

Boston Bar Journal

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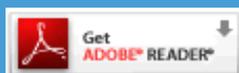
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Boston Bar Journal

fall 2010

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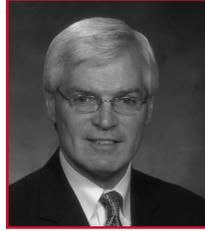
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Statement of Editorial Policy

The *Boston Bar Journal* is the premier publication of the Boston Bar Association. We present timely information, analysis, and opinions to more than 10,000 lawyers in nearly every practice area. Our authors are attorneys, judges, and others interested in the development of the law. Our articles are practical. Our publication is a must-read for lawyers who value being informed on important matters of legal interest. The *Boston Bar Journal* is governed by a volunteer Board of Editors dedicated to publishing outstanding articles that reflect their authors' independent thought, and not necessarily the views of the Board or the Boston Bar Association.

N.B. Judges serving on the Board of Editors of the *Boston Bar Journal* do not participate in discussions about or otherwise contribute to articles regarding impending or pending cases.

Profile of Don Frederico

Meet the BBA's New President

8 Random Facts About Don Frederico

- (1) Late at night he would sneak into the faculty lounge at Cornell Law School to play the piano. It was his way of unwinding after hours of studying.
- (2) In 1979, while clerking for U.S. District Judge Joseph Tauro, Don performed on open mike night at The Sword and The Stone coffehouse on Charles Street. Playing his guitar, he sang James Taylor's "Something In The Way She Moves." The owner reportedly told the young lawyer he hadn't heard the song performed so beautifully since James Taylor sang at the club.
- (3) A protégé of Jerry Facher at WilmerHale where Don began his career and worked 8 years, he was assigned to work on the Woburn case described in the book, *A Civil Action*. Don also sang and wrote songs for the firm's Habeas Chorus, a group known for its hilarious parodies.
- (4) Don spent 17 years as a partner at McDermott Will & Emery, and received the firm's Pro Bono Award for his representation of low-income residents of Roslindale.
- (5) An early adopter of Twitter, Don uses @don-frederico as his Twitter handle. The bulk of his tweets provide recommendations and links to articles about social justice and important constitutional issues.
- (6) His first rule of listening to the radio is: "Thou shalt not change the station when they're playing a Van Morrison song."
- (7) At a classmate's request, Don brought his guitar to his 30th reunion at Cornell Law School, spontaneously started a sing-a-long at a party at a home on Cayuga Lake, and sang songs including the names of every attendee.
- (8) Don now fills his spare time playing golf and relaxing with his family on Cape Cod in the summers, reading a wide assortment of books, newspapers and magazines, serving on non-profit boards, writing his blog, and experimenting with social media.

Greenberg Traurig Shareholder Becomes Boston Bar President



Meet Don Frederico

Donald R. Frederico introduces himself as a “lawyer, husband, father and human-being-in-training.” At least that’s how the readers of his personal blog, [Reflections of a Boston Lawyer](#), have come to know him.

“I don’t think I have very many readers, and that’s okay,” says the BBA’s 89th president with characteristic modesty – just days before starting his one year term on September 1. “The writing is therapeutic for me, I write about topics that interest me, or issues that trouble me.”

His blogger's voice, not unlike that of the BBA, calls for adherence to principles, not emotions or slogans found on bumper stickers. Often he discusses issues facing the legal profession. He also speaks out against things he finds destructive.

A Widely Respected Lawyer Leader

Even a quick glimpse at Don's blog reveals that he has about as good a grasp of what's happening in the lives of lawyers and law firms, and the world in general, as anybody. At [Greenberg Traurig](#), a global firm with 30 offices in the United States, Europe and Asia, he chairs the national class action defense practice, and has a reputation for mentoring new lawyers and helping colleagues expand their practices and get involved in the community.

Here in Massachusetts, he is developing a reputation as a skilled and decisive discovery master in the Business Litigation Session of the Superior Court. Incredibly smart, he doesn't get ruffled when dealing with egos. A big picture thinker who cares about the right thing being done, he calmly and efficiently assists warring parties in narrowing areas of dispute in high stakes litigation.

It's also fair to say that nobody has taken office as BBA President with more experience of the BBA as an institution whose impact goes well beyond 16 Beacon Street. Since becoming involved in the BBA as a young lawyer, he's founded and co-chaired the Class Action Committee, chaired the Litigation Section, chaired the *Boston Bar Journal* Board of Editors, chaired the Nominating Committee, and served on the Council and Executive Committee.

Lisa Arrowood, a partner at Todd & Weld and BBA Council member, remembers Don from the days when both were associates at WilmerHale, she in her first year, and he two or three years ahead of her. "What I remember most was that Don was so patient with me and taught me the very basics about how you frame an objection to an

Third Party Commentators Describe Don Frederico

Boston Colleagues He's Worked With Over the Years

"Don is very, very smart. He's got terrific analytical ability and he's got a ferocious work ethic. The combination of those qualities makes him a terrifically effective litigator. He was a great partner to have for the years when we were partners together at McDermott Will & Emery. I was very sorry to see Don move on to Greenberg Traurig. He will bring vision, energy, and a commitment to continue building on the good works of the BBA's prior leadership."
— **Mark W. Pearlstein, Partner-in-Charge, Boston Office, McDermott, Will & Emery**

"Don and I were colleagues and partners at McDermott Will & Emery for the seven years just prior to my appointment to the Court. He was everything that one could ask for in a partner. He was intelligent, diligent, engaging, professional, generous with his time and advice, and always willing to share the burdens of the enterprise. He was particularly committed to improving the practice of law, and the working environment in which partners and associates alike labored. He had a wonderful quality of quiet thoughtfulness about him. When he spoke you always knew he had something important to contribute to the conversation."
— **Justice Robert Cordy, Supreme Judicial Court of Massachusetts**

"I met Don 26 years ago when we were both associates at Hale and Dorr. Don was 5 or 6 years ahead of me, and he was a terrific teacher of young associates, including me. My immediate impression of him was that he was always very calm, generous with his time, and thoughtful. More recently, Don and I successfully defended, as co-counsel,

interrogatory,” she says. “He will bring to the BBA presidency a thoughtful, patient person who really works very well with other people. He’s a listener and he really doesn’t have an ego, which is one of his greatest strengths.”

Don’s the type of president who wants members to know how much he respects and plans to build on the good work of his predecessors, Jack Regan, Kathy Weinman, Tony Doniger, and Jack Cinquegrana. “Each of them left the BBA stronger when they left than when they took office, and I want to build on the momentum that comes from having a strong group of volunteers and a great staff,” he says.

Previewing the Year Ahead at the BBA Under Don’s Leadership

Don knows how desperately under-funded the state courts and legal services programs are, and wants the BBA to continue at the forefront of efforts to secure increased funding for both. A strong communicator, he wants to underscore the message that the BBA is a diverse and inclusive organization, standing at the crossroads of the legal profession – where lawyers from a variety of practice settings and viewpoints come together to debate issues, to learn from each other, to improve their ability to serve their clients and constituencies, to find community, and to promote shared values.

At the same time, Don says the opportunity to address new lawyers at swearing-in ceremonies in Faneuil Hall evokes a “bittersweet” experience: “I look out at the sea of faces and realize that many of them have no jobs. I worry not only about how these new lawyers will make a living, but also question what it says about the direction of our profession and whether new lawyers will be able to gain the training, mentoring and experience that they will need to lead the profession in the future.”

Having thought long and hard about the problem of so many new graduates going jobless, Don has no magic bullets to offer. Nor does he have any easy answers to

a major RICO class action case. He was masterful, especially concerning class action issues. It was a pleasure to be on the same team with him even though we were at different firms. Don is a very deep thinker and excellent strategic lawyer.”

– **Howard Cooper, Partner, Todd & Weld**

Opposing Counsel

“Don was my opposing counsel on a very substantial case, and I found him to be extraordinarily civil, smart and professional. The case involved complex electronic discovery issues, and Don and his team were on top of what was then a relatively new aspect of discovery – demonstrating deep competence, and a calm command of the case and the litigation process generally. And if that isn’t enough, he is just a genuinely nice person, even as opposing counsel.” – **Mary K. Ryan, Partner, Nutter McClennen & Fish, Past President of the BBA**

“I was Don’s opposing counsel, when as pro bono counsel for hundreds of low and moderate-income clients, he took on a tough case and sued a government agency. He brings a masterful and sophisticated approach to large, complex litigation. There are very few lawyers who operate at that level. Don is also the consummate gentleman, and he has a strong commitment to public service and the ideals of pro bono work.” – **Richard Goldstein, Partner, Donoghue Barrett & Singal**

Lawyers Who Have Worked with Don as Discovery Master

“Don is an experienced professional. He has managed complex litigation from the advocate’s side of the table, and he is thoughtful and patient. So he is able as discovery master to take those skills and perspective and

the issue of clients not wanting their cases staffed by new lawyers. Still, he plans to convene a work group because he thinks the BBA is an appropriate place for lawyers from firms, academia, and other practice settings to begin a conversation about whether the problem is cyclical or structural, and what if any mitigation measures might be taken.

The Making of a Lawyer, Husband, Father and Human-Being-In-Training

Don Frederico grew up in Webster, New York, a suburb of Rochester. His father owned a road construction company. In a blog post about the billable hour, Don even references the fact that although his father paid his workers by the hour, he bid on jobs with a commitment to get the job done right, regardless of whether it took more time than he anticipated.

His father also enjoyed playing saxophone in a band, and gave his son saxophone and piano lessons. Though Don eventually gave up the sax, he taught himself guitar and continued playing both piano and guitar in college and law school. An avid Beatles fan, Don also liked Simon and Garfunkel and Bob Dylan.

Don did his undergraduate work at the College of Wooster, a small liberal arts college in Northeastern Ohio. Now serving on the college's Board of Trustees, he retains close ties to the school, and still keeps in touch with friends he made there.

