. 26(b)(3).

10. Lauriat, *supra* note 7, at 347.

11. Mass. R. Civ. P. 34.

12. Superior Court Standing Order 1-09, § 3(a) (2009)

13. Section 3(c) states:

> In the initial written response, the responding party shall articulate with clarity the scope of the search conducted or to be conducted. If the scope of the search changes during production, the responding party in the supplemental written response shall articulate with clarity the change in scope. If 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.

14. The ethical ramifications of discovery violations are beyond the scope of this article.

15. There is no indication in the language of Order 1-09 that the Court intended its reach to apply retroactively to discovery already propounded or to supplemental discovery responses provided after Jan. 12, 2009. Nevertheless, practitioners should be aware of the potential application of Order 1-09 to discovery originally propounded before the effective date of the order in ongoing cases.

Book review: *Defusing Workplace Time-Bombs*

By R. Liliana Baldwin

Defusing Workplace Time-Bombs: Drafting Employment Agreements and Policies to Prevent Disputes, Avoid Tax Traps, and Settle Cases. Peter M. Panken, Jeffery D. Williams & Daniel L. Hogans, et al. 2008. ALI-ABA. Softcover with CD. 170p. ISBN: 978-0-8318-0014-7. $99.

No matter where you attended law school, it is unlikely that you ever took a course that taught you how to draft an employment agreement of any kind, learning why each and every provision was included and what each protected against or ensured. In fact, many of us enter the practice of law and adopt form agreements from colleagues, books or law firm archives that are used to create the standard agreements we as employment counsel most often use. Over time, we may come to understand why certain provisions are included (or excluded) and revise provisions to reflect applicable case law or to address practical considerations learned through experience. However, for attorneys who are new to the practice of employment law or for those attorneys — like in-house counsel or solo practitioners often expected to be in command of almost every area of the law — it is crucial to have a reference book that not only provides various forms of the most common employment-related agreements and policies, but also provides detailed annotations, commentary, case references and practical advice about the use of these form documents.

Defusing Workplace Time Bombs: Drafting Employment Agreements and Policies to Prevent Disputes, Avoid Tax Traps, and Settle Cases may be such a reference book; one that can easily take its place — without taking up much space — on a new employment lawyer's bookshelf or on the bookshelf of a more experienced lawyer who may only dabble from time to time in employment-related agreements and policies. In addition to a CD that contains editable versions of all of the model forms and policies included in the book, the book also contains four substantive sections: Part I — Model Agreements and Forms; Part II — Commentary; Part III — Sample Policies; and Part IV — Illustrative Cases.

Some of the highlights included in Part I are a draft executive employment agreement (drafted with a pro-employer slant) that provides provision-by-provision annotations and comments, a sample consulting agreement, a short non-competition and non-solicitation agreement and more lengthy agreement on proprietary information, inventions, non-solicitation and non-disclosure, and a comprehensive settlement and release agreement with detailed commentary. Part II includes two short articles. The first article provides a pithy analysis of the effect of IRS Code Section 409A on severance agreements. The second is an informative article by David J. Carr, partner with the firm of Ice Miller in Indianapolis, entitled, "Ten Traps to Avoid in Drafting Enforceable Confidentiality, Non-Compete, and Non-Solicitation Agreements." Carr's article is an enjoyable David Letterman-type countdown of all the mistakes that can be made in these agreements, how to avoid the mistakes, and numerous case citations that put some of these mistakes in context. A useful part of the Carr article is the appendix, which provides a sample "Exit Interview Statement of Understanding," which could be used as a checklist or agreement to ensure against misuse of confidential business information and property upon an employee's termination of employment.

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In addition to form agreements and commentary, the book also includes a number of helpful policies in Part III. Again, these policies may not be as helpful to a more seasoned employment practitioner who has probably already had to draft some of these policies to address client needs, and has perfected many of them based on long-term experience with the particular issues. However, they are wonderful starter policies for more novice attorneys dealing with issues such as managing e-mail use, record retention and destruction, assets handling, a model employer code of ethics, and addressing complaints of misconduct in the workplace. The sample policies are detailed and extensive. In fact, the drafts of each of these policies are so comprehensive that even a seasoned employment attorney may find them useful to fine-tune already existing policies and procedures. For example, the sample seven page e-mail guidelines cover almost every aspect of e-mail communications in the workplace, addressing topics such as courtesy and respect in e-mail, when to use e-mail versus when to engage in a face to face conversation, checking and managing e-mail, and grappling with spam. Any employment lawyer is bound to find something in these guidelines that will make an existing favorite workplace e-mail policy even better.

The least useful section of the book and perhaps somewhat of a random addition to the text is the last section, Part IV: Illustrative Cases. Although the discussion of some of these cases was interesting and definitely within the ambit of employment law (covering issues such as communications consistent with Rule of Professional Conduct 4.2 and the self-critical analysis privilege), only a few, if any, of the cases were "illustrative" of the model agreements and policies in the preceding sections. This section also seemed superfluous given that the previous sections were chock full of illustrative cases put specifically in the context of the agreements, policies or topics covered.

Overall, *Defusing Workplace Time Bombs: Drafting Employment Agreements and Policies to Prevent Disputes, Avoid Tax*

Traps, and Settle Cases provides solid guidance and advice for entry-level employment attorneys and perhaps other more experienced attorneys with little exposure to employment law, about some of the field's most regularly negotiated agreements, frequently utilized workplace policies and related legal issues. Otherwise, and unless there is a particular agreement, policy or topic that is of interest, this book's audience is not the more experienced employment attorney.

ALI-ABA publications, like MCLE publications, can be great references because their authors are drawn from top experts in the field. However, unlike MCLE publications, which draw primarily expert Massachusetts practitioners, ALI-ABA publications draw an "all-star cast of contributors" from all over the country. In this regard, one of the main drawbacks of this book for an attorney who only practices law in Massachusetts is that the form and sample agreements included in the book have been drafted by attorneys practicing law in Indiana, Michigan, New York and Washington D.C. As such, the law cited and discussed relevant to the agreements treated in this book (most of which are defined by state law) does not include Massachusetts law. Although this issue does not affect the usability of the other sections of the book as much, it may make a Massachusetts-based attorney — particularly an attorney entering the employment law field — prefer to invest in a comparable MCLE publication, such as the two-volume and regularly supplemented, *Drafting Employment Documents in Massachusetts* (William B. Koffel, Ed., et al.) MCLE, 2007, which also offers sample forms on disc and costs almost twice as much. ($195 for non-members and $175 for sponsors).

Through corrective lenses: Congress' attempt to refocus the Americans with Disabilities Act of 1990

By David E. Belfort and Linda Huynh

Introduction

On Sept. 25, 2008, President George W. Bush signed the Americans with Disabilities Amendments Act (ADAA or "the act") of 2008 into law. The act significantly expands the original scope of the Americans with Disabilities Act ("ADA") of 1990, which became law by the pen of his father, President George H. W. Bush. The recent legislation received wide bipartisan support as it swiftly moved through the legislative process and has the potential to bring sweeping change to the practice of disability discrimination. While proponents of employee rights appear elated at this liberalization of the statute, some management-side advocates caution that the ADAA will irreparably erode an employer's ability to successfully challenge the criteria for disability qualification. This article explores the new amendments and their anticipated impact on this hotly contested area of law.

The ADA

Citing Congress' findings that "some 43,000,000 Americans have one or more physical or mental disabilities," 42 U.S.C. § 12101(a)(1), and that "individuals with disabilities are a discrete and insular minority" who have been "subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society," § 12101(a)(7), in 1990 the ADA represented one of the most significant pieces of civil rights legislation in history. This groundbreaking legislation was designed to protect individuals with disabilities from discrimination in the workplace and to allow disabled workers a fair opportunity to succeed on the job.

By way of review, the ADA extended rights primarily to those who meet the definition of being disabled. The statute defines "disability" using a three-pronged approach, as follows:

(A) a physical or mental impairment that **substantially limits** one or more of the **major life activities** of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

§12101(2).

In the years following enactment of the ADA, this definition became subjected to increasingly restrictive interpretation by the courts.

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Principal changes to the ADA

While the act retains the original language in the definition of "disability" set out in the ADA, the act significantly expands the ADA's coverage by loosening the criteria used to interpret that definition, consistent with the original intent of Congress. Specifically, the act is Congress' response to two landmark Supreme Court decisions: *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) (impact of mitigating measures, such as medicine and assistive devices must be considered in determining whether a "substantial limitation" exists) and *Toyota Motor Manufacturing, KY, Inc. v. Williams*, 534 U.S. 184 (2002) (to qualify as a "disability" under the ADA, impairment must have a substantial effect on employee's daily life, not just their ability to perform their job). The act reflects the Legislature's finding that the holdings in these cases have "narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect … " Pub. L. 110-325.

Mitigating measures: A response to *Sutton v. United Airlines*

The plaintiffs in *Sutton* were severely myopic (nearsighted) twin sisters with uncorrected visual acuity of 20/200, but who used corrective lenses to aid their sight, who applied for commercial airline pilot positions with United Airlines. The airline required that their pilots possess an uncorrected visual acuity of 20/100 at a minimum. Therefore, neither sister was offered a position. The two subsequently filed suit under the ADA, arguing that the question of whether an employee's impairment is "substantially limit[ing]" should be assessed without regard to corrective measures, i.e. glasses or contact lenses that might improve their vision. The

Court disagreed, finding that the sisters had failed to allege that they were disabled within the meaning of the ADA. More specifically, the Court held that "the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment including, in this instance, eyeglasses and contact lenses." *Sutton*, 527 at 475.

One of the more significant changes to the ADA is a response to this holding in *Sutton*. The ADAA expressly provides that the ameliorative effects of mitigating measures (such as medication, prosthetics, hearing aids, medical equipment, learned behavioral or adaptive neurological modifications, assistive technology and/or accommodations) should *not* be considered while assessing whether an employee's impairment substantially limits a major life activity. Pub. L. 110-325; 42 U.S.C. § 12102 (4)(E)(i). Massachusetts, in contrast, has long recognized that employees' condition of disability should be determined without reference to any available corrective measures. This has been the law of the commonwealth since *Dahill v. Police Department of Boston*, 434 Mass. 233 (2001) (citing and giving deference to Massachusetts Commission Against Discrimination Guidelines: Employment Discrimination on the Basis of Handicap Chapter 151B s. II.A.7 (1998)). Because under Massachusetts law disabling conditions are considered in their natural, unassisted state, plaintiffs often preferred to file their claims under state law, rather than federal, a trend that will surely shift under the act. Ironically, given that the *Sutton* facts involved vision, a narrow ADAA exception exists as to "ordinary eyeglasses or contact lenses," the ameliorative effects of which may be taken into account when determining whether a person is disabled under the act. 42 U.S.C. § 12102 (4)(E)(ii). This exception applies to "lenses that are intended to fully correct visual acuity or eliminate refractive error." *Id.*

Substantially limits: Response to *Toyota Motor Mfg. of Kentucky v. Williams*

The ADAA also repudiates the standard for "substantial limitation," as articulated in *Williams*. In *Williams*, an assembly-line worker, who was diagnosed with carpal tunnel syndrome, brought suit under the ADA alleging that Toyota violated the ADA by failing to provide her with reasonable accommodations. Williams claimed that she was qualified as "disabled" under the ADA because her physical impairments substantially limited her in performing several major life activities, including (1) manual tasks; (2) housework; (3) gardening; (4) playing with her children; (5) lifting; and (6) working. However, the Court found that she did not qualify as disabled, holding that in order to be substantially limited in a major life activity, an "individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." *Williams* 534 U.S. at 198.

