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Look no Further! The Scope of Consent Searches After *Commonwealth v. Ortiz*

By Jessica Langsam

Case Focus

In *Commonwealth v. Ortiz*, 478 Mass. 820 (2018), a closely-divided Supreme Judicial Court held that, under the Fourth Amendment and article 14 of the Declaration of Rights, a suspect's consent to search for weapons or drugs "in the vehicle" does not include consent to search under the hood (and under a removed air filter) unless it is "reasonably clear" to a "typical reasonable person" that consent extends beyond the interior of the vehicle and the trunk. *Id.* at 826-27. The case turned on the scope of the suspect's consent and the application of the settled rule that "[t]he standard for measuring the scope of a suspect's consent under the Fourth Amendment [and article 14] is that of 'objective' reasonableness — what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Id.* at 824 (quoting *Florida v. Jimeno*, 500 U.S. 248, 251 (1991)). *Ortiz* considered "the words spoken" in the exchange to be informed only by "the context" as it existed during that time, *id.*, a narrower period than in previous cases and one that excludes a suspect's lack of objection when his consent to the scope of the search is deemed ambiguous.

Background

An officer stopped the defendant's car and asked if there was anything "in the vehicle that the police should know about, including narcotics or firearms." *Ortiz*, 478 Mass. at 821. The defendant replied, "No, you can check." *Id.* He exited the vehicle at an officer's request and was then handcuffed. *Id.* at 821-822. A drug-detection dog walked around the vehicle but did not alert. *Id.* at 822. Officers searched the vehicle's interior but found no contraband. *Id.* They then raised the hood, removed the air filter, and found a bag containing firearms. *Id.* The defendant watched from the side of the road but did not object. *Id.* He was arrested and subsequently told officers that the firearms belonged to him and that he had given consent to look in his vehicle. *Id.*

The defendant sought to suppress the firearms and his statements on the ground that the search unconstitutionally exceeded the scope of his consent. *Id.* After an evidentiary hearing, the court suppressed the evidence, ruling that although the defendant's consent was free and voluntary, when the officer asked only about items "in the vehicle," a typical reasonable person would understand the scope to have been limited to the interior, and the scope of the defendant's consent was not expanded by his lack of objection during the search. *Id.* at 822-823.

The Majority Opinion

In this 4-3 decision, the SJC affirmed suppression, concluding that the defendant's consent was limited to a search of the vehicle's interior, which included, the Court said, the passenger compartment and the trunk. The majority cited a similar conclusion by the Tennessee Supreme Court in *State v. Troxell*, 78 S.W.3d 866 (Tenn. 2002). *Ortiz*, 478 Mass. at 824. There, an officer asked the driver of a pickup truck whether he had "any weapons *in* the vehicle"; the driver replied "no, nothing"; the officer asked, "Okay if we take a look?"; and the driver answered, "Yeah, go ahead." *Id.* (emphasis in original). As the SJC noted, *Troxell* concluded that "[t]he verbal exchange therefore expressly indicated" that the officer intended to search "in the vehicle"

(i.e., the cab) and that it was therefore “objectively reasonable to conclude that the consent to search included only the interior.” *Id.* (quoting *Troxell*, 78 S.W.3d at 872).

In essentially an alternative ruling, the majority stated that as a matter of fairness, the scope of consent, like voluntariness, must be unambiguous and that the scope of consent here was ambiguous and suppression was warranted because the police may not take advantage of an ambiguity that could be resolved with a clarifying question. *Id.* at 825-826. The Court held that “unless it is reasonably clear that the consent to search extends beyond the interior of the vehicle, the police must obtain explicit consent before a vehicular search may extend beneath the hood.” *Id.* at 826-827. It held that where, as here, the scope of consent to search was not reasonably clear, the defendant’s silence when the search extended to the hood was not a substitute for consent but was rather “mere acquiescence to a claim of lawful authority” and his failure to revoke consent was not an agreement to expand the scope beyond its initial limit. *Id.* at 827.

The Dissent

The dissent would have reversed suppression, noting that to apply the standard interpreting a suspect’s consent to search required considering not only the exchange itself but also the “facts and circumstances surrounding” it, including whether the defendant limited the scope, and, as stated in *Jimeno*, the “expressed object” of the search. *Id.* at 827-28. Concluding that the defendant did not limit consent to the interior and trunk, the dissent pointed to his “unqualified and unambiguous general consent” in response to the officer’s request to search for “any narcotics or firearms in the vehicle” and his lack of objection when officers looked under the hood, which would indicate to a “typical reasonable person” that he “authorized the entire search.” *Id.* at 828.