Minnesota Superior Court Judge Denise Reilly was a year ahead of Don Frederico at the College of Wooster, and recalls three things about him:

1. He was a student leader who took his responsibilities very seriously.
2. He talked about going to law school.
3. He was a very gifted musician.

"I can remember spending hours with Don," says Judge Reilly. "We would just sit and talk about all the world's problems. He wasn't afraid to explore beyond

manage complex and fast-paced discovery in a major litigation."

– **H. Joseph Hameline, Member, Mintz Levin Cohn Ferris Glovsky & Popeo**

"Don assisted the parties greatly in our dispute. He expedited the discovery schedule and made himself available. He's good at making rulings on the fly in depositions and in conjunction with actual motion hearings in discovery. He's very capable."

– **John C. La Liberte, Partner, Sherin & Lodgen**

"I was very impressed by Don's seriousness, sense of purpose, and professionalism. He has a very well balanced temperament and an excellent demeanor. He's very approachable, a quick study, and makes it easy for anyone to discuss difficult issues with him."

– **Kenneth R. Berman, Partner, Nutter McClennen & Fish**

From the Client's Perspective

"Don brings his global clients the value of a strategic partner. In a complex environment challenging in-house counsel to manage a myriad of regulatory, legal, cross-jurisdictional, political and often sensitive issues, we need more than skilled legal technicians assisting us. Don brings that broader focus backed by practical experience, but without sacrificing keeping his eye on the goal and efficient ways to achieve it." – **Kenneth A. Grady, General Counsel and Secretary, Wolverine World Wide, Inc.**

"Don is unpretentiously brilliant. He employs great legal judgment, common sense, cost efficiency, and an understanding of the client's business needs. He is a true team player, as he operates with a great sense of humility. Don is driven by a very sincere sense of wanting to be helpful, solve problems, do the right thing, and support

the boundaries of conventional issues. When he says something it's worth listening to because he's given it quite a lot of thought."

Dr. Tom Benninger, an obstetrician & gynecologist in Louisville, Kentucky, was one of Don's classmates and remains a close friend today. He, too, remembers getting to know Don through the campus coffee house that Don managed and where Don frequently performed, and says he was most impressed by Don's "approachability and obvious intelligence." Dr. Benninger's favorite memory is that of Don's kindness and patience in trying to teach him to play guitar.

In 1976, Don started Cornell Law School. He and Tom Newman, today an attorney at Murray, Plumb & Murray, met the first week of classes, became good friends, and served on the *Cornell Law Review* together. "I remember Don as a brilliant, intellectually curious student with a voracious appetite for the law, Newman recalls. "But even in the most heated debates the first year students would have, Don always had a friendly smile and a twinkle in his eyes."

Don was elected Managing Editor of the Law Review, in part a testament to his diligent, thorough work, his fine attention to detail, and his reputation for being responsible and reliable. It also helped that even in a very competitive environment, Don was liked by everyone.

Decades later, Don and his classmate had the occasion to work together as co-counsel on two substantial pieces of litigation in Maine. "Don is a great strategic thinker and a ferocious litigator – but with the same friendly smile and twinkle in his eye that I came to know that first week of law school, says Newman."

Professor Kevin M. Clermont at Cornell Law School taught Don both civil procedure and advanced civil procedure, and once worked with his former student on a case. "He's an extraordinary lawyer," says Professor Clermont. Recalling Don's days as a student, he says: "Don was very smart, very diligent, very enthusiastic and

his clients when they're in a time of need."

– **Scott Hochfelder, former Vice President, General Counsel & Secretary; Legal & Risk Management at KB Toys, Inc.**

As a College of Wooster Trustee

"Don and I have served together on the College of Wooster's Board of Trustees. He's very level-headed and a clear thinker. He does his homework, and his keen insights and astute judgment have been especially valuable in the area of governance. Don respects the opinion of others but he's quite capable of making wise decisions in challenging situations."

– **Chief Judge Solomon Oliver of the U.S. District Court for the Northern District of Ohio**

"Don is the consummate trustee because he's thoughtful, analytical and has a very clear vision of our mission. He enters into difficult decision making always keeping that mission in mind, and brings his careful reasoning and deep judgment to bear on the issues facing the college."

– **Grant H. Cornwell, President, College of Wooster**

Colleagues at Greenberg Traurig

"Years ago, when we committed to build a nationwide platform, we knew that Boston was one of the key business and cultural centers in the country, and that a serious presence there would be essential to our firm. We greatly value our relationship with the Boston Bar Association, and we have no doubt that Don will make an invaluable contribution as its President."

– **Richard A. Rosenbaum, CEO, Greenberg Traurig**

"Don has a sincere desire to improve the profession, and in particular, a willingness to educate the next generation of lawyers. He has been a wonderful mentor to the

genuinely interested. What made him remarkable was that as a person he seemed to be very special: thoughtful, kind, and reflective. He had lots of friends.”

Professor Clermont says he is not surprised that Don enjoys class action defense work. “Class action work is very academic,” says the Professor. “Because so much is at stake and so many people are involved, every question becomes a big question. There’s lots of law, lots of debate on each of those questions. You have to be a master of all trades but a specialist in civil procedure.”

From Don’s perspective, class action defense work is intellectually stimulating, as the issues are complex, and the law is in a constant state of flux.

“The cases are often of significant business importance to your clients,” he says. “So you get an opportunity to work closely with the clients at a very high level to address problems, both retrospectively and prospectively.”

Anybody who has worked with Don always observes that in addition to being really smart, having phenomenally good judgment, and working very hard on behalf of his clients, he’s an amazingly grounded person.

When asked what helps him stay centered, he says: “I’m blessed with a very supportive wife and three wonderful children, and they are a daily reminder of what is most important in my life.” His wife, Catherine is a registered dietitian who teaches college students, and their daughter, Alyssa, 17, is a senior at Noble & Greenough. Their son, Stephen, 20, is a junior at the University of Miami, and son, Brian, 23, a College of Wooster graduate, recently completed his Master of Arts in Teaching at Boston University, and hopes to teach history.

Don also finds inspiration from a Bible passage he learned in his youth, which he still tries to apply to his life, and paraphrases as follows: “The question is asked, what is required of us, and the answer is: to do justice, to love kindness, and to walk humbly.” ■

younger lawyers at GT, and I would expect that same commitment in his new role as President of the Boston Bar Association. Don also has the rare combination of a great legal mind with practical judgment in a complex practice area where both of those qualities are critical in order to provide clients excellent legal service.”

– **Brian L. Duffy, Chair, National Litigation Practice Group, Greenberg Traurig.**

“As a mentor to associates, Don is very hands on, which I appreciate. He gives a lot of good, instructive feedback on my legal work and legal skills. Don is always keenly aware of what the right result is, and has very high integrity. He’s also a very good model of an experienced lawyer who’s dedicated a lot of time and effort to giving back to the community.” – **Eric M. Gold, Associate, and alum of the BBA Public Interest Leadership Program**

“Don and I have done major class action cases together. He absolutely is diligent about making sure he understands the facts, and he knows what the court is looking for in terms of making a decision. He’s a very calming presence and judges listen closely to the arguments he’s making.” – **Robert A. Sherman, Shareholder, Greenberg Traurig**

“Don is a person who sees and believes in the noble side of our profession, what we as lawyers can do to advance the cause of justice and the rights of those less fortunate. He is a person who is willing to take on the hard issues when necessary and I expect he will do exactly that in his presidency.” – **Victor Polk, Shareholder, Greenberg Traurig**

President's Page

The Future of the Profession

By Donald R. Frederico

I was the proverbial tree falling in the proverbial forest. I became President of the BBA in the middle of the very quiet week before Labor Day, and though I fell, I didn't make a sound.

Day Two was different, as I made my first public appearance in my new role. I debuted at Boston College Law School, where I had been asked to introduce a panel at the first year law students' Legal Ethics Orientation. In my brief introduction, I explained that I was newer in my position than they were in theirs. I also told them how important an understanding of legal ethics is to the BBA and its members.

After my opening remarks, I stayed and watched the program unfold. Panel members played the roles of a law firm ethics committee, a partner and an associate trying to sort through difficult conflict of interest issues in a business setting. After break-out sessions, there was an open question and answer period. Having not attended law school for quite some time, I wasn't sure what to expect. Were the students cynical or open-minded? Would they engage on basic principles of lawyer-client confidentiality and conflicts? Would Professor McMorrow, an excellent moderator, have to drag questions out of them, or would they engage on their own?

I was not disappointed. The students were very engaged, inquisitive, thoughtful, and smart. Most important, they were principled. They recognized instinctively that, where exceptions to the rules governing client confidentiality did not apply, confidentiality could not be compromised. They did not tolerate the argument that a law firm's business interests could trump the duty it owes one of its clients. I wanted to hire all of them.

Since becoming an officer of the BBA, I have had the opportunity to address students at the other end of their scholastic journey. Twice a year, the Supreme



Judicial Court welcomes the newest class of Massachusetts attorneys at a swearing-in ceremony at Faneuil Hall. Justices of the Supreme Judicial Court preside over the official portion of the ceremony, preceded by an exceptionally entertaining and informative speech by Clerk Maura Doyle concerning the historic setting at which the ceremony takes place, the history of the Court, the Massachusetts constitution and the lawyers' oaths. Officers of the BBA and MBA also make brief presentations to the new lawyers, introducing them to the roles of the bar associations and inviting them in for educational programs and networking opportunities.

I have been the BBA representative about a half dozen times over the last few years. Since the economic crisis of 2008, the experience has been bittersweet. The new lawyers and their families seem thrilled about the milestone they have reached. At the same time, we know they are entering the profession at a time of great uncertainty.