The act rejects the Court's narrow interpretation in *Williams* and states "that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." Pub. L. 110-325 Section 2(B)(5). The act directs the Equal Employment Opportunity Commission to issue regulations liberalizing this standard, so the final chapter on the agency's interpretation has yet to be written. We do expect that the act's practical effect will be to direct inquiry upon whether an entity is providing reasonable accommodations or engaging in an interactive process with disabled individuals as opposed to whether an individual is substantially limited in a major life activity.

In addition to rejecting the *Williams* standard, the act also deviates from the EEOC's regulations, which define the phrase "substantially limits" too restrictively. The current regulations require a condition to cause an individual to be unable or to be significantly restricted in his or her performance of a major life activity as compared to the average person. 29 CFR § 1630.2. Regarding the major life activity of working, an individual must be significantly restricted from performing a class of jobs or a broad range of jobs. *Id*. We await the EEOC response to their regulatory mandate on this issue.

Expansion of the list of "major life activities"

In rejecting the *Williams* holding for its strict analysis of what constitutes a major life activity, the ADAA further expands coverage of a vast array of afflictions by including two non-exhaustive lists of major life activities. The first list includes many of the major life activities that the EEOC has previously recognized, such as walking, caring for oneself, performing manual tasks, seeing, hearing, speaking, breathing, learning and working. In addition, the ADAA adds eating, sleeping, standing, lifting, bending, reading, concentrating, thinking and communicating as major life activities. "Major Bodily Functions" have also been added to the list and include "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions." Pub. L. 110-325; 42 U.S.C. § 12102 (2)(B).

Episodic conditions

The ADAA further clarifies that individuals who suffer from episodic impairments or who are in remission are still considered disabled under the act, as long as the impairment would substantially limit a major life activity when the condition is active. Thus, with the expansive coverage provided by the ADAA, individuals who suffer from illnesses that have periods of dormancy, such as cancer or epilepsy, now meet the definition of disability and accordingly, are entitled to protection under the act.

"Regarded as"

The third prong of the ADA's definition of "disability" involves being "regarded as" having an impairment. 42 U.S.C. § 12101 (3). The act expands prior coverage by providing that individuals can demonstrate that they were "regarded as" being disabled by showing that they were subjected to an action prohibited by the ADA based on an actual or perceived impairment, regardless of whether the impairment limits or is perceived to limit a major life activity. In other words, employees can sufficiently meet this third prong of the definition simply by showing that they have suffered some form of adverse employment action based on perceived physical or mental impairment. The impairment does not have to qualify as a "disability," given that major life activities are not considered in this analysis.

Reasonable accommodations

While the definition of "reasonable accommodation" does not change under the ADAA, the act clarifies that individuals who meet the first and second prongs of the definition of disability are entitled to reasonable workplace adjustments. Individuals who are merely "regarded as" disabled are not entitled to accommodations. 42 U.S.C. § 12111.

Conclusion

Because the ADAA became law only this year and the EEOC has yet to issue its highly anticipated regulations, the impact of the amendments remains largely uncertain. The consensus thus far is that, with the expansion of coverage, many individuals who were not previously covered under the ADA will now find protection as "disabled." Employers must now focus far more attention on the reasonable accommodation analysis, the interactive process and the consistent treatment of disabled and able employees. Therefore, it is anticipated that the focus of ADA practice will shift dramatically from whether an employee is disabled to whether an employer is properly complying with its affirmative obligations to provide accommodations to disabled employees as mandated by the ADA.

The management bar no doubt believes that the amendments have irreparably eroded employers' ability to challenge the nature of an alleged impairment and that the act will open the floodgate to accommodation requests and related litigation. Employee advocates suggest the changes will clarify confusing Court precedent, so as to protect those with legitimate disabling conditions in accordance with the broad scope of the ADA. Only time will tell whether the ADAA effectively clarifies former areas of dispute and whether the expansion of coverage will effectively protect individuals with disabilities from workplace discrimination.[1]

Notes

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Family responsibilities discrimination: The final barrier to women's equality in the workplace

By Rebecca G. Pontikes

Child-rearing, caregiving and family responsibilities have traditionally been either marginalized or devalued because they are "women's work." Women, who still perform the lion's share of these responsibilities, pay a penalty in the market workplace because employers reward only employees who put all their time and effort into their jobs. Such an "ideal worker" is assumed to have no family responsibilities, or have a partner who can take on those responsibilities. In other words, the ideal worker is assumed to be a man with a wife who does not work outside the home. Generally, employers are seen as entitled to the "ideal worker." Any individuals who deviate from the norm are not considered as desirable as the "ideal worker." In practical reality, this is mostly women.

For women, the male construct of the "ideal worker" forces them to make one of three choices: a) perform two jobs (the marketplace job and a caregiving job), b) not enter the workplace at all or leave it when after taking on care-giving responsibilities, or c) work in a marginalized setting (for example, part-time work). These three categories are a result of the societal problem of sex discrimination that forces women into traditional roles. However, in the popular imagination, when women are forced into one of these three categories, it is called their "choice."[1] Thus, penalties from employers toward workers with family responsibilities — particularly employing stereotypes of how caregivers will or should act — have not traditionally been viewed as actionable.

In truth, the "opt out revolution" is anything but a freely made choice, and the three categories, as well as the concept of an "ideal worker" who has no family responsibilities, hurt men as well as women. The increasing number of hours that workers spend at their jobs has led to a clash between work and family responsibilities. The clash has spawned a growth in the number of lawsuits filed by workers alleging they were discriminated against because of their family caregiving responsibilities. Called "family responsibility discrimination" cases ("FRD"), the number of such cases has grown from a total of eight in the 1970s, when the first case was heard in U.S. courts, to 358 in the first half of the 2000s. Between 1996 and 2005, the number of FRD cases filed grew nearly 400 percent from the previous decade, from 97 cases to 481. The awards average a little more than $100,000, with the largest award to date being $25 million. Companies sued for discriminating against workers with family responsibilities include nearly 30 that have been designated as "Best Companies to Work For" by *Working Mother* magazine or have been touted by *Fortune*'s "Most Admired" list as amongst the best in the nation for treating employees well.[2]

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The theme running through all FRD claims is an employer who has stereotyped an employee because he or she has family responsibilities and is no longer an "ideal worker." The employer takes an adverse action based upon a stereotype of what an ideal caregiver would, could or should do. Practitioners can bring FRD claims in both the federal and state courts through a variety of statutes and common law theories:

- Title VII
- the Massachusetts Fair Employment Practices Act
- the Pregnancy Discrimination Act ("PDA")
- common law claims (breach of contract, violation of the covenant of good faith and fair dealing, intentional interference with an advantageous relationship)
- the Family and Medical Leave Act ("FMLA"), the Massachusetts Maternity Leave Act ("MMLA") and the Small Necessities Leave Act ("SNLA")
- the Americans with Disabilities Act ("ADA") and
- specific state statutes

Title VII and the Massachusetts Fair Employment Practices Act, M.G.L. c. 151B

Employees who bring FRD suits under Title VII and the Massachusetts Fair Employment Practices Act, M.G.L. c. 151B can prove discrimination either through comparator evidence or by demonstrating that the employer acted based upon a stereotype of how a caregiver should or will act. The stereotyping is move often evidenced through comments, such as that it is not possible "to be a good mother and have this job."[3] Proof of stereotyping does not require comparators, often making cases based upon such evidence easier to prove than cases based upon comparators. Stereotyping about gender was first deemed to be a violation of Title VII in *PriceWaterhouse v. Hopkins,* 490 U.S. 228, 251 (1989). In *PriceWaterhouse,* Hopkins, a female manager in an accounting firm, was denied partnership after she failed to conform to gender stereotypes. During the review process, "[o]ne partner described her as 'macho;' another suggested that she 'overcompensated for being a woman;' [and] a third advised her to take 'a course at charm school.'" *Id.* at 235. Hopkins was also told that "in order to improve her chances for partnership … [she] should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'" *Id.* The idea was that penalizing

a woman for not conforming to a stereotype of how she should act constitutes gender discrimination. In *Back v. Hastings on Hudson Union Free School District*, 365 F.3d 107 (2nd Cir. 2004), the Second Circuit extended this logic to remarks about the incompatibility of motherhood and employment. The *Back* court found that evidence that stereotyping of women as caregivers can be evidence of sex discrimination and that the employee did not need to put forth comparator evidence to prove her case.

In Massachusetts, the Superior Court in *Sivieri v. Department of Transitional Assistance*, 21 Mass.L.Rptr. 97, 2006 WL 1707954 (Mass.Super.) relied upon *PriceWaterhouse*, *Back* and a case from the First Circuit, *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 57 (1st Cir. 2000), to find that "stereotypical remarks about the incompatibility of motherhood and employment can be evidence of gender discrimination. These types of statements reflect a discriminatory animus not towards parenthood, but towards women, based upon antiquated ideas about what a woman's role in society should be. Basing employment decisions on such sex-based over-generalizations constitutes gender discrimination prohibited by c. 151B." In response to the employer's argument that Sivieri had no male comparators, the court stated, "It would blink reality to deny that a considerable part of our society believes that mothers are principally responsible for the care of young children and are therefore less effective as employees. Thus, 'where stereotypes are considered, the notions that mothers are insufficiently devoted to work, and that work and motherhood are incompatible, are properly considered to be, themselves, gender-based'" (quoting *Back*).

Employees can also rely upon the "sex-plus" theory to show that their gender plus an associated characteristic (childcare, pregnancy, etc.) was the basis for the adverse employment action. In such cases, the *McDonnell Douglas* burden-shifting paradigm is the method of proof, and the employee must demonstrate that similarly situated individuals outside the protected class were treated more favorably. The "sex-plus" theory allows women to argue that treating men and some women without the associated characteristic (for example, women without children) more favorably is evidence of gender discrimination.[4]

The Pregnancy Discrimination Act

The Pregnancy Discrimination Act ("PDA") bans treating pregnant women differently from non-pregnant women and men who are similarly situated. 42 U.S.C. § 2000e (k). However, case law has not limited the PDA to pregnant women. Cases in which an employer refused to hire a pregnant woman because it assumed that she would not return to work immediately after the birth, and in which an employer took adverse actions against an employee who had been pregnant and who might again become pregnant, have also been upheld by the courts.[5]

The FMLA , Massachusetts Maternity Leave Act and Small Necessities Leave Act

The FMLA protects caregivers in that employees are guaranteed up to 12 weeks after the birth or adoption of a child to care for the child or to care for a serious health condition of a spouse, child or parent. Employees also receive job protection for 12 weeks to care for their own or a relative's serious health condition. 29 U.S.C. §§ 2601 *et seq*. Upon returning from the FMLA leave, the employer must reinstate the employee to his or her former position or to a comparable position with equivalent pay, benefits and terms and conditions of employment. 29 C.F.R. § 2614(a) (1); 29 C.F.R. § 825.214. If an employee's leave exceeds 12 weeks, she or he loses the right to reinstatement.[6] Two Massachusetts state laws, the Massachusetts Maternity Leave Act ("MMLA")[7] and the Small Necessities Leave Act ("SNLA")[8], provide similar protections for employees.

Under the FMLA, an employee may sue for an employer's interference with his or her attempt to exercise rights guaranteed by the statute and for retaliation for having taken advantage of rights under the statute. 29 U.S.C. §§ 2615 (a) (1) and (2); *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 301 (4th Cir. 1998).

To assert a claim for interference, the employee needs to show only that she or he was entitled to take leave under the FMLA, the employer interfered with the taking of the leave, and that she or he was harmed as a result. There is no need to show that other, similarly situated employees were treated differently or that the employer intended to interfere with the employee's rights.[9] Interference includes:

- a refusal to authorize FMLA leave,
- discouraging an employee from using leave,
- shortening the length of leave to which the employee is entitled,
- requesting that the employee return to work earlier than required,
- using the taking of FMLA leave as a negative factor in employment actions,[10] and
- hostility following the announcement that the employee intended to take FMLA leave.[11]

The ADA's association provision

The ADA bans discrimination against workers who are associated with disabled individuals. 42 U.S.C. § 12112(b) (4). The EEOC has opined that "relationship or association" means a "family, business, social, or other relationship or association." 29 CFR § 1630.8 (2006). In the appendix to this part of the CFR, the EEOC specifically gives an example of an employee with caregiving responsibilities:

> [A]ssume that a qualified applicant without a disability applies for a job and discloses to the employer that his or her spouse has a disability. The employer thereupon declines to hire the applicant because the employer believes that the applicant would have to miss work or frequently leave work early in order to care for the spouse. Such a refusal to hire would be prohibited by this provision.

Appendix to 29 CFR § 1630.8.

To bring a cause of action under this section, the employee must demonstrate that the disabled individual with whom she or he is associated must meet the definition of disability under the ADA. 42 U.S.C. 12102 (2); *Larimer v. IBM Corp.*, 2003 U.S. Dist. LEXIS 7396, 2003 WL 1989649, 30 Employee Benefits Cas. 2189 (N.D. Ill., May 1, 2003); *Jackson v. Service Engineering, Inc.*, 96 F.Supp. 2d 873 (S.D. Ind. 2000). The employee, however, is not entitled to an accommodation because of the disabled individual with whom she or he is associated.[12]

Common law claims

Some plaintiffs have been successful in bringing common law

claims. In Massachusetts, Dr. Tina Theroux sued her partners in a dental practice for gender and pregnancy discrimination in violation of the Massachusetts Equal Rights Act ("MERA") and breach of contract.[13] The Superior Court dismissed the MERA claim but allowed the breach of contract claim to proceed. The court found that the defendants had invoked a provision of Theroux's contract, which deprived her of the benefit of her bargain based upon her pregnancy, thus violating the covenant of good faith and fair dealing implied in all contracts.

State statutes

Some states and municipalities have enacted legislation which specifically protects caregivers. Alaska, Connecticut and Washington, D.C., all have statutes which protect either "parenthood" or "familial status" as part of their employment anti-discrimination statutes. Aspen, Colo., Atlanta, Ga., Cook County, Ill., Crested Butte, Colo., Harrisburg, Pa., Howard County, Md., Miami-Dade County, Fl., Milwaukee, Wis., State College, Pa., Tacoma, Wash., and Tampa, Fl. all have family responsibility, familial status or parental status as part of their employment anti-discrimination laws. Additionally, several states have pending legislation to make discrimination based upon familial status or caregiver status unlawful: California, Florida, Michigan, New York and Pennsylvania. Practitioners who practice in any of these forums can take advantage of a directly applicable law rather than try to fit an FRD claim into other, pre-existing frameworks.

Conclusion

Unfortunately, women who work outside of the home are still saddled with both family responsibilities and market work responsibilities. With employers demanding more and more hours, it is little wonder that FRD claims are on the rise. Practitioners who are interested in bringing these claims have a wide variety of vehicles to address FRD. By properly spotting these issues, these claims will not be able to be ignored and will spur changes in the workplace.

Additional resources

www.worklifelaw.org

www.eeoc.gov/policy/docs/caregiving.html (EEOC's Care-Giver Discrimination Guidelines)

www.abetterbalance.org

www.pardc.org

www.flextimelawyers.com

www.mass.gov/mcad/maternity1.html (MCAD's Maternity Leave Act Guidelines)

Unbending Gender: Why Work and Family Conflict and What to Do About It, by Joan C. Williams (Oxford University Press, 1999)

Solving the Part-Time Puzzle: The Law Firm's Guide to Balanced Hours, by Joan C. Williams and Cynthia Thomas Calvert, forthcoming (National Association for Law Placement)

"WorkLife Law's Guide to Family Responsibilities Discrimination," by Joan C. Williams and Cynthia Thomas Calvert, WorkLife Law, UC Hastings College of the Law, 2006 (available at www.worklifelaw.org).

"A Crackdown on Caregiver Discrimination," by Carmelyn P. Malalis and Linda A. Neilan, *Trial Magazine*, August, 2007.

"Litigating the Maternal Wall: U.S. Lawsuits Charging Discrimination against Workers with Family Responsibilities," by Mary Still, 2006 (available at www.worklifelaw.org).

"Family Responsibilities Discrimination: Don't Get Caught Off Guard," by Joan C. Williams, 22 *The Labor Lawyer* 293 (2007).

Notes

1. *Unbending Gender: Why Work and Family Conflict and What to Do About It*, by Joan C. Williams (Oxford University Press, 1999).

2. *Litigating the Maternal Wall: U.S. Lawsuits Charging Discrimination against Workers with Family Responsibilities*, by Mary Still, University of California Hastings College of the Law, July 6, 2006. This paper is available in pdf format at www.worklifelaw.org.

3. *Back v. Hastings on Hudson Union Free School District*, 365 F.3d 107 (2nd Cir. 2004).

4. *Phillips v. Martin Marietta Corporation*, 400 U.S. 542 (1971).

5. *Wagner v. Dillard Department Stores, Inc.*, 17 Fed. Appx. 141 (4th Cir. 2001); *Walsh v. National Computer Systems, Inc.*, 332 F.3d 1150 (8th Cir. 2003).

6. *See e.g., Myrick v. Aramark Corp.*, 2004 U.S. Dist. LEXIS 7301, 2004 WL 906176, (N.D. Ill. 2004).

7. M.G.L. c. 149, §105D.

8. M.G.L. c. 149, § 52D.

9. 29 U.S.C. §§ 2612 (a) and 2614 (a); *Callison v. City of Philadelphia*, 430 F.3d 117 (3rd Cir. May 19, 2005).

10. 29 CFR § 825.220 (b) (2006); *Liu v. Amway Corporation*, 347 F.3d 1125, 1134 (9th Cir. 2003) (supervisor's pressuring employee to reduce her leave, changing her status from "pregnancy leave" to "personal leave," issuing a negative performance evaluation while the employee was on leave, and supervisor's hostile attitude towards the employee was enough evidence to preclude summary judgment for the employer).

11. *Batka v. Prime Charter, Ltd.*, 301 F.Supp.2d 308, 310 (S.D.N.Y. 2004). Other examples of FMLA claims for FRD are:

- *Van Diest v. Deloitte & Touche*, 2005 U.S. Dist. LEXIS 22106, 2005 WL 2416921 (N.D. Ohio 2005). The court upheld an FMLA retaliation claim filed by a receptionist after she took FMLA leave to care for her sick mother. The court reasoned that she was terminated one month after requesting FMLA leave and had always received good evaluations prior to her termination.
- *Lincoln v. Sears Home Improvement Products, Inc.*, 2004 U.S. Dist. LEXIS 402, 2004 WL 62716 (D. Minn. 2004). The court rejected the employer's argument that the plaintiff was fired because he failed to return the FMLA paperwork when he took leave to care for his mother who suffered from depression after his father's death. The court reasoned that the plaintiff gave the employer sufficient notice and that the employer failed to provide him with notice of his FMLA rights when his father was ill and denied plaintiff's leave requests during both his mother's and father's illness.
- *Knussman v. State of Maryland*, 65 F. Supp.2d 353 (D.Md. 1999). The Fourth Circuit upheld an award of $665,000 in damages, attorney's fees and costs to a father who sued under FMLA after his employer refused to grant his request for leave to care for his newborn child.

- *Sallis v. Prime Acceptance Corp.*, 2005 U.S. Dist. LEXIS 16693, 2005 WL 1950661 (N.D. Ill. 2005). The court denied summary judgment in FMLA claim filed by employee who claimed that after requesting and obtaining approval to care for her mother, who had emphysema, the employer began changing her job duties, gave her written warnings threatening to terminate her if she took more time off from work, assigned her more difficult accounts, and terminated her.
- *Wagner v. Dillard Department Stores*, 2001 WL 967495 (4th Cir. 2001). District court's finding of discrimination upheld in a case involving a pregnant woman who was not hired because her potential employer feared she would take family leave.
- *Fisher v. Rizzo Brothers Painting Contractors, Inc.*, 403 F.Supp.2d 593 (E.D. Ky. 2005). The employer told a pregnant employee that in 54 years, the company had never had a pregnant employee, that her pregnancy was viewed as an "inconvenience" by her co-workers, and that she would not want to return to work after the birth. The employee suffered from complications to her pregnancy and required leave. The employer told the employee that any leave would be unpaid and did not advise her of her rights under the FMLA. The employee asked to be "laid off" to collect unemployment. When she contacted her employer to be rehired, she was told that there was no position for her. She sued claiming interference with her use of FMLA rights. The court denied summary judgment finding a question of fact as to whether the employee would have returned from leave.

12. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 5CFR Pt. 1630, App. section 1630.8 (2005).

Some examples of ADA association cases include:

- *McGrenaghan v. St. Denis School*, 979 F. Supp. 323 (E.D. Pa. 1997). The court held that an employer violated the ADA's association clause when it transferred a teacher with a full-time position to a half-day teaching, half-day resources and position shortly after her son was born with a disability.
- *Abdel-Khalek v. Ernst & Young, LLP*, 1999 WL 190790 (S.D.N.Y. March 5, 1999, as amended April 7, 1999). The court upheld plaintiff's ADA claim that she was not hired because her daughter had serious health problems, reasoning that (1) the defendant knew the plaintiff's daughter had a disability and (2) the plaintiff was the only member of the technical staff not hired when the defendant acquired her former employer.
- *Miller v. CBC*, 908 F. Supp. 1054 (D.N.H. 1995). The court upheld an ADA claim filed by a female manager who said her employer told her she should stay home with her kids (twins and a son with Down syndrome) and that having a son with a disability made her unpromotable.
- *Gower v. Wrenn Handling, Inc.*, 892 F. Supp. 724 (M.D.N.C. 1995). Denying summary judgment on ADA association claim because high medical bills for several surgeries related to plaintiff's son's eye disorder may have been a factor leading to plaintiff's termination.
- *Deghand v. Walmart Stores, Inc.*, 926 F.Supp. 1002 (D. Kans. 1996). The court denied employer's motion for summary judgment, reasoning that (1) most of relevant adverse employment action occurred soon after plaintiff's husband's mental breakdown; (2) plaintiff's supervisors told her that her husband's condition caused her too much stress, and (3) plaintiff's supervisors told her that the employees she supervised were uncomfortable with her because of her husband's disability.
- *Tyndall v. National Education Centers,* 31 F.3d 209 (4th Cir. 1994). The Fourth Circuit upheld the district court's rejection of ADA association claim, reasoning that the plaintiff's termination resulted from her record of past absences and need for additional time off and not the employer's assumption that she would have to miss work to care for her disabled son.