The challenges facing new attorneys today are greater than ever. Law firms are not hiring, hire and then defer, or hire much smaller classes than they have in recent memory. Legal services organizations face staggering budget cuts that force layoffs of large numbers of experienced lawyers at a time of unprecedented demand. Some corporate clients of private firms no longer want first year associates working on their cases. Because of a hiring freeze in our state courts, there are no longer opportunities for lawyers to begin their careers as law clerks. Taking a long-term view, the future of the profession seems grim.

This year at the BBA we will begin a conversation among bar leaders from various settings who have experience with these issues and who can share their perspectives of the scope and causes of the problems and what, if anything, can be done about them. The members of this working group will come from law firms, in-house legal departments, law schools, a legal services organization, and a career counseling practice. Co-chaired by Maureen O'Rourke, Dean of Boston University Law School and a member of the BBA Council, and Christine Netski of Sugarman, Rogers, Barshak & Cohen, the group will consider whether today's challenges are structural or merely cyclical, what law schools might do to prepare students for the new realities, what new practices might be adopted by legal employers, and what new programs can be set up within the BBA to help. We don't know where this adventure will take us, but what better way to start than to bring the right people together to talk, and what better place to do that than the BBA? ■

The Profession

Attorney Departures Meet New Marketplace Realities: Re-examining *Meehan*

By Richard J. Yurko

Twenty-five years ago, several lawyers left the Boston law firm of Parker, Coulter, Daley & White to set up a new boutique firm, Meehan, Boyle & Cohen, P.C. The departing partners initiated an action to recover under their prior partnership agreement and Parker Coulter counterclaimed. Several years later, the Supreme Judicial Court decided *Meehan v. Shaughnessy*, 404 Mass. 419 (1989), which has since served as a guide on how lawyers should behave when leaving a firm.

The legal marketplace today looks substantially different than it did then. A different professional landscape suggests that the “rules” laid down in *Meehan* need to be re-examined.

Meehan’s Professional Landscape

Before the departure, Parker Coulter had twenty partners, several junior partners, and an equal complement of associates. It typified the mid-sized firm of its day. The departing lawyers included: Jim Meehan and Leo Boyle, both partners; Cynthia Cohen, a junior partner; and an associate. Parker Coulter was a traditional partnership; Meehan Boyle was established as a professional corporation.

The issues in *Meehan* centered around (a) what was owed to the departing partners under the Parker Coulter partnership agreement, and, more importantly, (b) whether the departing lawyers had breached their obligations by the manner in which they established their new firm and contacted clients to retain the boutique.

After a fact-laden history of the departure, the Court examined statutory partnership law, the Canons of Ethics (banning noncompetition provisions against lawyers), and general fiduciary duty doctrines. The Court concluded:

- Partners and others in positions of responsibility may confidentially make normal preparations to leave a firm (e.g., rent offices, *prepare to* contact clients, make



Richard J. Yurko has practiced law in Boston for over 30 years. Before founding Yurko, Salvesen & Remz, P.C. in 1995, he hop-scotched from Bingham to Widett to Hutchins. He occasionally advises firms and rainmakers about partner departures. He is a member of the *Boston Bar Journal’s* Board of Editors.

banking arrangements, etc.). Typically, client files should remain with the former firm until the client approves a transfer.

- It was a breach of fiduciary duty for departing lawyers to contact clients *in advance* of letting the firm know that they were planning to leave, to fail to give the firm the chance to compete fairly for the clients, and to fail to ensure that clients knew that they could continue to use the firm.
- The departing lawyers have the burden of showing that any improper conduct did *not* cause a loss of business to the former firm.

The Court leaned heavily on the rules of partnership law, ethical opinions, general fiduciary law in the corporate context, and the Court's general superintendence of the profession. *E.g.*, 404 Mass. at 442 (“[R]equiring these partners to disprove causation will encourage partners in the future to disclose seasonably and fully any plans to remove cases”). A similar dispute today between a modestly-sized partnership and several departing lawyers would likely be treated the same way. *But see Lampert, Hausler & Rodman, P.C. v. Gallant*, 19 Mass. L. Rptr. 283, 2005 Mass. Super. LEXIS 118 (Apr. 4, 2005), *rev'd* 67 Mass. App. Ct. 1103 (Rule 1:28 decision), *on remand*, 2007 WL 756432. However, the practice of law has changed dramatically in the interim.

Today's Profession

Whereas Parker Coulter served as a rough prototype for the profession in 1985, not so today. First, far fewer firms are operated as traditional partnerships. Today, limited liability partnerships and professional corporations with detailed operating and shareholder agreements are more prevalent.

Second, in 1985 a firm of several score lawyers practicing in a single location was the norm. Today, large numbers of lawyers practice in Massachusetts offices of multi-state, national, and international firms. As of 1990, the top 25 law firms in Boston had from 59 to 279 lawyers and all had more lawyers in Massachusetts than outside. (Boston Business Journal Book of Lists – 1990 at p. 27). As of 2010, the top 25 law firms in Boston had between 74 and 1840 lawyers and 12 of the 25 firms had more lawyers outside of Massachusetts than inside. (Boston Business Journal Book of Lists – 2010, p. 12).

Third, in 1985, the legal world was divided among partners, junior partners, and associates. Today's firms have more variants on the attorney-to-firm relationship than Ben & Jerry have flavors, including: equity partners/shareholders, contract partners/contract shareholders, non-equity partners/shareholders, principals, junior partners, counsel, of counsel, permanent associates, partnership track associates, non-partnership track associates, contract/temporary lawyers, and so on.

Finally, most profoundly, in 1985, the departure of significant business-producing lawyers was rare. Now it is commonplace. Each major law firm has experienced not only losses but also gains as significant business producers have gone from one firm to another. Not only do most lawyers no longer remain at one firm for a lifetime, but some may not remain at a firm for more than a year or two. Conversely, it is not only harder to become a “partner,” but also reaching equity status in a firm guarantees little to the individual lawyer, as firms have chosen to “de-equitize” partners when the firm's needs dictate.

This is not to say that such professional evolution is a good thing. It is, however, the current professional reality.

The *Meehan* Court silently assumed that the Parker Coulter structure and operation were the professional norm. No longer. To the extent that *Meehan* was grounded on the assumption that each partner has substantial input into firm decision-making, a real opportunity to affect the course of a partnership, and thus has a strict fiduciary duty to the firm *qua* firm, the *Meehan* model seems strangely antiquated to, say, a firm that has five hundred equity-holders in three dozen cities from Singapore to London and where remaining an equity partner depends on the business model adopted by a distant managing committee. What chance does a “partner” — holding one-tenth of one percent of an interest in a firm — have to influence policy, let alone profits and losses? Why should that “partner” have any more of a fiduciary duty to the mega-firm than a well-paid stockbroker has to his mega-brokerage house? What should the rules be for a valued “permanent” associate who decides to leave to seek some equity?

Meehan also seems to have been grounded on an assumption that the good will of a client is a joint asset of both the firm and the individual lawyer doing the client’s work. Again, that may have made sense in 1985 for a mid-sized firm in Boston. It translates less well to a “contract partner” who arrives at a firm with 25 corporate clients and then opts to leave, two years later, with those same 25 corporate clients. Indeed, today’s clients are increasingly sophisticated consumers of legal services, particularly corporate clients with in-house counsel.

Some firms today bear more of a resemblance to publicly-held corporations than to the late Parker Coulter. Some lawyers have convoluted, formulaic compensation arrangements that render them essentially sole practitioners paying a percentage overhead

to a “firm” that houses them. Nothing in *Meehan* anticipated these changes; nothing in *Meehan* prevents courts today from recognizing this shift in how law is actually practiced.

Towards a Post-Meehan Model

If some law firms today bear a closer resemblance to large brokerages than to Parker Coulter and if today’s lawyers can look more like hop-scotching stockbrokers than Parker Coulter partners, how does this impact the *Meehan* analysis? Today the Supreme Judicial Court would likely rely much less on idyllic notions of a partner’s “fiduciary duty” and more on its general superintendence of the changing profession. See *Lampert, supra* (suggesting that *Meehan* is actually in conflict with corporate fiduciary duty caselaw). This does not mean that the result in *Meehan* would be drastically different, but the rationale would be more straightforwardly rooted in the business realities of the practice of law.

Indeed, a more current view of the profession could draw much from the Business Litigation Session’s approach to stockbroker hopscotch and the brokerage house “Protocol for Broker Recruiting.” In *Smith Barney v. Griffin*, Suffolk Superior Court Civ. No. 08-0022-BLS1, 23 Mass. L. Rptr. 457, Judge Gants summarized how brokerage non-competition cases had become commonplace and he pointed to the Protocol as a reason for denying injunctive relief. Many of Judge Gants’ comments could easily be brought to bear on the revolving door of “partners” in and out of today’s mega-law-firms.

Recognizing that non-competition provisions are already not permitted under rules of professional conduct, a post-*Meehan* analysis of law firm departures should reach similar conclusions with some nuanced differences. It seems to me that the first two prin-

ciples of *Meehan* remain generally sound if applied even-handedly:

- All lawyers, whether “partners” or not, may make normal, confidential preparations to leave a firm. Files remain with the former firm until the client specifies otherwise. Prompt transfer is required upon client direction.
- Neither a senior lawyer who is preparing to leave, *nor* a firm that gets wind that a senior lawyer is leaving, *nor* the firm that the new lawyer is joining can peremptorily contact clients without each advising the other prior to the contact and ensuring that the client understands it may also choose to have its work done by the departing lawyer or former firm. (Yes, the firms themselves can violate these rules by acting peremptorily.) Joint, or at least simultaneous, announcements should be the norm and can be drawn up within a matter of hours. Occasionally, division of responsibility for making the initial contact can be agreed upon. However, unlike in *Meehan*, there is no need for the pause before contacting clients to last more than a few hours. Today’s firms are well-prepared for both attorney departures and additions. Finally, where an attorney’s departure from a firm is not voluntary and not the result of misconduct, the firm can have little standing to complain about the attorney contacting clients she has worked with.