13. *Theroux v. Singer et al.*, 21 Mass.L.Rptr. 187, 2006 WL 1745788 (Mass.Super.).

A close look at the Employee Free Choice Act from the perspective of union counsel[1]

By Dahlia C. Rudavsky and Kevin C. Merritt

When Congress passed the Wagner Act of 1935 — to be known later as the National Labor Relations Act ("NLRA") — it could have directed the federal government to maintain a neutral posture toward unions and workers' efforts to form unions. Instead, Congress made clear its belief that a free and robust workforce, organized through unions, was a necessity for a healthy economy, stating: "It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce … by *encouraging* the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization and designation of representatives … for the purpose of negotiating the terms and conditions of their employment … ." 29 U.S.C.A. § 151 (1998) (emphasis added). That language did not change when the Taft-Hartley Act passed in 1947, and has never changed since.

Despite Congress' intent to empower workers, court decisions have elevated employers' property rights in their business premises and operations over workers' rights to organize. Thus, the principle that property rights are sacrosanct has trumped Congress' intent. Employers have found ways around the NLRA's protections for organizing and bargaining, with the result that organized labor has been in decline for several decades.

Introduced as a means to reinvigorate the labor movement, the Employee Free Choice Act ("EFCA")[2] currently before Congress aims to address the most prominent systemic problems that have undercut employees' rights to act collectively through unions under the NLRA. This article summarizes why each of the three major components of the EFCA will help to at least level the labor relations playing field and restore some fairness to the process of workers forming and negotiating through unions.

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I. Majority signup or "card check"

Much of the attention that the act has received has focused on its majority signup or "card check" provisions. Those provisions would allow a union to be certified as the exclusive bargaining agent for a group or "unit" of employees based upon a showing of support — typically via signed authorization cards — of 50 percent of the employees in the unit. This system is certainly not new, having been explicitly upheld by the U.S. Supreme Court as a valid expression of worker choice, most prominently in *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969). The NLRA, for its part, is silent as to the method by which a union may be certified. Section 9(a) of the NLRA merely refers to "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees … ." *See also United Mine Workers v. Arkansas Flooring Co.*, 351 U.S. 62, 72 n.8 (1956) ("Board election is not the only method by which an employer may satisfy himself as to the union's majority status").

When one considers the backdrop against which union certifications currently take place, the significance of the act's majority signup provisions becomes evident. Employers understand that they benefit from resisting and delaying an election. As an empirical matter, the passage of time works against a union, as employers subject their workforce to a parade of horribles should they select union representation, and employees grow increasingly uncomfortable with the uncertainty and contention surrounding the election process. *See* James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 Iowa L. Rev. 819, 868 n.244 (2004). One oft-cited study suggests that a union's chances for success in an election drop by .29 percent for each day of delay in an election campaign. Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self Organization Under the NLRA*, 96 Harv. L. Rev. 1769, 1777 (1983) (citing Roomkin & Juris, *Unions in the Traditional Sectors: the Mid-Life Passage of the Labor Movement*, 31 IRRA Proceedings 212, 217-18 (1978)). The act seeks to correct for that advantage by reinforcing majority signup as an alternative certification method.

Opponents of the act self-servingly contend that its passage will erode the democratic system of board-sanctioned secret ballot elections. That contention is seriously flawed. First, a growing

body of scholarship suggests that secret ballot elections under the board's regime bear few of the hallmarks of democratic process, largely due to aggressive, often illegal employer anti-union tactics. *E.g.,* Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing*, Econ. Policy Inst. Briefing No. 235 (2009) (empirical data from board certifications and election campaigns between 1999 and 2003 demonstrates that employers' "threats, interrogation, surveillance, and harassment ha[ve] ensured that there is no such thing as a democratic 'secret ballot' in the NLRB certification election process"). Indeed, proponents of unions work under a severe disadvantage even when the employer hews to the law in its anti-union campaign. Unlike democratic elections, board elections afford the employer dramatically unequal access to voters and campaign media via perfectly legal "captive audience" meetings on company time, and use of the employer's e-mail and other communications systems, where the union must rely on off-site contact with workers who choose to attend meetings in their free time, and are denied use of the employer's communications system. *See* Gordon Lafer, American Rights at Work, *Free and Fair? How Labor Law Fails U.S. Democratic Election Standards* (2005).

Second, under EFCA, employees retain their ability to choose between majority signup and a board-sanctioned elections: employees not wishing to proceed via majority signup can simply decline to sign an authorization card. If a union receives less than the majority of signatures required for recognition, it then must petition the board for an election.

Third, at least under current board law, an employer could still force an election even after a union's showing of majority support, so long as a 30 percent minority of employees dissents from the majority. In *Dana Corporation*, 351 N.L.R.B. No. 28 (Sept. 29, 2007), a contentious 3-to-2 decision, the board threw out a decades-old rule by which a union obtaining certification by means of majority signup was presumed, for one year, to continue to have the support of a majority of the employees in the bargaining unit. Under pre-*Dana Corp.* precedent, during that year, legal challenges to the union's majority status were barred. The *Dana Corp.* board, however, held that no election bar will be imposed after a card-check recognition unless (1) employees receive 45 days' notice of their right to file or support a decertification, and (2) no valid petitions are filed within those 45 days. *Dana Corp.* at 1. A decertification petition with the support of only 30 percent of employees would force an election, and that 30 percent could include employee signatures obtained before as well as after the employer's recognition of the union. *Id.* Although *Dana Corp.* has been condemned as an unnecessary, overreaching change to a longstanding rule by a pro-employer board,[3] it will remain a check on majority signup systems even if EFCA passes, at least until reversed by a subsequent board or by legislation.

II. First contract arbitration

Currently, once the union is certified, the employer has little incentive to conclude — or even begin — negotiations for a first collective beginning agreement. The NLRA provides no penalty for delay. Although a union may bring a charge of unfair labor practice concerning the employer's bad faith failure to bargain, the board's resolution of the charge often takes years and, even if successful, results only in an order requiring the employer to bargain. Moreover, even during negotiations, the employer often continues its anti-union campaign to erode workers' support for the fledgling union. *See, e.g.,* Ronald Meisburg, Nat'l Labor Relations Bd., *Additional Remedies in First Contract Bargaining Cases*, Memorandum GC 07-08 (May 29, 2007) ("[h]igh impact violations during first contract bargaining" may result in "seriously damaged collective-bargaining relationship that is less likely to achieve the good-faith bargaining necessary to reach a first contract"). As a result, many newly certified unions never secure a first contract. *See generally* John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999–2004*, 62 Indus. & Lab. Rel. Rev. 3 (2008).

The act would reshape the current model for first-contract bargaining by requiring parties to submit to binding arbitration if no contract is reached after 90 days of unsuccessful negotiations and 30 days of mediation. An arbitration board convened under Federal Mediation and Conciliation Service rules would hear the matter, and issue a decision binding the parties for two years. Similar systems operate in Canada. *See, e.g.*, Roy Adams, The Employee Free Choice Act: A Reality Check, Labor & Employment Relations Assn., Proceedings of the 58th Annual Meeting (2006).

Notably, EFCA "mandates" arbitration only insofar as the parties do not successfully negotiate on their own within the act's time limits — all of which are malleable. The clock does not start running, in any event, until the union specifically requests action on the employer's part, and even then, each time period may be extended by mutual agreement.

III. Enforcement and penalties

EFCA's provisions for increased enforcement — perhaps least contentious because even management advocates recognize the relative toothlessness of the NLRA's enforcement mechanisms — may also be the one most likely to have immediate effects on unions and union campaigns.

Currently, an employee fired in violation of the NLRA is entitled to no more than simple back pay, less interim earnings, which might total a few thousand dollars or less for a given employee. Consequently, an employer can fire its most activist employees as long as it can afford to pay the relatively small back pay awards that might result.[4] In effect, employers can buy — cheaply — the power to violate the law. *See* 153 Cong. Rec. S4175 (daily ed. Mar. 29, 2007) (statement of Sen. Kennedy) (current penalties for NLRA violations "are so minor that employers treat them as just another cost of doing business"). This very limited remedy compares unfavorably to the punitive and/or multiple damages available under other federal statutes affecting the workplace, such as Title VII of the Civil Rights Act of 1964 and the Fair Labor Standards Act. Worse, the NLRA currently contains no provision to deter "repeat offenders," i.e., employers who systematically fire or otherwise retaliate against employees for supporting a union. Although the board possesses injunction powers under § 10(j) of the NLRA, as a practical reality, those powers have rarely been invoked. *See* Arthur Rosenfeld, Nat'l Labor Relations Bd., *End-of-Term Report on Utilization of Section 10(j) Injunction Proceedings, June 1, 2001 through December 31, 2005*, Memorandum GC 06-02 (2006) (only 70 § 10(j) injunctions approved between 2001 and 2006).

EFCA's expanded enforcement provisions contemplate three basic changes, all of which apply only to violations during an organizing campaign or during first-contract negotiations. First, EFCA would allow for awards of triple back pay, bringing the NLRA more in line with other statutes within the corpus of federal labor and employ-

ment law. Second, the act would deter repeated violations by imposing civil penalties of up to $20,000 per willful or repeat violation. Third, the act would *require* the board to seek injunctive relief where there is "reasonable cause" to believe that the employer has discriminated against workers for exercising NLRA-protected rights.

Some commentators cavil that these provisions are "one-sided," i.e., they only increase penalties applicable to employers, not those applicable to unions. But this is easily answered: employers, not unions, have routinely used their greater resources to undermine the bargaining relationship and manipulate the board's adjudication system. Furthermore, the board is *already* required to seek injunctions against unions for certain kinds of strikes and boycotts involving third-party businesses; EFCA's injunction requirements would merely create a category of employer behavior subject to the same treatment, once again leveling the playing field.

A better observation would be that EFCA's increased remedies and civil penalties do not go far enough, in that they fail to address the board's pervasive administrative problems, which will continue to impede enforcement of labor rights. Those problems, however, would be better fixed by executive attention to the agency itself.

IV. Conclusion

The Employee Free Choice Act represents a significant step toward much-needed reform in an area of law where, increasingly, workers must measure "victory" merely in terms of preserving the status quo. It restores some balance in American labor relations, though in the view of labor's advocates, it does not go far enough. Given the realities of power politics in Washington, it remains to be seen whether it will pass as drafted or will be seriously watered down in the legislative process.

Notes

1. The authors acknowledge the assistance of Vincent Roger and Vail Breed in preparing this article.

2. H.R. 1409, 111th Cong. (2009); S. 560, 111th Cong. (2009).

3. For example, even if the "card check" system has its flaws, procedures exist to safeguard employee rights and curb any union misconduct. A union that coerces employees into signing cards, for example, violates § 8(b)(1)(A) of the NLRA. *See Dana Corp.* at 16. Likewise, a union that accepts recognition without actually having majority support violates the act, and the board can order an employer to cease and desist from bargaining with a minority union. *Id*.

4. Indeed, because back-pay damages are subject to mitigation, and because most nonunion workers earn low level wages, the net damages awarded to the individual worker often are substantially smaller than the wages the employer would have paid if the worker had not been fired in the first place.

Finding your legal career during a recession

By Jared D. Correia

Finding a job is hard work. Finding a job you like is harder work still. And finding a job you like in the middle of the economic crisis in which we are now mired may be the hardest work of all, perhaps the hardest job anyone has had in a long time. This is equally true for those trying to find their first job, for those looking to transition jobs or careers or for those seeking their last job before retirement. No industry has been left unaffected, as job slashing and salary cutting are superficially effective measures for combating losses in other sectors. Within the legal profession, finding a new job may seem nigh impossible, especially in Massachusetts. This past year, the commonwealth saw an 86.4 percent bar passage rate for the July test, the results of which indicate that there will be scads of attorneys joining the job hunt here at the dawn of 2009. But, the dawn brings with it enlightenment.

The fact of the matter is that, has always been that, finding a job is possible in almost any economic climate. And, finding a job becomes more and more likely, more probable, when the correct investment is made in the process. Regardless of the interruption, recession or depression, companies will always choose the candidates who make the best general impression following the application and interview(s). Opportunities may shrink, but that only means that your job-seeking skills must be more finely sharpened, further refined, such that you might slip in through your limited windows of opportunity when they become opened for you. You must be a lean and mean job searching machine.

Everything on Earth seems to be more sophisticated than it was but 10 years ago. And, the job application process has not been left unaffected, either. If everyone else is increasing their savvy, moxie and technical abilities, so should you, lest you be left behind, with your graying, antiquated skills. It is no longer enough to send the same resume, even if you have printed it upon the finest linen paper, to each job offering you run across. There is much, much more to today's job seeking. And, you don't have to have a job posting in front of you to begin. You can start as early as you want to, even if you want to start the day you walk into law school.

But, all of this requires rethinking the ways in which we approach searching for a job; most especially, it requires us to change our attitude toward the job searching process, so that we might remake ourselves over, from passive participants in our careers to proactive managers of our careers. Fortunately, the leap is assisted: there is an aid for study.

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The fifth edition incarnation of the American Bar Association ("ABA") treatise on finding a legal job, *The Legal Career Guide: From Law Student to Lawyer*, is ostensibly a chronological recording of steps to be taken by law students in order that they might one day find the legal career that they have always dreamed of. And, if you take up the text, and read from cover to cover, that is exactly what you will find. Such a review could result in looks of disdain covering the features of law school graduates, and practicing attorneys, who might feel as though they have missed the boat, and are now left without a life preserver, by virtue of the mere chance that they did not start law school in 2008. The authors of the text (ABA stalwarts Gary A. Munneke and Ellen Wayne), though, warn against such a limited reading. They insist that readers should pick out sections of the book as they need them, such that those who inquire of the text in this way will begin to hold in their hands not a stuffy legal text, but a field guide for the job search, to be accessed at any point in the job search, and by any law student or attorney seeking a new position. Viewed in this light, the advice is generic enough to the legal profession that it may be applied to various life circumstances, from those prevailing upon the student to those prevailing upon the old salt, to those prevailing upon everyone in between.

The *Guide*'s greatest strength resides in its three-pronged lesson, consisting of the following trident points: be yourself; prepare yourself; work hard. It is a humanist application of the ideal of the Trappist monastery. Before you may reach to the specific lessons for job searching robustly covered in the *Guide*, you must find the wisdom left for you at the very top of the mountain. The points are simple, but rest on solid bedrock. How are you to know what job you want unless you know what your own values are? How are you to sell yourself as a unique person unless you know what skills you, and only you, possess? *Know Thyself. And, Introduce Thyself to Others*, sayeth the *Guide*. How can you know whether you wish to work at a company unless you have researched it thoroughly beforehand? How can you expect to know what to say in an interview for a judicial clerkship if you have not reviewed that specific form of interviewing, and have done no research on the proclivities of the particular judge and court? *Preparation is Nine-Tenths of the Law. Why Wouldn't You Treat an Interview Like an Important Case? Measure Nine Times, Cut Once*, thunders the voice of Gary Munneke, from the mountain. You thought law school was hard, involving intense study and grueling hours, and yet you think that somehow the legal job search will be different? Your work as an attorney involves intense concentration and grueling hours, and yet you think finding a new job will somehow be different? *Finding a Legal Job Is a Full-Time Job Unto Itself. Best to Ora et Labora. Then Labora Some More.* Thus spake Ellen Wayne.

At times, this book does read like a how-to written by the child of an unholy union between Friedrich Nietzsche and Vince Lombardi. But, once you grasp the overarching concepts that the authors seek to drive home, you may process to the nuts-and-bolts directory, remembering Plato as only a colorful modeling clay. And, there is plenty here to sink your teeth into.

The *Guide* will show you how to make the best analysis, from the point in time at which you stand, as to what the appropriate direction of your career should be. The answer will be determined by your own values, your interpretation of your skills and your assessment of the job market. The *Guide* will show you how to look for jobs, and how to decide which one to take, by showing you how to draft a resume, research employers, create a network and interview effectively. Along the way, you will pick up helpful hints about the hiring process for law firms and other entities, you will find out where to look for aid should your search falter or waiver and you will learn how to manage the setbacks that inevitably occur during the job searching process. You will be reminded that a setback is not a termination. You will be buoyed, once more, to start anew, with renewed determination to find a career, and not just a temporary paycheck, despite how tempting it might give in to immediacy, with responsibilities and debt bringing their crush bearing down upon you. The *Guide* will also provide you with a thorough review of where the legal marketplace stands, and where it is going, such that you may yoke your knowledge of the present legal scheme with an expert's peek into the future of the legal world, in order to determine what your next career choice will be, and how it will lead you to where you will end up, further on down the road.

In addition to the headline topics generally covered by the *Guide*, there are simply presented nuggets of practical advice that are recognized as golden upon the closer inspection of a determined alchemist. As a non-exhaustive sampling list: the authors promote this ideal that attorneys are unique individuals, with special skills to sell in the marketplace — this explodes the notion that law school strips away identity, and leaves the remaining humans as lawyer-drones, who are replaceable, interchangeable parts; the authors insist that the earlier and more effectively lawyers and law students can access their unique, job-transferable skills, the more options they can create for themselves in a changing marketplace — this seemingly goes without saying, and is undeniably true, yet this dramatic tool for success is ill-used, if used at all; young lawyers should understand that their first assignments may determine the course of their legal career — so they should take care in deciding what initial work they should accept; attorneys should always be mindful of the business aspect weighing upon all practices — the law is not an entirely theoretical exercise in the real world; the authors refer to the interviewing of employers, and not the other way around — this is a hammer in the toolbox of the enterprising attorney, who wishes to reduce his nervousness, or, further, to reverse the power structure inherent in the traditional interview. Beyond these strings of pearls stretching across the pages of the *Guide* (making careful reading a must, for you know now what you will miss when you divert your attention), readers should take care not to dismiss the appendices. The appendices alone are worth the price of admission. Appendix A provides a clearinghouse of online and paper resources that will assist in every aspect of the job search. This listing of vetted sources is essential for building your career-planning information base. Appendix D is instructive for its lists of "real-life" duties attendant upon specific attorney positions, so that you may find out just what your employer may not tell you: exactly what you are getting into. Appendix D also implicitly underscores another theme running through the *Guide*: that the future of the legal profession (and where the money is at, incidentally) lies in specialization. The growing complexities of the modern world must be discreetly argued by someone: that someone is the lawyer.

In any economic climate, those who get the jobs will separate themselves most effectively from their competitors during the job application and interview processes. In an economic recession, during which the job market reveals itself in fits and starts, and through concealed cracks and shafts of daylight, separation becomes more distinct and hierarchies of skills and attributes are more closely analyzed and tiered. It will still be that those who get the jobs will be those who separate themselves most effectively from their competitors; but, the margin for error will be reduced. Now you are the student attempting to get into an Ivy League college by proving to the administration that this is the year that they must provide a scholarship to the tuba-playing high school javelin star with an interest in invertebrate biology, which figure is cut by you, and you alone. In the same way, you must convince your targeted legal employers that you are the only one who suits their needs. *The Legal Career Guide: From Law Student to Lawyer* will help you to make that argument a winning one.

Better late than never: *Gates v. Reilly* and the circumstances in which creditors may pursue "late" claims against estates

By David H. Abbott and Andrew D. Berman[1]

On March 24, 2009, the Massachusetts Supreme Judicial Court ("SJC") handed down a decision concerning the circumstances in which a creditor may pursue a claim against an estate notwithstanding the creditor's failure to prosecute his claim within the "short" one year statute of limitations set forth in G. L. c. 197, § 9 ("§ 9"). In *Gates v. Reilly*, 453 Mass. 460 (2009), the SJC provided its most detailed explanation yet as to the circumstances in which creditors will be entitled to relief pursuant to G. L. c. 197, § 10. The decision is therefore of importance to practitioners who represent estates and to those of us who may be contacted by a client who has a claim against an estate that appears time-barred under § 9.

Background[2]

Mildred Dooling died testate on May 12, 2003. At the time of her death, Dooling owned the Devereux School, located at 44 Smith St. in Marblehead, and a substantial interest in the property at 44 Smith St. M.D. Realty Trust owned the remaining interest in that property. The school and Dooling's interest in the real property at 44 Smith St. were assets subject to the probate of her estate.

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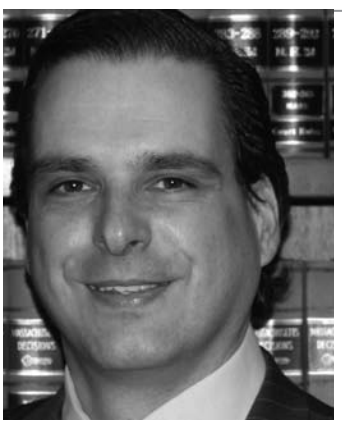

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Dooling never married and had no issue. She was survived by eight nephews and nieces, including the plaintiffs Gates and Russell, and the defendant executors Joseph Reilly and James Georges. Dooling's will left her estate (including the school and her interest in the school property) to her eight nieces and nephews in equal shares.

Gates and Russell (who are sisters) worked at the school for many years (since 1969 and 1971, respectively), first as teachers, and eventually came to be responsible for all aspects of the school's operations except bookkeeping and financial affairs. Gates and Russell alleged that they justifiably relied on Dooling's repeated promise, made over more than three decades, that in exchange for their services at the school (for which they were compensated far below market rates), Gates and Russell would become the sole owners of the school and the property at 44 Smith St. on their aunt's death.