Where *Meehan* makes less sense today is in its unstated assumption that the good will of clients is equally shared between firm and the rainmaker. Experience has taught us over the last quarter century of legal musical chairs that, when lawyers leave firms and they comply with the *Meehan* rules, most clients

routinely retain them. Indeed, most major law firms and recruiters would admit that, when they evaluate bringing on a lateral acquisition, the firm generally expects the lateral to perform to a business plan derived from her past “book of business.”

Recognizing this, the only rationale for *Meehan*’s burden-shifting to the departing lawyer to prove *lack* of causation from any breach of rules is the prophylactic effect that such a burden-shifting has in discouraging a breach. Today, one wonders whether this aspect of *Meehan* could be better achieved by a court-sanctioned protocol analogous to the Financial Industry’s “Protocol for Broker Recruiting.” See Protocol. Compulsory confidential mediation or arbitration, analogous to the Protocol’s ban on litigation, might also be a wise superintendence principle to protect underlying client confidences.

One can lament or cheer the dramatic changes that have occurred in the legal marketplace over the last quarter century. Whatever one’s view of those changes, those changes should lead to a re-examination and open discussion of the *Meehan* rules. My forecast is that, when faced with these issues again, the Courts will (1) examine how firms really operate in the marketplace today and will not let firms cry foul about a departing partner’s conduct if the firm has also been a beneficiary of reciprocal acquisitions, (2) continue to place the client’s general interests above those of the lawyers’ narrow economic interests, and (3) continue to favor lawyers and firms that act above board and honestly with each other, even if swiftly, in contacting clients. ■

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Case Focus

***Commonwealth v. Life Care Centers of America, Inc.:* SJC Rebuffs Prosecutors' Effort To Expand Corporate Criminal Liability**

By Michael A. Collora

In *Commonwealth v. Life Care Centers of America, Inc.*, 456 Mass. 826 (2010), the Supreme Judicial Court rejected an effort by prosecutors to dramatically expand the criminal liability of corporations. Employees of a nursing home lost track of a patient with dementia, who fell down a stairway and died. The Commonwealth indicted the nursing home corporation for involuntary manslaughter, even though it apparently lacked evidence that any employee acted with the state of mind required for the crime of manslaughter. The Commonwealth intended to prove its case by aggregating the knowledge and conduct of multiple employees and imputing their collective knowledge to the corporation in order to demonstrate criminal intent. *Id.* at 831.

Acting upon two questions certified by the trial court ahead of trial, the Supreme Judicial Court rejected the collective knowledge theory in a crime requiring *mens rea*. Involuntary manslaughter, the Court said, requires an intentional reckless act that causes death – that act must be more than grossly negligent, and at least one employee must have such a mental state before the corporation can be convicted under the theory of *respondeat superior*. *Id.* Labeling as “illogical” the Commonwealth’s theory that aggregation of a series of negligent acts by individuals could promote merely negligent conduct into wanton or reckless conduct on the part of the corporation, the Court added that such aggregation also raises due process concerns. *Id.* at 830-31. It also reaffirmed that to convict the corporation for the actions (or omissions) of that individual, he or she must be acting for the corporation at the time when the actions (or omissions) at issue occurred.

In so ruling, the Court in *Life Care Centers* cited previous civil cases permitting use of the collective knowledge theory, but noted such holdings were limited to allegations requiring knowledge, not willfulness. *Id.* at 835. In *Birbiglia v. St. Vincent Hospital, Inc.*, 427 Mass. 80 (1998), for example, the SJC approved a jury instruction that the hospital’s knowledge



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could be found if its agents collectively knew of the use of an unauthorized recording, thus violating M.G.L. c. 272, § 99Q (which penalizes non-consensual interception of oral or wire communication).

In *Birbiglia* the SJC foreshadowed its *Life Care Centers* holding by noting that the statute at issue did not require willfulness, which it said could not be found by aggregating the knowledge of all employees. *Id.* at 87 n.5. However, following *Birbiglia*, it continued to affirm its position that knowledge of a corporation's employees may be cumulated where the claim in question does not require specific intent, a long standing concept in both civil and criminal jurisprudence. See, e.g., *United States v. T.I.M.E. - D.C.*, 381 F. Supp. 730 (W.D. W. Va. 1974). Thus, it was not surprising that the SJC rejected the use of collective knowledge to prove intent, but it was an important rejection of a novel theory that would have expanded the criminal liability of corporations.

The Commonwealth relied heavily on *United States v. Bank of New England*, 821 F.2d 844 (1st Cir. 1987). There the First Circuit had approved of a jury instruction that the defendant bank should be found to have acted knowingly if its employees knew collectively of the reporting requirements for cash transactions with customers exceeding \$10,000. *Id.* at 856-58. The Court also held that there was sufficient evidence of willfulness, either because at least one employee acted willfully or alternatively because the bank was recklessly indifferent as an institution to the regulatory requirements. *Id.* The scope of the decision has been debated.

The SJC distinguished *Bank of New England* on the ground that the *mens rea* alleged and shown was tantamount to knowledge in the regulatory offense context, a situation the SJC concluded was quite different from the elements of manslaughter. *Life Care Ctrs.* 456 Mass at 836. The Court's restrictive reading of *Bank of New England* should continue to limit

prosecutors' efforts to extend *Bank of New England's* holding beyond regulatory offenses. See, e.g., discussion in Ann Foerschler, *Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct*, 78 CAL. L. REV. 1287, 1305 (1990).

Bank of New England has not been widely followed, and the SJC wisely chose not to expand on it. In so ruling, it had support elsewhere. For example, in recently upholding a civil RICO finding of fraud against several tobacco companies, the D.C. Circuit indicated it was dubious as to the "collective intent" theory, but instead found sufficient evidence of specific intent to defraud as to certain tobacco executives to uphold the RICO finding. See *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1122 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 3502 (2010).

As well, in civil cases alleging violations of Section 10(b) of the 1934 Exchange Act and its Rule 10b-5, which allegations require an intent to defraud, federal appellate courts have uniformly rejected pleadings as to a group mental state and have required specific allegations of fraudulent intent as to specific individuals before permitting the case against the corporation to go forward. See, e.g., *Southland Sec. Corp. v. INSpire Ins. Solutions Inc.*, 365 F.3d 353, 368 (5th Cir. 2004) cited by the Supreme Judicial Court in support of its decision. *Id.* at 834.

Conclusion

Life Care Centers of America should put to bed efforts by prosecutors in the Commonwealth to prove specific intent crimes of corporations by aggregating the actions and inactions of employees, absent having sufficient proof that one individual employee or agent possesses the specific mental state required. How much influence the decision will have on the development of the law in other jurisdictions remains to be seen. ■

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Voice of the Judiciary

Using Technology to Improve Case Access and Management in the Massachusetts Appeals Court

By Joseph Stanton

During the 2009-2010 term, the Massachusetts Appeals Court entered the second highest number of appeals in the court's thirty-eight year history (2,355 appeals), while simultaneously issuing its second highest total number of decisions and opinions (1,582). During the same period, the number of employees in the Clerk's Office fell from fifteen to eleven – a 25% drop. To keep pace with the record-number of appeals and decisions, particularly during this period of limited human resources, the Appeals Court is expanding its use of technology in a number of ways.

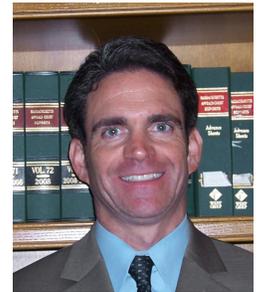
Current Use of Electronic Documents.

The Appeals Court Clerk's Office scans all briefs, appendices, transcripts, and certain motions into searchable PDFs (portable document format) which are then stored in the court's internal document management system. To assist this effort, the Clerk's Office has for years requested that parties voluntarily submit a PDF copy or a scannable paper version of briefs and appendices when filing the required number of paper copies. PDFs submitted by the parties are also added to the court's internal document management system. Whether submitted by the parties or scanned internally, PDFs are regularly used and searched by judges and all other court personnel.

New Uses of Technology

The court is now moving to a more advanced level of using available technology to assist in case management and document storage through the following means:

E-mail Filing. In May 2010, the Appeals Court promulgated a standing order, www.mass.gov/courts/appealscourt/standing_order_filing.html, that requires parties



Joseph Stanton is Clerk of the Massachusetts Appeals Court. He thanks the staffs of the Appeals Court Clerk's Office and the S.J.C.'s Information Technology Department for their dedicated work and assistance with the initiatives described in this article.

to file by e-mail a PDF of certain motions and letters (e.g., motions for attorney's fees, to expand the record on appeal, to stay or for immediate issuance of the rescript, Rule 16 (l) letters, petitions for rehearing, and an opposition to any of the foregoing) in addition to filing the paper copy. The PDF copy has eliminated the need for attorneys to file three additional paper copies of the document and helps the court to conserve resources and the environment.

Electronic Transcripts. The Clerk's Office is working with the Office of Transcription Services (O.T.S.) to obtain a PDF version of each transcript produced in criminal proceedings in the trial courts over which the O.T.S. has authority (i.e., non-Superior Court cases). Further, the Superior Court administrative office and the union representing court reporters of the Superior Court recently agreed that the reporters need only produce a PDF version of all transcripts. As a result, in the near future, the Superior Court's court reporters will provide PDFs of transcripts to the Superior Court, rather than paper copies. Following likely amendments to the Massachusetts Rules of Appellate Procedure, the appellate courts will accept these PDFs in lieu of the traditional paper versions.

E-Notice. The Appeals Court recently proposed a standing order to permit attorneys and self-represented litigants to register for electronic notification via e-mail of court orders, notices, and decisions in lieu of paper notice. E-notices will be sent four times per day to registered attorneys and self-represented litigants, resulting in speedier notice to parties and conserving the court's resources. In addition, the Appeals Court is expanding the scope of its e-notice program so that e-notices will also be sent to (1) trial court judges informing them of decisions and orders in appeals that arise from cases over which the judge presided in the trial court, and (2) attorneys and self-represented litigants informing them when an appeal is taken under consideration by a panel without oral argument.