Gates and Russell pursued challenges to their aunt's will in the Probate Court, claiming that the will was the product of duress and undue influence. While the will contest was pending (and within one year of Dooling's death), their attorneys filed a number of documents that put the executors on notice that Gates and Russell were claiming to be creditors of the estate. On May 26, 2004, the judge allowed the executors' motion to strike Gates and Russell's challenge to the will. On June 14, 2004 (13 months after Dooling's death), Gates and Russell filed a complaint in the Superior Court against the executors, again claiming to be creditors of the estate. They filed an amended complaint on July 16, 2004, which, in addition to claims of breach of contract, unjust enrichments, services rendered, deceit and constructive trust, also included claims in which Gates and Russell sought, pursuant to various theories, to enforce an equitable interest in the school and school property. The executors moved to dismiss Gates and Russell's Superior Court action on the grounds that it was not commenced within one year of Dooling's death as required by G. L. c. 197, § 9(a). On June 7, 2005, the Superior Court allowed in part and denied in part the executor's motion. The Superior Court dismissed all of Gates and Russell's claims as time-barred under § 9 except for those claims in which they sought an equitable interest in the school property and related injunctive relief.[3] The Superior Court also entered a preliminary injunction enjoining the executors from selling, transferring or otherwise disposing of the school or the school property.

In May 2006, Gates and Russell hired the authors of this article as new counsel and, on Sept. 15, 2006, they filed a bill in equity pursuant to G. L. c. 197, § 10 ("§ 10"), in the Supreme Judicial Court for Suffolk County (the "county court"). On Oct. 2, 2007, based on the documents, affidavits and pleadings filed in the § 10 proceeding, a single justice of the Supreme Judicial Court issued a memorandum of decision and judgment in which he found and concluded that: (1) Gates and Russell's attorney filed a notice of creditor's claim well within the one-year statute of limitations, but

did not file the corresponding civil action until one year and 33 days after the death of Dooling; (2) the delay of 33 days was due solely to former counsel's neglect; (3) the neglect may not be attributable to the plaintiffs under principles of agency; (4) the plaintiffs' claims are meritorious; (5) justice and equity require that the plaintiffs be allowed to pursue those claims; and (6) the defendants have shown no prejudice from the delay. Based on these findings of fact and conclusions of law, the single justice ordered that the plaintiffs' claims be reinstated in the Superior Court. The executors appealed to the full court.

After rejecting a couple of preliminary arguments raised by the executors[4] and articulating the standard of review applicable to a decision of the single justice under § 10,[5] the Court examined the statutory framework governing the time within which claims may be brought against estates. In sum, § 9 sets forth a one-year statute of limitations for an "action by a creditor of the deceased" against the deceased's executor or administrator.[6] Section 10, however, allows a creditor who has failed to comply with § 9's one-year statute of limitations to file a bill in equity seeking "judgment for the amount of his claim against the estate of the deceased person." To be entitled to relief under § 10, the Court observed that the statute requires a creditor to demonstrate two things: (1) that justice and equity require recognition of the claim; and (2) that the creditor is not chargeable with culpable neglect in not prosecuting the claim within the one-year statute of limitations.

Justice and equity

Citing *Matter of the Estate of Grabowski*, 444 Mass. 715, 719-720 (2005), the Court observed that justice and equity favor recognizing a creditor's time-barred claims where the claims are meritorious and the estate has not shown prejudice. The Court further stated that a claim is "meritorious" where "it has both legal and factual support," see *id*. at 719-720, and that a court is unlikely to find "prejudice" where the estate was on notice of the creditor's claims within the one-year limitations period. See *id*. at 720; *Mullins v. Garthwait*, 875 F.Supp. 14, 21 n.10 (D. Mass. 1994). In the case at bar, the Court observed that Gates and Russell's claims, which were based on alleged promises made over more than three decades upon which they claimed to have relied, were supported by their own affidavits and corroborating deposition testimony from family members, friends and others in support of their claims. Indeed, in addition to their own detailed affidavits, the plaintiffs submitted corroborating testimony from eight family members, friends and others. The Court also noted that the plaintiffs had submitted an affidavit from an expert establishing that they had been compensated at far below market rates during their employment by the school. Based on this evidence, the Court concluded that the time-barred claims were sufficiently grounded in law and fact to be deemed meritorious.

The Court also concluded that the executors had not shown that they had been prejudiced by the filing of Gates and Russell's creditor claims 33 days after the one-year statute of limitations had expired. First, the Court observed that the executors were on notice of the claims well within the one-year limitations period. Second, the Court reasoned that, even if relief under § 10 was denied, the executors would have to defend against Gates and Russell's other related claims which remained pending in the Superior Court. Finally, the Court noted that the school and school property remained in the estate as a result of a preliminary injunction entered in the Superior Court.[7] For these reasons, the Court concluded that the executors had failed to demonstrate the type of prejudice[8] that might otherwise counsel against the granting of relief under § 10.

Culpable neglect

Citing *Downey v. Union Trust Co.,* 312 Mass. 405, 408-409 (1942), the Court emphasized that a creditor seeking relief under § 10 must establish that his failure to file suit within the one-year limitations period "was not due to his carelessness or to any lack of diligence for which he might properly be censured or blamed." In *Grabowski*, the Court had written that "[a]gency principles (which might operate to make an attorney's neglect attributable to the client as principal) do not apply to [§ 10]."[9] The executors in *Gates* argued that this rather unequivocal statement in *Grabowski* was mere dicta, and that it was inconsistent with prior cases interpreting § 10. See *Hastoupis v. Gargas*, 9 Mass. App. Ct. 27, 33 (1980), and cases cited ("'creditors' can be charged with the result of their lawyers' blameworthy conduct under [§] 10"). In *Gates*, the Court narrowed the scope of the sweeping statement that it had made in *Grabowski*. The Court stated that "agency principles do not strictly apply to equitable proceedings brought under § 10, where a creditor's attorney is responsible for missing the one-year statute of limitations … however, the attorney's conduct may be attributable to the client where the attorney exhibits a 'disregard of professional responsibilities' as opposed to 'a misunderstanding of the controlling law.'" 453 Mass. at 472 (internal citations omitted). This is a significant clarification of the law in this area.

In the case at bar, the executors claimed that Gates and Russell were chargeable with culpable neglect because they had "intentionally" waited for the outcome of the will contest before filing suit in the Superior Court, and therefore, they were not entitled to relief under § 10. Had this been true, the plaintiffs may well have not qualified for relief under § 10. See *Monaghan v. Monaghan*, 323 Mass. 96, 97-98 (1948). However, based on the affidavits filed by Gates, Russell and the attorney[10] who represented them at the time that the one-year statute of limitations expired, the Court concluded that their attorney's failure to timely file suit in the Superior Court was not "intentional" or based on any strategic decision, but rather it "was sufficiently the product of a misunderstanding of the controlling law that it ought not be attributed to Gates and Russell." *Gates*, 453 Mass. at 473. Although Gates and Russell's attorneys may have been negligent in not timely filing suit, that negligence was a product of a misunderstanding of the controlling law, rather than the result of the attorneys' mere procrastination or callous disregard of their professional responsibilities, and therefore it was not attributable to Gates and Russell under § 10. *Id.* at 472-473.

Since the Court concluded that Gates and Russell had met their burden of demonstrating that justice and equity required recognition of their claims, and that they were not chargeable with culpable neglect in not prosecuting their claims within one year of their aunt's death, the Court affirmed the single justice's order reinstating their creditors' claims. The case is scheduled for trial in the Superior Court in early 2010.

Analysis

Although § 10 relief also requires a finding that a creditor's claim be "meritorious," § 10 cases tend to turn on the other prong of the analysis: whether the creditor is chargeable with "culpable neglect." In all of the last six reported decisions interpreting § 10, including *Gates*, the creditors had timely retained counsel to pur-

sue their claims against an estate. See *Gates*, 453 Mass. at 462; *Grabowski*, 444 Mass. at 721; *Mullins*, 875 F.Supp. at 26; *Hastoupis*, 9 Mass. App. Ct. at 32-34; *Herman v. Watson*, 330 Mass. 414, 414-415 (1953); *Downey,* 312 Mass. at 410. The attorneys in all of these cases failed to timely file suit either due to their misunderstanding of the controlling law, see *Gates*, 453 Mass. 460; *Grabwoski*, 444 Mass. 715; *Mullins*, 875 F.Supp. 14; and *Hastoupis*, 9 Mass. App. Ct. 27; or for reasons that were not clear on the record. See *Downey*, 312 Mass. at 410; *Herman*, 330 Mass. 414. In all of these cases, the creditors were awarded relief under § 10.

If a creditor does not timely retain counsel, it will be considerably more difficult for the creditor to avoid a finding that he is chargeable with culpable neglect and therefore ineligible for relief under § 10. That is because the creditor's neglect in failing to timely file suit will be attributed to the creditor, rather than to an attorney. Further, any failure to prosecute the creditor's claim within § 9's one-year limitations period must not have been the result of an intentional decision or strategic choice. It must also not have been the consequence of the creditor's attorney's procrastination or callous disregard of his professional duties. Rather, *Gates* emphasizes that, for an attorney's failure to timely prosecute his client's claim to be "pardonable" under § 10, it must have resulted from a bona fide misunderstanding of the controlling law. In that case, the client will be granted leave to pursue a meritorious claim against an estate. Otherwise, the creditor's sole recourse will likely be an action for legal malpractice against his attorney.

Notes

1. *David H. Abbott practices civil litigation (including appeals), and Andrew D. Berman practices both civil and criminal litigation, as members of Simonds, Winslow, Willis & Abbott, in Boston. The authors represented the plaintiffs Katherine Gates and Elizabeth Russell in* Gates v. Reilly, *453 Mass. 460 (2009).*

2. The factual allegations set forth in this background section are taken from the SJC's opinion.

3. The Superior Court relied on *New England Trust Co. v. Spaulding,* 310 Mass. 424, 430 (1941), which the Supreme Judicial Court held that § 9 "does not apply to suits to enforce equitable interests in property of a decedent in the possession of an executor, as such a suit is not only by a creditor to collect a debt but one by the holder of an equity to enforce his title."

4. The Court rejected the executors' claim that Gates and Russell's dismissed "creditors" claims were *res judicata* and therefore could not be reasserted via § 10, on the ground that no final judgment had been entered on the dismissed claims under Mass. R. Civ. P. 54(b). 453 Mass. at 464-465. The Court also rejected the executors' claim that the single justice committed reversible error by not ordering an evidentiary hearing or appointing a commissioner or special master, on the ground that the executors did not request before the single justice either an evidentiary hearing or the appointment of a special master. *Id.* at 464, n.7.

5. The Court declared that it will review without deference factual findings made solely on documentary evidence, and review *de novo* questions of law. *Id*. at 466.

6. M.G.L. c. 197, § 9(c), provides that the same statute of limitations applies to an action by a creditor of a deceased against a trustee of a trust, the assets of which are subject as a matter of substantive law to being reached by creditors of the deceased.

7. It should be noted that any judgment that a creditor may obtain pursuant to § 10 "shall not affect any payment or distribution made [from the estate] before the filing of such bill and notice." M.G.L. c. 197, § 10.

8. The executors' principal claim of prejudice was that, as a result of the reinstatement of the plaintiffs' creditors claims, the estate faced potential liability for prejudgment interest (at 12 percent per annum) on those claims dating back five years to the date that they were originally filed. Plainly, the SJC did not view that alleged "prejudice" as the variety of prejudice that will counsel against the granting of relief under § 10.

9. 444 Mass. 715 at 721.

10. Although the executors attempted to discredit the testimony of the plaintiffs' former attorney, her testimony was not contradicted in the record and, indeed, it was corroborated by Gates and Russell's own affidavits.

Public rights, private harms and the public's role:

A discussion of *Hertz v. Secretary of Executive Office of Energy and Environmental Affairs*

By Louis Dundin

Although the Municipal Harbor Planning Program of the Massachusetts Office of Coastal Zone Management has received relatively little scrutiny from litigators since its inception, it has recently drawn the attention of abutters seeking to use the program as a new route to challenge waterfront projects that affect the use of their privately owned property. The first appellate decision interpreting the municipal harbor plan regulations, however, has not only stymied this approach, but has also resulted in an opinion that provides a glimpse into the current Appeals Court's view of how a statute or regulation may dictate the public's role in governmental decision-making. As a result, the Appeals Court's opinion in *Hertz v. Secretary of Executive Office of Energy and Environmental Affairs* may ultimately be of more interest to practitioners beyond the context of waterfront development than within it.

The Appeals Court's reasoning in *Hertz* flowed from, and thus requires a brief explanation of, the nature of the municipal harbor plan scheme. Pursuant to the municipal harbor plan regulations at 301 CMR 23.00, a municipality may propose a municipal harbor plan, or an amendment to an existing plan, in order to make limited alterations to the baseline Mass. Gen. Laws ch. 91 ("chapter 91") standards that govern a particular waterfront area. The scheme gives municipalities a say in the permitting of their waterfronts and allows state regulators to take account of local community objectives and priorities as well as harbor-specific conditions. Logistically, the process entails the filing of an application with the secretary of the Executive Office of Energy and Environmental Affairs ("EEA") that includes the requested alterations to chapter 91 standards, the municipality's objectives, and suggested offsets to the impacts to the proposed alternate standards. The overall plan must promote the commonwealth's interests in tidelands with equal or better effectiveness than the baseline regulatory standards. Ultimately, EEA has discretion to approve, deny or modify a requested plan or amendment, however, EEA does so only after receiving input through public hearings and written comment. The final plan amounts to an overlay on all or part of a harbor in which the alternate standards are applied during the chapter 91 licensing process if a project meets the offsetting requirements set forth in the plan.

The litigation in *Hertz* grew out of a dispute between the residents of an upscale condominium development and the City of Boston over the city's redevelopment plan for the neighboring "Lovejoy Wharf" building and wharf complex. Lovejoy Wharf should be familiar to many by sight, if not by name, as the derelict building and wharf that perches on Boston Harbor adjacent to the Boston Garden and the Land Court. The plaintiffs' condominiums sit just landward of Lovejoy Wharf, on the floors above the Land Court. Conflict began during the public participation segment of the city's request to amend the Boston Harbor Municipal Harbor Plan in 2006. The requested amendment allowed certain changes to be made to the Lovejoy Wharf building that would not normally have been permitted under chapter 91 licensing. The change the plaintiffs were most concerned about was an increase in height that would allow the shorter Lovejoy Wharf building to be built to a height even with the plaintiffs' building, and as a result, to block the view from their condominiums.

The 2006 amendment at issue in *Hertz* was intended to facilitate revitalization of the section of the harborfront next to the garden and the Zakim Bridge. This area included the Lovejoy Wharf building and wharf, the plaintiffs' building and a portion of the water. The city decided to deal with this section in two phases. First, it submitted an amendment in 1999 for the area that focused on the plaintiffs' building, which allowed the plaintiffs' building to be built to its current height. Second, the city proposed the 2006 amendment to deal with the Lovejoy Wharf building and wharf. The amendment requested an increase in height even with the plaintiffs' building, but proposed as mitigation the construction of public amenities, including a waterfront viewing area and visitor center, a harborwalk with landscaped areas and connections to improve pedestrian access, and a boat dock that would encourage use of the largely abandoned wharf.

The plaintiffs appeared at public hearings and submitted written comments opposing Boston's proposed plan during the amendment process. However, EEA ultimately concluded that the mitigation proposed in the plan would provide a net benefit to the public's use of a dilapidated and underused section of the waterfront. The plaintiffs submitted a request for reconsideration of the decision, but that was denied as well. The plaintiffs then filed their case against EEA in Superior Court for substantive review of the municipal harbor plan amendment.

The Superior Court resolved the case on EEA's motion to dismiss. The court concluded that the harms the plaintiffs alleged in their complaint — in particular that the plan would allow a building that would block the air, light and view from their condominiums — were not within the area of concern of the harbor plan. The problem with these harms, the court determined, was that the plaintiffs' complaints only consisted of harms from private property, and the municipal harbor plan regulations only concern themselves with harm to public use of public places. Thus, there was no standing for their claims. Subsequent to filing their complaint, the plaintiffs had also submitted affidavits describing access, noise and air pollution problems that would affect their use of their condominiums, but the court's opinion did not address these issues specifically. Presumably, the court rejected these al-

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legations on the same basis.

On appeal, the Appeals Court generally confirmed the Superior Court's analysis and conclusion, but couched it in different terms. The Appeals Court agreed that all of the various harms alleged by the plaintiffs were merely harms to the use of their private condominiums, and not to the public's use of public spaces. This distinction drew upon the Appeals Court's reasoning in *Higgins v. Department of Environmental Protection*, 64 Mass. App. Ct. 754 (2005). There, the court had concluded that neighbors to a chapter 91 project had no standing under that regulatory scheme for harms to their view and access to their private office building, because chapter 91 was concerned with the public's views from public places, not private ones. If the chapter 91 program was not concerned with views from private property in *Higgins*, it made simple sense that the municipal harbor plan regulations, a public planning scheme with similar interests that overlays the chapter 91 program, was also unconcerned with views from private property in *Hertz*. However, perhaps in response to the plaintiffs' complaints that the Superior Court did not pay enough attention to their affidavits, the Appeals Court did not spend much time discussing standing in terms of whether a particular type of harm fell within the area of concern of the regulations. Instead, the court focused on who the plaintiffs were and what EEA's duty was to them.

Duty is an often overlooked component in the relatively complicated intersection of standing and administrative law. The Supreme Judicial Court stated in *Enos v. Secretary of Environmental Affairs*, 432 Mass. 132 (2000) that, in addition to the other considerations involved in determining standing, such as the area of concern of a statute and the availability of other remedies, "standing usually is not present unless the governmental official or agency can be found to owe a duty directly to the plaintiffs." *Id.* at 136. Massachusetts courts, however, have not consistently stressed this duty component of standing. This might be explained by the fact that one can understand the duty component as an alternative method with which to examine the area of concern of a statute when the government is a party to the case. If a statute does not create any duty for an official to perform for a particular person, then it is unlikely that the person can state any harm to them caused by the official that is within the scope of the statute.

The *Hertz* court set up its standing analysis in terms of duty. The court noted that, contrary to the plaintiffs' claims, the regulations do not grant them any special presumption of standing as abutters, nor does it make them "aggrieved persons." Moreover, the regulations have no provisions for judicial review whatsoever. Based upon these facts, the court concluded that the regulations created no right in these plaintiffs to redress the private injuries they set forth. Essentially, in the terms of the duty analysis, the court concluded that the regulations did not create any duty that EEA owed to abutting private condominium owners concerning their private space. EEA has a general duty to involve the public through notice and comment, but not to grant any special consideration to an abutter's view, particularly when it creates a detriment to the public at large. On this basis, the plaintiffs, in their capacity as abutting condominium owners, did not state any harm within the concern of the regulations. This makes sense because the regulations set the interests of the public at large as the priority, over and above any particular person's private interest. Given these priorities, it would have been strange for the court to conclude that a group of abutting neighbors could use such a regulatory scheme to prevent the creation of a project that would benefit the public at large because of a potential cost to the neighbors' view.

This much of the court's opinion was fairly consistent with the Superior Court's ruling, albeit stated in different terms, and might have been sufficient to resolve the plaintiffs' claims. However, the Appeals Court chose to go on to discuss the nature of the regulatory scheme and the public's role in it. Specifically, the Appeals Court observed that the municipal harbor plan regulations set forth a detailed regulatory scheme that provides only for public hearings, comments and reconsideration, and not for any broader right of judicial review. The court stated that this type of advisory role was consistent with the public's role under the Massachusetts Environmental Protection Act 301 CMR 11.00 ("MEPA"), which the Supreme Judicial Court had discussed in *Enos*. Comparing *Enos*, the *Hertz* court noted that a detailed review of MEPA revealed no legislative intent that persons like the plaintiffs should be able to seek judicial review of the merits of EEA's determination. Based upon this analysis, the court detected no intent to allow the plaintiffs judicial review in *Hertz*. Bolstering this conclusion, the court also observed that a right to judicial review for these types of private harms would subject almost all municipal harbor projects to litigation and cause a great deal of delay in a program that was seemingly designed to limit the role of public participation. At the same time, the court took note of the fact that the plaintiffs had other opportunities for judicial review without the creation of a new cause of action, through the underlying chapter 91 process.

Taking this analysis as a whole, the Appeals Court appears to be more than willing to employ the duty portion of the standing analysis, and largely as a result, views the municipal harbor plan program and MEPA similarly with regard to standing. While that clearly means that abutters alleging private harms will not have standing under either scheme, perhaps the more interesting point is that the Appeals Court went to the trouble of including an analysis of the public's role in the scheme. The court's conclusion that MEPA and the municipal harbor regulations treat the public's involvement similarly, likely means that the court intends to interpret standing under both programs in the same limited fashion regardless of the identity of the plaintiff. Consequently, in most cases, there probably will not be judicial review of the merits of municipal harbor plan decisions using causes of action such as declaratory judgment, *certiorari* or chapter 30A administrative review.

This conclusion should be of significance not only to parties interested in waterfront development, but also to any practitioner regularly dealing with standing under administrative schemes, because it adds one more concrete example to a relatively small world of cases where Massachusetts courts have determined that the public's participation in the administrative process does not necessarily require a right to judicial review on the merits. It also adds further support to the conclusion that the Legislature and public agencies may create rules that require an official to make open, informed decisions by consulting the public, without concern that such a consultation requirement will create a multiplicity of litigation that ultimately stagnates the effectiveness of the regulatory program.

Thus, on its face, the most specific point to take away from the *Hertz* opinion is that the municipal harbor plan regulations will not serve as a new path to challenge waterfront development. Plaintiffs seeking review of that type will have to resort to the more well-traveled paths of chapter 91, the Wetlands Protection Act and municipal zoning appeals. However, for those interested in the complex and sometimes-shifting standing case law of the commonwealth, the *Hertz* case also provides insight into appellate courts' understanding of the duty prong of standing analysis while giving practitioners another example of a type of regulatory scheme that allows public consultation without creating a new cause of action.