E-Pay. The clerk's offices of both appellate courts are designing an electronic payment option to allow parties to pay entry fees over the internet to docket an appeal.

E-Filing. Staff of the appellate and trial courts have formed a working group that is studying and developing an e-filing system. The system will be modeled after the federal courts' system and allow attorneys to file documents electronically. The system will be developed through use of pilot programs in some of the courts, including the Appeals Court. Also, it is possible that the court will start accepting briefs and appendices with hyperlinks to cited precedent and record documents.

Docketing Statements. The Appeals Court recently proposed a pilot program that will require appellants to file a docketing statement containing information about the case. The program provides one form for civil appeals and a second form for criminal appeals. The forms will be posted on the court's website in writable PDF and it is possible that attorneys will be able to email completed forms to the court.

The Appeals Court's Website. The Clerk's Office is working with the S.J.C.'s I.T. Department to update the on-line version of the court's docket multiple times each workday instead of just at midnight, post PDF copies of briefs and appendices in non-impounded cases for review by the bar and public, and post additional informational guides and forms.

Conclusion

The use of technology to modernize the appellate docket and case management system will assist the bar and the court by streamlining procedures and eliminating the need for paper copies. The Appeals Court Clerk's Office looks forward to working with the bar to implement these improvements. ■

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C09-1005-035 (10/09)

Editor's Inbox

A Comment on Advance Conflict Waivers

By Peter Katz

The Summer 2010 issue of the *Boston Bar Journal* contained an [article](#) (the "Article") arguing that advance conflict waivers, already common, "will become even more essential and standard practice" and that such waivers provide benefits to firms and clients. The benefit to lawyers is clear. The benefit to clients is not.

This comment assumes that Rule 1.7 of the ABA Model Rules of Professional Conduct and its Massachusetts counterpart allow advance conflict waivers, although that assumption may deserve further discussion.

The Article quotes a fairly typical example of advance waiver language: It is possible that some of our present or future clients will have matters adverse to you while we are representing you. We understand that you have no objection to our representations of parties with interests adverse to you, and that you waive any actual or potential conflict of interest as long as those engagements are not substantially related to our representation of you. We agree that your consent shall not apply in any instance where, as a result of our representation of you, we have obtained confidential information that, if known to such other client, could be used to your material disadvantage.

It may be self evident, but is worth emphasizing, that the premise of this language is that there is in fact a conflict which, absent the client's consent, would prevent the lawyer from representing one or both of the adverse parties. In plain English, this waiver is intended to permit the lawyer to undertake work that could otherwise be prohibited. So the lawyer is asking the client for permission to do something which under the ethical standards of the profession is traditionally thought of as exceptional, not ordinary. Nevertheless, asking for a conflict waiver in the form of a broad consent to the lawyer's exercise of discretion seems to have become a regular feature of engagement letters.

Under Rule 1.7, for the client's consent to be effective the waiver request must be both comprehensible and reasonable. The quoted waiver states that it will apply if the other



Peter Katz is an attorney in the Office of the General Counsel of Harvard University. This article states the personal opinions of the author and does not express official views of the Office of the General Counsel or of the University. The author thanks Barry A. Miller for his contributions to this article.

engagement is not “substantially related” to the lawyer’s work for the client. (This assumes that any restriction relating to confidentiality is satisfied; often, advance waiver language pledges merely that the firm will not improperly disclose the client’s information.) But does “substantially related” put any serious limitation on the lawyer? It certainly appears to allow a firm to undertake litigation against the client, for example, if the litigation involves a real estate transaction and the firm’s engagement for the client is for patent work. This language also would not necessarily bar the firm from representing an adverse party in transactions, such as working on a purchase of all the client’s assets while the firm is counseling the client on ERISA matters. Does “substantially related” therefore mean only that the firm cannot be adverse to the client in the very matter on which the firm is advising the client?

The advantage for the lawyer — and the difficulty for the client — in this ambiguous state of affairs is that the waiver puts decisions on the many situations in which a matter might or might not be considered “substantially related” into the hands of the lawyer, even though it is the client’s interest that is at stake. The Article implicitly recognizes this problem by remarking that it would be better to avoid blanket waiver language in favor of a waiver request that identifies the subject, the potential opposing party, and the nature of the anticipated adverse matter. This starts to sound like a conventional request for a specific waiver of a known conflict. In other words, the more careful a lawyer is to meet the letter and spirit of the rules by evaluating a potential conflict in light of the particular circumstances, the less defensible it is to ask the client to agree to a waiver in advance.

The Article maintains that advance waivers, by allowing the lawyer to undertake future “unrelated work” and thus removing a barrier to engagements, ensure that the client can engage or keep its counsel of choice. But if there is no true conflict, there should be no barrier, and if there is a potential conflict, the client would expect notice of it and the opportunity to reconsider its choice of counsel in that light. From the client’s viewpoint, under the advance waiver the lawyer seems to be refusing to represent the client unless the client grants a consent that effectively diminishes the lawyer’s duty of loyalty. Lawyers should not be surprised if clients do not find this attractive.

In light of these concerns, why are lawyers asking for advance waivers? They seem to serve two major purposes. One is that, as firms grow, potential for conflicts increases and it becomes more difficult to identify and track them. Blanket waivers help protect firms from the consequences of missing or not recognizing conflicts. The other purpose, of course, is that advance waivers reduce an important obstacle to taking on new business. These are powerful motivations, and neither benefits the client. Clients may be excused for fearing that their lawyers, even with the best of intentions, will tend to exercise in their own favor the discretion they enjoy under advance conflict waivers. ■

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Legal Analysis

Melendez-Diaz, One Year Later

By Martin F. Murphy and Marian T. Ryan

In September 2004, in a routine cocaine trafficking trial in Suffolk Superior Court, the prosecution offered three drug analysis certificates, each containing a chemist's sworn statement that the seized substance was cocaine. The defendant's lawyer objected, arguing that the Sixth's Amendment's Confrontation Clause forbade the admission of the drug certificate without cross-examination of the chemist who prepared the certificate. The objection was overruled, and the claim fared no better on appeal: the Massachusetts Appeals Court rejected the argument in a footnote and the Supreme Judicial Court denied Melendez-Diaz's application for further appellate review.¹

But that timely objection brought dramatic change to the criminal justice landscape in both Massachusetts and elsewhere when, in June 2009, the United States Supreme Court vacated Melendez-Diaz's conviction, ruling that the admission of the drug certificates violated his right under the Sixth Amendment to "be confronted with the witnesses against him." *Melendez-Diaz v Massachusetts*, 129 S.Ct. 2527 (2009). Relying on its prior decision in *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that the drug certificates were part of "the core class of testimonial statements" covered by the Confrontation Clause and "thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." *Id.* at 2531.

Justice Scalia's 5-4 majority opinion rejected a broad range of arguments the Commonwealth advanced against this interpretation of the Confrontation Clause. Two merit particular mention. First, the Court dismissed the Commonwealth's contention that lab analysts' certificates were admissible because they reflected the results of "neutral, scientific testing." *Id.* at 2536. Citing the recent National Academy of Sciences report criticizing the state of forensic science in the United



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States,² the Court held that “[c]onfrontation is one means of assuring accurate forensic analysis...[l]ike expert witnesses generally, an analyst’s lack of proper training or deficiency in judgment may be disclosed in cross-examination.” *Id.* at 2536-37.

The Court also rejected several practical objections raised by the Commonwealth and Justice Kennedy’s dissenting opinion. The majority opinion discounted Justice Kennedy’s contention that requiring forensic analysts to come to court would “disrupt forensic investigations across the country and ... put prosecutions nationwide at risk of dismissal based on erratic, all-too-frequent instances when a particular laboratory technician . . . simply does not or cannot appear” in court. *Id.* at 2549. Justice Scalia posited that “[d]efense attorneys and their clients will often stipulate to the nature of the substance in the ordinary drug case. It is unlikely that the defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis.” *Id.* at 2542.³

Melendez-Diaz in the SJC and the Appeals Court

In the year following that decision, one thing is absolutely clear: cases raising challenges based on *Melendez-Diaz* have occupied an extraordinary amount of attention from this state’s appellate courts. In the first fifteen months following the Supreme Court’s opinion, the Massachusetts Supreme Judicial Court and the Appeals Court have decided 164 appeals raising *Melendez-Diaz* challenges: The SJC decided 15 and the Appeals Court 149 (22 by published opinion; 127 by unpublished Rule 1:28 opinions.) In nearly all of these cases, defense lawyers have challenged the admission of two kinds of certificates which were commonly admitted as a substitute for expert testimony in criminal cases in the years before *Melendez-Diaz*: drug certificates of the kind at issue in *Melendez-Diaz* itself, and similar certificates prepared

by police ballisticians, offered by the prosecution in gun cases, attesting that a gun seized from a defendant is in fact a functioning firearm. The SJC has held a defendant’s conviction must be vacated where a drug or ballistics certificate was admitted unless the evidence contained in the certificate was “harmless beyond a reasonable doubt.” *Commonwealth v. Vasquez*, 456 Mass. 350, 355 (2010). Applying this standard, the SJC and Appeals Court have vacated 129 of the 164 convictions reviewed, finding in nearly all of the other 35 cases that admitting drug or ballistics certificates, though improper, was harmless error.⁴ Appellate courts have concluded that the admission of drug certificates was harmless error when, for example, the prosecution offered a defendant’s statement that the substance was crack cocaine and police officers testified that the drug “field-tested” positive for cocaine. *Commonwealth v. Connolly*, 454 Mass. 808, 830-31 (2009).

Impact on the Trial Courts

While the appellate courts have been reviewing past convictions, prosecutors, defense lawyers, trial court judges and the state’s forensic scientists have been grappling with *Melendez-Diaz* in real time. The State’s Executive Office of Public Safety has compiled statistics on court appearances by experts that shed some light on *Melendez-Diaz*’s impact.⁵ In the first six months of 2009, before *Melendez-Diaz* was decided, the State Police lab received only *seven* requests for its chemists to testify in court in drug cases. In the next six months, that number increased to 247. In the first five months of 2010, that number has increased still further, to 476. The State Police lab is only one of four state labs that does drug testing; chemists in the other labs (at the University of Massachusetts and at Department of Public Health facilities in Jamaica Plain and Amherst), have received an additional 1,130 requests to testify, bringing the total during that five month-period to 1,606. That does not mean, or

course, that chemists have actually testified that many times. Many cases were continued or resulted in pleas. Rarely--about five percent of the time, according to the state's statistics — defense counsel stipulate, as Justice Scalia suggested they *often* would, that the substance is, in fact, the charged drug. But during the first five months of 2010, chemists from the four labs testified 184 times in drug cases. This is not surprising, as most defense counsel see little advantage to stipulating to an essential element of the offense.

This new role — the bench chemist as a testifying witness — has imposed a serious burden on the resources of the state testing labs, where budget constraints have prevented new hiring. The state has responded to this challenge smartly, shifting drug testing between labs to balance workloads and stopping routine testing to determine drug *purity*, which prosecutors are not required prove as an element of a drug offense. See *Commonwealth v. Beverly*, 389 Mass. 866, 868-69 (1983). The labs' workloads have also benefitted by the passage of Question 2 on the 2008 ballot, G.L.c. 94C, §32L, which de-criminalized possession of one ounce or less of marijuana. Chemists no longer use valuable lab time analyzing drugs in most marijuana possession cases.

Expert testimony in gun cases has also become more commonplace. In the eleven months following *Melendez-Diaz*, the State Police crime lab has received 308 requests for ballisticians to testify. Statistics documenting the frequency of such testimony are not available, but the numbers are clearly significant.

Behind these statistics lay a host of new practical problems. Often the most immediate involve locating and scheduling the necessary experts. Chemists, DNA analysts or ballisticians must now juggle multiple, and often conflicting, court dates and must

negotiate with Assistant District Attorneys from different counties who each need the same expert on the same trial date. Frequently the "solution" will be for the expert to appear in the morning in one court and in another in the afternoon. Experts must review their work and prepare for testimony in several different cases at the same time. In addition to the time spent out of the lab to be in court, there is the additional time needed for travel and trial preparation. These problems are compounded when state experts leave state service. Even when such experts can be located, their new employers, understandably, are not willing to compensate them for testifying for the Commonwealth, and often compensation at a private expert's rates in addition to travel costs may be necessary. The District Attorney's office, which bears those costs within the confines of its budget, must then weigh the nature and strength of their case, the background of the defendant, the feasibility of proceeding without the testimony of that expert and the possibility of resolving the case through a change of plea against the expenditure of resources necessary to obtain the expert's testimony. Post-*Melendez-Diaz*, anecdotal evidence suggests that some prosecutors' offices are more likely, particularly given these resource constraints, to "break down" drug cases — that is, dropping charges that carry mandatory minimum penalties — and permitting defendants to plead to lesser charges to avoid the need to bring a chemist to court.

Beyond Guns and Drugs: Emerging Issues

Justice Kennedy's dissent in *Melendez-Diaz* predicted that the Court's holding would extend well beyond the drug certificates that were at issue in that case. Justice Kennedy noted that forensic science is not a solitary endeavor. In many cases, several analysts participate in the review of evidence and, as noted, forensic scientists may leave state service before they are called to testify. Several recent SJC opinions are

relevant to the fundamental question raised by Justice Kennedy: whom does the defendant have the right to confront?

This issue has emerged in a number of homicide cases where a medical examiner testified about the victim's cause of death based on an autopsy performed by another pathologist who no longer works in the medical examiner's office. In *Commonwealth v. Durand*, 457 Mass. 574 (2010), for example, the SJC reversed the first degree murder conviction of a defendant in the death of his girlfriend's four-year-old son. The court found that the admission of the testimony of the substitute medical examiner regarding the factual aspects of the autopsy report prepared by the original medical examiner violated the defendant's confrontation rights. *Id.* at 584-85. The substitute medical examiner (Dr. Flomenbaum) testified that, in preparation for his testimony, he had examined the autopsy file of Dr. Philip, who performed the autopsy; the victim's emergency room records; the autopsy photos taken by Dr. Philip and a police officer who was present at the autopsy; a report prepared by the forensic dentist (who testified at trial); and microscopic slides which Dr. Philip had prepared from tissue samples. Flomenbaum testified, in detail, about both the internal and external injuries to the victim which had been observed and catalogued by Philips. Flomenbaum's opinion regarding the internal injuries was based upon his study of a photograph of those injuries and the tissue slides. Neither that photograph nor the slides were introduced into evidence.

Relying upon *Commonwealth v. Nardi*, 452 Mass. 379 (2008), the court found that the trial judge erred in permitting Flomenbaum to testify to the factual findings contained in Philip's autopsy report. Although the court ruled that Flomenbaum's *opinion testimony* about the cause of death was properly admitted, the *facts* he recited to the jury, particularly his graphic description of the injuries and the internal tearing

and severing of two organs, should not have been admitted. Since this factual evidence both supported Flomenbaum's opinions and bore directly on the issue of extreme atrocity or cruelty, the court, applying the substantial risk of a miscarriage of justice standard, could not conclude that the erroneously admitted evidence had little or no effect on the jury's decision to convict the defendant of first degree murder based on a theory of extreme atrocity or cruelty.

Another area of interest, and one where multiple state analysts may participate in the examination of forensic evidence in a single case is the presentation of DNA evidence. In *Commonwealth v. Banville*, 457 Mass. 530 (2010), the defendant, who had been convicted of the murder of his seventeen year old niece, claimed that the admission of DNA evidence against him violated his Confrontation Clause rights. In *Banville*, the prosecution offered evidence that the victim's DNA was found in blood stains on the defendant's clothing and the defendant's DNA was found under the victim's fingernails and in saliva swabbed from her breast. *Id.* at 533-534. One chemist (who did not testify) generated the DNA profiles of the victim and the defendant; the testifying DNA expert compared those profiles to the DNA found on the "crime scene" evidence--the defendant's clothing and the victim's body. The testifying expert did not mention any details of the work done by the chemist who generated the profiles, but opined that the DNA profile in the crime scene evidence was a "match" or in some cases, "not a match" with the defendant's or victim's profiles. The witness also testified that that the probability that the DNA was that of someone other than the defendant was one in 5 quadrillion as to the sample under the victim's nails and one in 410 trillion as to the saliva sample. *Id.*

The defendant contended that his Confrontation Clause rights were violated because he did not have the opportunity to cross-examine the chemist who generated the DNA profiles. The court found that the

testifying chemist's opinion that the defendant's profile "matched" the blood and saliva found on the victim's body violated the defendant's Confrontation Clause rights because it included "testimonial hearsay" — the non-testifying expert's determination of the defendant's DNA profile. *Id.* at 541 n. 3. In contrast, the testifying expert's opinion that the probability "of the DNA in question being that of someone other than that defendant was on the order of one in five quadrillion" did not violate the defendant's constitutional rights because it was a statement of the testifying expert's opinion, not a description of the facts determined by the non-testifying expert. As Justice Spina wrote: "Opinion testimony, though based on hearsay, is admissible and does not offend the Sixth Amendment so long as the witness does not testify to the details of the hearsay on direct examination. Thus, the witness giving the opinion testifies at trial only about her own actions and observations, the identification of the hearsay material on which she relies, the reliance of professionals within her area of expertise on such hearsay and her own opinions. She is subject to cross-examination about those matters. If the cross-examiner chooses to delve into the hearsay basis of the opinion, he is free to do so." *Id.* at 540. In *Banville*, the SJC affirmed the defendant's conviction, finding that defense counsel had waived the issue by failing to object to the expert's testimony about a "match" and concluding that the expert's testimony did not create a substantial likelihood of a miscarriage of justice.⁶

Conclusion.

One year after *Melendez-Diaz*, some questions are clearly settled. Lawyers and judges know that drug and ballistic certificates cannot be offered over a defendant's objection. And a testifying expert *may* generally offer *opinions* based upon the expert's review of

testing and analysis performed by others, but may *not* recite the test results or factual findings of non-testifying experts. Nonetheless, the exact line between permissible and impermissible questions has as the SJC itself has noted, "sometimes proven difficult to apply during the course of the trial," *Durand*, 457 Mass. at 586 n.13, and it seems clear that final impact of the objection *Melendez-Diaz's* trial counsel's made to the admission of drug certificates in Suffolk Superior Court in September 2004 will not be known fully for years to come. ■

Endnotes

¹ *Commonwealth v. Melendez-Diaz*, 69 Mass. App. Ct. 1114, 2007 WL 2189152, *4 n. 3 (July 31, 2007), *review denied*, 449 Mass. 1113 (2007).

² National Research Council of the National Academies, *STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD* (2009).

³ For a helpful discussion of the arguments advanced in the case, see Miller & Ricciutti, *Crawford Comes to the Lab: Melendez-Diaz and the Scope of the Confrontation Clause*, 53 Boston Bar Journal 13 (Fall 2009).

⁴ The small number of cases where there was a split decision—where, for example, the court vacated drug convictions, but affirmed gun convictions—have been counted as "vacated" convictions.

⁵ The Executive Office of Public Safety provided the statistics reported here.

⁶ Defense counsel's efforts to extend *Melendez-Diaz* to other records commonly offered in criminal cases, such as certified copies of Registry of Motor Vehicle and court records, have been unsuccessful. *Commonwealth v. McMullin*, 76 Mass. App. Ct. 904 (2010).