Taxing matters: Your client could owe taxes in another state — and save money by filing there

By Keith Shaffer and Steven Plisko

Do you represent a company that owns or leases property outside of its home state? Does it conduct sales or operations in more than one state? Do members of its staff live in a state different from the one in which they work? If you answered "yes" to any of these questions, your client could owe taxes in more than one jurisdiction.

Multistate income taxation affects many companies — and some do not even realize it.

Are you exposed?

The laws of each individual state control if a company is subject to its income tax by determining whether or not the company has a nexus — or a connection — with it.

Although nexus is determined on a state-by-state basis, certain activities or circumstances within a state usually guarantee it exists, including:

- Having legal domicile or a principal place of business;
- Maintaining an office or other facility, or owning property;
- Having payroll;
- Rendering services; and
- Soliciting orders.

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The level of nexus required varies depending on the tax involved. The three most prevalent state taxes are: 1) corporate income, 2) franchise and 3) sales and use.

Income tax nexus is the term used to describe the types of contacts necessary to establish a state's right to impose an income tax obligation. A corporation generally is subject to income tax in the state in which it is incorporated, and also may be subject to income tax in any other states in which its property, employees or other agents are physically present on a regular and systematic basis. A corporation which has income tax nexus in a state will also have nexus for franchise tax and sales tax.

Federal Public Law 86-272 prevents states from claiming income tax nexus if contact within the state is limited to the employment of salespersons or independent contractors whose only function is to solicit sales for out-of-state approval and fulfillment. However, Public Law 86-272 does not prevent states from claiming franchise tax or sales tax nexus when a corporation is soliciting sales within a state. Also, Public Law 86-272 only applies to solicitation of sales of tangible personal property. Solicitation of sales of services or intangible property are not afforded protection from imposition of an income tax.

Franchise tax is a tax that corporations pay for the privilege of doing business within the state. Depending on the state, the franchise tax may be levied based on percentage of profits, capital stock, net worth of the business, assets or the amount of property held within the state. It is not uncommon for a company to be subject to a franchise tax, but not an income tax, in the same state. Beginning in 2009, Massachusetts will require companies that do business in the state to pay either the franchise tax on net worth or tangible assets, even when Public Law 86-272 protects the company from income tax.

A business must collect sales tax from its customers when it has a direct or indirect physical presence in a state, known as sales tax nexus. Failure to recognize that sales tax nexus may exist in a state, even where there is no income tax nexus in that same state, can result in exposure for uncollected sales tax.

How can you reduce your overall state tax liability?

Establishing nexus with a state does not necessarily increase your tax liability. Take corporate income taxes: Many states determine the portion of your income subject to their tax using a three-factor apportionment formula based on the percentage of your sales, property and payroll attributable to the state. Others use a single-factor apportionment formula based just on sales.

States generally require a taxpayer to be subject to income tax in more than one state before they are allowed to apply an apportionment formula. When corporations are allowed to apportion

their income, sellers of tangible property determine their sales factor by dividing the amount of sales delivered to customers in a state by total sales. Many states, including Massachusetts, have a sales "throw back rule" which can cause sales delivered into states where the corporation is not subject to tax to be included in, or thrown back to, the numerator of another state where the corporation is taxable.

Having nexus in another state may enable you to reduce your tax bill by apportioning some of your income to a state with a lower tax rate and reducing your apportionment in a higher tax rate state. For example, say your company is based in Massachusetts but makes substantial Internet and mail order sales in Florida, where it has no physical presence. Massachusetts' business income tax rate is 9.5 percent, while Florida's is only 5.5 percent. Both states apportion income using the same formula.

Assume your company's taxable income is $1.5 million. If your company has no nexus with any other state, all of its income will be taxed by Massachusetts, for a tax liability of $142,500 ($1.5 million x 9.5 percent). But if your company established income tax nexus with Florida, some of its income could be taxed at the lower 5.5 percent rate, reducing its overall tax bill. The portion of the company's income subject to tax in Florida would not be subject to tax in Massachusetts.

A company will be considered to be taxable in another state only if that state has jurisdiction to tax the company, whether or not it imposes such a tax. If a tax return is not filed in another state, Massachusetts will presume that the company is not taxable in that state. A tax filing that is not required, but rather is made on a voluntary basis, will not be sufficient evidence to support that a company is taxable in such other state.

Exactly how much tax could be saved would depend on a variety of factors. But given the fact that the Massachusetts Legislature may consider a proposal to increase the corporate tax rate to 10.5 percent, the highest rate in the country, any redistribution of taxable income from Massachusetts to another state will result in a reduced overall tax liability. Of course, before taking steps to establish nexus with another state, you would also need to consider the other potential business and tax consequences.

Are you in compliance?

Filing requirements for multistate corporations vary considerably from state to state. The requirements are further complicated when the company with nexus is a member of a group of affiliated companies. Some states require each taxpayer with nexus in the state to file a separate return, while others require or allow related taxpayers to report income on a combined or consolidated basis.

Businesses that sell, rent or lease a product collect and remit sales taxes to a variety of jurisdictions. In general, vendors who have made any sales that are subject to sales or use tax, and purchasers who are required to pay the use tax, must file returns on a monthly, quarterly or annual basis.

To avoid paying too high a tax bill or being exposed to penalties for not filing in required states, carefully consider state income tax and sales tax filing requirements in all states for which nexus potentially exists. Discussing your business' interstate activities with your tax and legal advisors can help ensure you stay in compliance, and may in fact reduce your company's overall state tax bill.

Understanding discovery: The Supreme Judicial Court clarifies the attorney-client privilege and work-product doctrine as related to tax memoranda

By Natasha Varyani

The Supreme Judicial Court recently took on its own initiative a case from the Appeals Court considering whether certain tax memoranda prepared by accounting firms were protected under the attorney-client privilege or the work-product doctrine. The Massachusetts Department of Revenue sought these documents in discovery during the course of an appeal of certain tax assessments. In *Commissioner of Revenue v. Comcast Corporation*, 453 Mass. 293 (2009), the taxpayer Comcast Corp., in connection with an appeal of the amount of excise tax due in connection with a liquidation of shares of stock that yielded significant capital gains, objected to the commissioner of Revenue's request to produce certain documents on the grounds that the tax memoranda, and drafts of the tax memoranda, were privileged or protected. The Supreme Judicial Court affirmed the Superior Court's decision that the documents were protected by the work-product doctrine.

Retention of accounting firms

Taxpayer had retained an accounting firm for tax advice with regard to the transaction in question. It would be common business practice for any company to seek tax advice for a transaction of this size and scale. Comcast's in-house tax counsel was the individual that retained Arthur Anderson for tax advice. It was in his capacity as state and local tax counsel that the individual at Comcast retained Arthur Anderson. He turned to the accounting firm to prepare a memorandum discussing the impact of certain planning opportunities and to interpret Massachusetts law. Even though he was state and local tax counsel for Comcast, he was not adequately familiar with Massachusetts law. Communications with Arthur Anderson were considered by all to be confidential and privileged and were treated as such.

During the course of the audit, the commissioner sought certain information regarding the transaction at hand and deemed the information that the taxpayer produced "insufficient." The taxpayer continued to withhold the tax memoranda as those documents were considered protected. The Supreme Judicial Court considered the applicability of the attorney-client privilege and the work-product doctrine separately.

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The attorney-client privilege

The underlying purpose behind the attorney-client privilege is to allow clients to make full and open disclosures to their legal counsel so that fully informed legal advice can be rendered.[1] The purpose of this is to promote "broader public interests in the observance of law and administration of justice."[2] Despite the high value placed on the privilege, Massachusetts courts have construed the privilege narrowly, in order to "protect the competing societal interest of the full disclosure of relevant evidence," particularly where information is being withheld from a government entity, as is true in tax proceedings.[3]

The requirements of the attorney-client privilege are that: (1) legal advice of any kind is sought, (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose are made in confidence, (4) by the client, and (5) at his instance permanently protected from disclosure by himself or by the legal advisor. The protection may be waived by the client.[4] The party asserting the privilege, the taxpayer, bears the burden of proving that the privilege applies.

The commissioner argued that the taxpayer in this case had not met its burden for three reasons. First, the information at issue was not confidential, but was public knowledge. The Court disagreed and found that every necessary step was taken to keep the contents of the memoranda private.

Second, the commissioner challenged the assertion that the memoranda fell within the "derivative attorney-client privilege" because the information was disclosed to a third party, namely, an accountant. The Court stated that the privilege can shield communications with a third party to the extent that the third party facilitates communication between attorney and client and thereby assists the attorney in the rendering of legal advice.[5] The Court cited a case in which in-house counsel requested an accountant to evaluate the tax consequences of a proposed restructuring.[6] In that case, the taxpayer argued that the accountant prepared the analysis in order to assist in rendering legal advice, but the Court determined that the derivative privilege outlined in *Kovel* did not protect the advice because the accountant was not needed to facilitate communication between counsel and client. The Supreme Judicial Court applied the same analysis to Comcast, and determined that the memoranda prepared by Arthur Anderson were not protected by the attorney-client privilege.

In so holding, the Supreme Judicial Court recognized the difficulty in drawing a distinction between "legal advice" and "tax or

accounting advice" given to a client. Regardless, the court held that as the advice was disclosed to a third party, it need not resolve the distinction between the two. The Court noted that while Comcast was free to seek advice on Massachusetts law from a practicing Massachusetts attorney, advice was instead sought from an accountant, and was therefore not protected by the privilege.

The work-product doctrine

The work-product doctrine is used "to enhance the vitality of an adversary system of litigation by insulating counsel's work from intrusions, inferences, or borrowings by other parties."[7] In Massachusetts, the work-product doctrine protects documents prepared in anticipation of litigation even when prepared by non-lawyer representatives.[8]

The Court held that the Anderson memoranda in question were protected by the work-product doctrine not only because they contained the "mental impressions, conclusions, opinions and legal theories" of its authors, but also because they were prepared "because of" the reasonable prospect of litigation. The memoranda in question were prepared in order that the taxpayer could make an informed business decision about the possible or likely outcome of litigation that would rise from the transaction.

Disclosure of tax advice memoranda

While preparation of memoranda seeking tax advice from non-lawyers is commonplace, taxpayers should be cognizant of the intricacies of the protections provided by both the attorney-client privilege and the work-product doctrine and take appropriate actions to ensure that advice is protected where applicable. In this case, the Supreme Judicial Court has provided guidance as to the steps necessary to protect communications between taxpayers, their counsel and their tax advisors.

Notes

1. *See generally*, *Suffolk Constr. Co. v. Div. of Capital Asset Mgmt.* 449 Mass. 444, 449 (2007).
2. *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1982).
3. *Comcast*, 453 Mass. at 304.
4. *See Suffolk Constr. Co.*, at 448.
5. *See U.S. v. Kovel*, 296 F.2d 918 (1961).
6. *U.S. v. Adlman*, 68 F.3d 1495, 1500 (2d Cir. 1995).
7. *See Ward v. Peabody*, 380 Mass. 805, 817 (1980).
8. Mass. R. Civ. P. 26(b)(3).

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