Legal Analysis

Technology and Privacy in the Workplace: Monitoring Employee Communications After the Supreme Court's *Quon* Decision

By Ariel D. Cudkowicz, Kent D.B. Sinclair, and Erik W. Weibust

The use of technology in the workplace is ubiquitous and rapidly changing. While such advances present exciting opportunities for enhanced efficiencies, increasingly they blur the line between personal and professional use, which can lead to complicated issues of employee privacy. On the one hand, employees are regularly encouraged or required to perform their job duties using employer-provided technologies, such as computers, PDAs, and e-mail, and employers often explicitly permit or tolerate limited use of workplace resources to access personal e-mail accounts, commercial websites, and social networking sites. Indeed, many professional employees, including lawyers, are encouraged to expand their professional networks using websites such as LinkedIn and Spoke, or to market their expertise on industry blogs. On the other hand, employers frequently have legitimate business interests in retaining, accessing, viewing, and utilizing information and records stored on their servers and hard drives, including information gathered from seemingly private e-mail, chat, or social networking accounts that employees have accessed using company technology resources.

Determining the scope of employers' rights to access such data has been a subject of significant uncertainty. Many had hoped that the U.S. Supreme Court would use the case of *City of Ontario, California v. Quon*, — U.S. —, 130 S.Ct. 2619 (2010) to provide guidance and create bright line rules for this difficult issue. Unfortunately, the Supreme Court's holding in *Quon* was intentionally narrow and expressly limited to public employees and the very



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unique facts before the Court. Nevertheless, the decision provides some useful guidance to employers, particularly when read in conjunction with other recent decisions issued by courts across the country, including in Massachusetts.

Quon v. City of Ontario, California

Quon involved a police officer (Quon) who was issued a pager with texting capability by his employer, the City of Ontario, California. The City paid for and owned the pager and usage plan. The City's policy on Internet and e-mail use reserved the "right to monitor and log all network activity including e-mail and Internet use, with or without notice." The policy warned that "[u]sers should have no expectations of privacy or confidentiality when using these resources." The City's pager usage plan limited the monthly number of messages and imposed an additional fee for any overage. After Quon's usage exceeded the maximum for several months, the police chief initiated an inquiry to determine whether the City should enroll in a larger or different text messaging plan with its wireless carrier. As part of the inquiry, the City obtained transcripts of Quon's messages for a two-month period, to see if the overages were due to personal or business-related text messages. In the process, the City discovered that some of Quon's messages were sexually explicit. He was disciplined as a result.

Quon sued the City, alleging that the search violated his Fourth Amendment right against unreasonable search and seizure and several federal and state laws. A federal district court determined that Quon had a reasonable expectation of privacy in the content of his text messages, but ruled in favor of the City after finding that it had acted for a legitimate purpose. The Ninth Circuit reversed, reasoning that even though the search may have been conducted for a legitimate rea-

son, it was not reasonable in scope because the City had failed to use a less intrusive means.

On June 17, 2010, the Supreme Court reversed the Ninth Circuit and ruled in favor of the City, but expressly decided the case on narrow grounds within the confines of the public-sector workplace.¹ In addition to its Fourth Amendment holdings, the Court concluded that the City did not violate Quon's rights, because the search was justified at its inception (i.e., it was undertaken to assess the need for a larger text message plan), the method of the search was reasonably related to the search's objectives, and those methods were not excessively intrusive. Notably, though the Court limited its holding to the public sector, the Court ended its analysis by explicitly stating that "[f]or these same reasons — that the employer had a legitimate reason for the search, and that the search was not excessively intrusive in light of that justification — the Court also concludes that the search would be 'regarded as reasonable and normal in the private-employer-context.'" *Id.* at 2633.

Although on its face *Quon* appears only to apply to public employees, the Supreme Court set forth broad principles with which all prudent employers should comply — public or private. First, employers should have clear and understandable technology use policies that explicitly define the specific types of technology they are intended to cover and explain that employees have limited expectations of privacy in the workplace. Second, employers must have a legitimate business interest for searching an employee's personal communications or transactions.²

Massachusetts Law and Other Cases Examining the Attorney-Client Privilege

In Massachusetts, it is well established that employers may search business files contained on company-provided computers, as well as work-related e-mails sent

using company-provided computers.³ The law is more ambiguous concerning employer monitoring of personal employee e-mails and Internet usage on company equipment and networks. Many of the decisions in this area have involved an employee's assertion of attorney-client privilege. While not focused principally on issues of statutory or Constitutional privacy right, these decisions raise many of the same concerns regarding an employer's right to examine personal communications.

Thus, while Judge Gants was still assigned to the Superior Court's Business Litigation Session, he ruled that an employee did not waive the attorney-client privilege by communicating with his legal counsel using a password-protected Yahoo e-mail account on a company-provided laptop computer, because the employee had a reasonable expectation of privacy in the account and the company's technology use policy did nothing to temper that expectation.⁴ Incidentally, in *Evans*, the employee had attempted to delete all such communications from the company-provided laptop, but they were nevertheless saved as screen shots on the computer's hard drive, which the company was ultimately able to recover with the assistance of a forensic expert.⁵ Although Judge Gants refused to find that the attorney-client privilege had been waived under the facts presented, he did provide explicit guidance to employers faced with a similar situation:

The bottom line is that, if an employer wishes to read the employee's attorney-client communications unintentionally stored in a temporary file on a company-owned computer that were made via a private, password protected e-mail account accessed through the Internet, not the company's Intranet, the em-

ployer must plainly communicate to the employee that:

1. All such e-mails are stored on the hard disk of the company's computer in a 'screen shot' temporary file; and
2. The company expressly reserves the right to retrieve those temporary files and read them.

Only after receiving such clear guidance can employees fairly be expected to understand that their reasonable expectation in the privacy of these attorney-client communications has been compromised by the employer.⁶

Likewise, the New Jersey Supreme Court recently held, in *Stengart v. Loving Care Agency, Inc.*, 201 N.J. 300 (2010), that an employee does not waive the attorney-client privilege when using a personal e-mail account on a company-provided computer to communicate with his or her attorney. Though some courts have held to the contrary,⁷ in light of the cases above it would be safest for employers either to disregard employees' attorney-client communications or review them only on the advice of counsel.

State Statutes

As an additional safeguard to employees, some states have enacted statutes that require employers to notify employees if they are monitoring employees' workplace electronic communications.⁸ Although Massachusetts does not have a statute requiring this type of notification, it has a general privacy statute, Mass. Gen. Laws ch. 214, § 1B, that has been used in the context of an employee's right to privacy with respect to e-mails sent over a company e-mail system.⁹ And there is some judicial support in the caselaw for these matters being decided by legislatures. As the

New Jersey Appellate Division recognized in holding that an employer's unilateral policies could not overcome the attorney-client privilege: "Here, we make no attempt to define the extent to which an employer may reach into an employee's private life or confidential records through an employment rule or regulation. Ultimately, these matters may be a subject best left for the Legislature."¹⁰ Thus, it may be that additional states will enact similar statutes following the increased visibility that *Quon* has given this issue.

How Employers Should Proceed

Taken together, the growing body of state and federal law indicates that there are steps employers should take to maximize the ability to search current or former employees' personal data. The most basic and important step that all prudent employers should take is to establish and consistently enforce a technology use policy. Any such policy should:

- Clearly describe the types of technology and media covered by the policy. In addition to company-provided computers, PDAs, e-mail accounts, and instant messaging services, the policy should specifically address anything an employee might reasonably consider to be private, such as personal e-mail accounts (e.g., Gmail, Yahoo, Hotmail), social networking sites (e.g., Facebook, LinkedIn), chat services (e.g., G-Chat, Blackberry Messenger), Twitter streams, text messages, personal digital assistants (PDAs), cellular phones, voice mail accounts, blogs, or other websites. The policy should also be open ended so as to be applicable to future technology developments.
- Explain that information the employee may believe has been deleted may, in fact, be retained by the company and can continue to be accessed.

- State unequivocally that the employee has no reasonable expectation of privacy over any information or communications that he or she accesses using company-based resources, including the items discussed above, and that these items may be monitored or retained by the company indefinitely and accessed at any time, without notice. One court has even gone so far as to caution that "the abuse of access to workplace computers is so common (workers being prone to use them as media of gossip, titillation, and other entertainment and distraction) that reserving a right of inspection is so far from being unreasonable that the failure to do so might well be thought irresponsible."¹¹

- Explain that such information may be disclosed for purposes of investigation, litigation, internal dispute resolution, or the like (regardless of whether that particular employee is directly involved), in addition to other legitimate business purposes, as defined by the company as the issues arise.
- Explicitly state that the policy can only be changed in writing by a specific high level employee (name the employee or position), and that any modifications to the policy from other employees or managers of the company will have no effect.

Once such a policy is in place, it should be reviewed and updated periodically, especially when the company implements any new technology or a new form of media becomes widespread and likely accessed by employees at the office. Moreover, companies should notify employees of the policy annually or at any time it is changed, and require them to sign acknowledgement forms or use a click-through website to acknowledge that they have reviewed and understand the policy.

In addition, the policy should be enforced consistently, and in a non-discriminatory and non-retaliatory manner, in the event a court decides to apply equitable principles.¹² This will likely mean training middle- and upper-management on the specifics and purpose of the policy so that they are not sending mixed messages to employees or enforcing policies inconsistently or unfairly.

Finally, companies should be able to articulate clearly the legitimate business purposes for accessing employee records that may be considered personal or private in nature. Litigation is one such purpose, and employees should be made aware not only of

the company's document retention and litigation hold policies, but also that any e-mails employees send or receive, websites they access, electronic documents they create, and the like — regardless of the employees' subjective expectation of privacy — may be discoverable in litigation, and can and will be accessed in that context, whether or not the litigation directly involves or was initiated by or against any particular employee. Not every such business purpose needs to be explicitly enumerated, however, in order for it to be legitimate; employers may make real-time decisions as issues arise, provided the justification given is reasonable and defensible. ■

Endnotes

¹ See *id.* at 2624 (“Thought the case touches issues of far-reaching significance, the Court concludes it can be resolved by settled principles determining when a search is reasonable.”); see also *id.* at 2630 (“A broad holding concerning employees’ privacy expectations vis-à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted. It is preferable to dispose of this case on narrower grounds.”).

² Although not directly addressed in *Quon*, many other courts have held, in both the public and private employment context, that employers are permitted to monitor employees’ computer usage, even personal Internet and e-mail usage. See, e.g., *U.S. v. Ziegler*, 456 F.3d 1138, 1144 (9th Cir. 2006) (collecting cases), *superseded on rehearing by* 474 F.3d 1184, 1192 (9th Cir. 2007) (downloading of personal items to work computer did not destroy employer’s common authority over computer); *Biby v. Bd. of Regents*, 419 F.3d 845, 850-51 (8th Cir. 2005) (holding that no reasonable expectation of privacy existed where a policy reserved the employer’s right to search an employee’s computer for legitimate reasons); *U.S. v. Simons*, 206 F.3d 392, 398-99 (4th Cir. 2000) (“[R]egardless of whether [defendant] subjectively believed that the files he transferred from the Internet were private, such a belief was not objectively reasonable after [his employer] notified him that it would be overseeing his Internet use.”); *U.S. v. Angevine*, 281 F.3d 1130, 1133-35 (10th Cir. 2002) (employer’s computer-use policy, which included monitoring, a right of access to equipment, and the employer’s ownership of the computers, defeated any claimed reasonable expectation of privacy); *Muick v. Glenayre Elecs.*, 280 F.3d 741, 743 (7th Cir. 2002) (“[Defendant] had announced that it could inspect the laptops that it furnished for the use of its employ-

ees, and this destroyed any reasonable expectation of privacy...”); *Thygeson v. U.S. Bancorp*, No. CV-03-467-ST, 2004 WL 2066746, at *22 (D. Or. Sept. 15, 2004) (employer may monitor employee access of personal Netscape e-mail account from work). Not all courts are as employer-friendly, however. See, e.g., *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F. Supp. 2d 548, 562 (S.D.N.Y. 2008) (employees have a reasonable expectation of privacy over e-mails on Hotmail and Gmail accounts even if viewed at work, using company-provided computers); *Curto v. Med. World Commc’ns, Inc.*, No. 03-CV-6327, 2006 WL 1318387, at *9 (E.D.N.Y. May 15, 2006) (employee has reasonable expectation of privacy in a home computer that was not connected to the employer’s network); *Stengart v. Loving Care Agency, Inc.*, 201 N.J. 300, 321-24 (2010) (employee had reasonable expectation of privacy in e-mail communications with attorney).

³ See e.g., *Commonwealth v. LeBlanc*, 76 Mass. App. Ct. 1104 (2009) (no expectation of privacy for files kept on company-owned computer); *Garrity v. John Hancock Mut. Life Ins. Co.*, No. 00-12143, 2002 WL 974676, at *2 (D. Mass. May 7, 2002) (no expectation of privacy for work e-mails).

⁴ *Nat’l Econ. Research Assocs., Inc. v. Evans*, No. 04-2618-BLS2, 2006 WL 2440008, at *4 (Mass. Super. Aug. 3, 2006).

⁵ *Id.*, at *1-2.

⁶ *Id.*, at *5.

⁷ See, e.g., *Scott v. Beth Israel Med. Ctr.*, 17 Misc. 3d 934, 937-43 (N.Y. Sup. Ct. 2007) (attorney-client privilege waived where e-mail policy states that there is no personal privacy); *Long v. Marubeni Am. Corp.*, No. 05-Civ-639, 2006 WL 2998671, *2-3 (S.D.N.Y. Oct. 19, 2006) (privilege waived).

⁸ See, e.g., DEL. CODE ANN. TIT. 19, § 705 (2010); CONN. GEN. STAT. ANN. § 31-48D (2010).

⁹ See *Restuccia v. Burk Tech., Inc.*, No. 95-2125, 1996 WL 1329386, at *3 (Mass. Super. Aug. 13, 1996) (refusing to grant summary judgment to employer where genuine issues of material fact remained on the issue of whether plaintiffs had a reasonable expectation of privacy in their e-mail messages).

¹⁰ *Stengart v. Loving Care Agency, Inc.*, 408 N.J. Super. 54, 72 (App. Div. 2009)

¹¹ See *Muick*, 280 F.3d at 743.

¹² See, e.g., *Curto*, 2006 WL 1318387, at *3 (“the lack of enforcement by [the employer] of its computer usage policy created a ‘false sense of security’ which ‘lull[ed]’ employees into believing that the policy would not be enforced”).

Deal Focus

Mergers & Acquisitions: Massachusetts Courts Reject Injunction Attempts

By James Carroll and Margaret Brown

It's becoming a common phenomenon: two public companies announce an acquisition on terms thought to benefit all interested parties and within days they face shareholder lawsuits that seek to enjoin the announced deal. While these suits typically include allegations of breached fiduciary duties or non-disclosures, the plaintiffs often go a step further, petitioning courts for "emergency" injunctions to stop the dissemination of information to shareholders, halt tender offers, and postpone or even cancel the shareholder votes required by law for most public-company merger transactions. As deal activity increases with a broader economic recovery, we are likely to see more of these sorts of cases: in recent years, virtually every public company merger or acquisition has faced this kind of litigation.

As recent case law demonstrates, Massachusetts courts are not receptive to injunctive efforts to block corporate transactions or interfere with shareholder voting in the public company context. Illustrative of the current view of Massachusetts courts is the case of *Elliot v. Millipore*, in which Judge Neel of the Business Litigation Session of the Suffolk County Superior Court rejected an attempt to stop the shareholder vote on Merck KGaA's \$7.2 billion acquisition of Millipore Corp. Given the predicted consolidation in the pharma and high-tech industries, *Elliot* may prove to be a particularly important case for both transactional lawyers and litigators.

The background to *Elliot* was unremarkable. In early January 2010, the board of Billerica-based Millipore received an unsolicited offer to buy the company. Millipore's board decided to test the waters for other suitors and quickly



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identified a set of potential merger partners, including Merck. During a month-long process, the board received offers from the initial bidder and Merck; and when the initial bidder refused to match Merck's final offer of \$107 per share — which represented a fifty percent premium over the Millipore's stock price prior to the unsolicited offer — Millipore's board approved the acquisition by Merck and on February 28, publicly announced execution of the agreement.

On March 2 — just two days later — a single shareholder filed a purported class action against Millipore, its directors, and Merck. The initial complaint alleged that the Millipore directors breached their duty to secure the best purchase price for shareholders, and that Merck had somehow “aided and abetted” those breaches. Once Millipore filed its initial proxy materials describing the transaction, the plaintiff amended his complaint to allege further breaches of the duty of candor, which were grounded in the alleged inadequacy of the proxy disclosures. The complaint sought to prevent consummation of the merger pending a showing that the board had secured the best deal for shareholders.

On May 14, two weeks after the filing on April 30 of Millipore's definitive proxy statement, the plaintiff filed an emergency motion for a preliminary injunction to block the shareholder vote that was scheduled for early June. The plaintiff alleged that Millipore's 125-page proxy lacked material information necessary for shareholders to cast an informed vote, such as details of the board's internal discussions about the negotiations with prospective acquirers and specific calculations that Millipore's financial advisor had used to assess the proposed deal.

In response, defendants argued that the plaintiff had not satisfied Massachusetts's three-prong test to

justify the extraordinary remedy of enjoining a vote. First, the defendants argued the plaintiff had shown no likelihood of winning on the merits of his underlying claims because the extensive proxy materials thoroughly documented all material information. Second, the defendants maintained that the plaintiff's claim of irreparable harm was undercut by the length of time he waited (more than two months after the deal announcement, and two weeks after the definitive proxy filing) to seek an injunction. Third, the defendants argued that the severe harm that an injunction would do to the bulk of shareholders — namely, losing their right to cast a yes-or-no vote on a deal that offered a substantial premium to Millipore's prior trading value — substantially outweighed the plaintiff's speculation that there existed, somewhere, a better deal.

On June 3, the day of the scheduled shareholder vote, the court denied the injunction motion. Citing the definitive proxy's “considerable detail” regarding the board's decision-making process, the fact that the \$107-per-share offer price marked a significant premium over Millipore's prior-year trading average, and the fact that early-voting stockholders overwhelmingly supported the transaction the court concluded that the remaining shareholders would be “prejudiced, not advantaged” by delaying the vote. The transaction was overwhelmingly approved by shareholders.

The outcome in *Elliot* exemplifies Massachusetts courts' skepticism of injunctive attempts in the context of sophisticated corporate transactions, and it is fully in line with other similar and very recent cases in Massachusetts. In May 2010, for example, the Suffolk County Superior Court's Business Litigation Session declined to enjoin Hospira, Inc.'s tender offer for shares of Javelin Pharmaceutical Inc.; and again in late June, the Middlesex County Superior Court

refused to enjoin the shareholder vote on Oracle Corporation's acquisition of Phase Forward Corp., and dismissed the underlying complaint in its entirety.

The lesson of *Elliot* and its brethren is clear. Massachusetts law is increasingly unreceptive to injunction motions seeking to interfere with sophisticated corporate transactions, particularly where such motions would seek to interfere with shareholder votes. While such cases may occasionally find

litigation "traction" elsewhere — indeed, there are Delaware cases granting injunctions in some circumstances, including injunctions delaying shareholder votes — our judges have been skeptical. This skepticism, and the important predictability that results, makes Massachusetts an attractive venue for matters involving sophisticated corporate transactions. ■

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