The dissent noted that whereas *Troxell* concluded that “in the vehicle” referred to the pickup’s cab, the *Ortiz* majority concluded that “in the vehicle” referred to the cab *plus* the trunk – and that there was no “meaningful difference” between the trunk and the hood because both were beyond the passenger compartment and opened separately. *Id.* at 828-29. The dissent also noted that *Troxell*’s “narrow focus on the colloquial use” of “in” ignored the conversation’s subject matter, and that *Troxell*’s search was more extensive in kind and duration and included a drug detection dog, an officer’s examination of the vehicle’s underside and gas tank, and removal of the gas tank at a service station (to which the defendant was instructed to drive), where drugs were found. *Id.* at 829. In contrast, the dissent found no ambiguity in the defendant’s consent to the scope of the search and noted that his failure to object when the search moved to the hood further evidenced his initial authorization for that portion of the search. *Id.* at 830.

Consent Searches Post-Ortiz

Cases prior to *Ortiz* considered a broader context to ascertain the scope of a suspect’s consent, including whether the defendant objected. In *Commonwealth v. Gaynor*, 443 Mass. 245, 255 (2005), cited by the *Ortiz* majority and dissent, the defendant argued that the scope of his consent was limited by what officers told him, which was that they wanted to test his blood and compare the results with results of testing connected to one victim. *Id.* However, the *Gaynor* Court held

that a reasonable person likely would have concluded that the police were seeking the defendant's blood test results, including his DNA profile, that the scope was not limited to the current investigation (there were additional victims), and that the defendant never limited the scope. *Id.* at 255-56. *See, e.g., Commonwealth v. Caputo*, 439 Mass. 153, 163 (2003) (holding that when defendant invited officers inside residence and then said that he did not want to talk with them, but did not ask them to leave and did not object when two officers reentered after inspecting his car, invitation to enter was not circumscribed). By way of explanation for limiting the context to only the exchange between the suspect and police, the majority noted that the law is already "quite protective of law enforcement" in that consent may be found valid even when the suspect was not informed of and was unaware of his right to refuse. *Ortiz*, 478 Mass. at 826.

Going forward, police who want to search a suspect's vehicle should choose their words carefully and obtain explicit consent for a search beyond the vehicle's passenger compartment and trunk. A suspect's consent will likely not be held to be any broader than the plain language of that exchange and could turn, as it did here, on what the meaning of "in" is.

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Massachusetts Adopts “Red Flag” Law

By Bethany Stevens

Heads Up

Massachusetts law has long provided two tools to suspend a person’s lawful access to firearms: a firearms licensing authority could suspend a person’s license to carry or possess a firearm if it found the person was unsuitable, or a court could — indeed, is required to — suspend a firearms license and order the surrender of the person’s firearms after finding a substantial likelihood of an immediate danger of abuse of a household or family member pursuant to G.L. c. 209A. Massachusetts has now added a third tool, modeled after “red flag” laws in other states, to allow seizure of the firearms of persons who present a risk to themselves or others. As of August 17, 2018, the District Court and Boston Municipal Court may now issue an “extreme risk protection order” to compel a person to immediately surrender firearms and ammunition on the petition of a household member, family member or licensing authority without the need for a finding of abuse. See [G.L. c. 140, §§ 131R-131Z](#).

What is an Extreme Risk Protection Order?

An extreme risk protection order (sometimes referred to as an “ERPO”) immediately suspends a person’s license to carry or possess a firearm and directs the person to immediately surrender their firearms licenses, guns (including stun guns), and ammunition to the licensing authority in the municipality where the person resides. An ERPO may issue only upon a finding that the person “poses a risk of bodily injury to self or others by being in possession of a [firearms license] or having in his control, ownership or possession [guns or ammunition].” G.L. c. 140, § 131T(a). While the order is in effect, the respondent is disqualified from obtaining a firearms license and is prohibited from possessing a firearms license, gun or ammunition. A violation of the order is a misdemeanor criminal offense.

Who Can Seek an Order?

The new law allows a household or family member, defined as those phrases are used in G.L. c. 209A, to file a [petition](#) with the court upon “belie[f] that a person holding a license to carry firearms or a firearm identification card may pose a risk of causing bodily injury to self or others.” G.L. c. 140, § 131R. A petition may also be filed by the licensing authority where the respondent resides (defined as “the chief of police or the board or officer having control of the police in a city or town, or persons authorized by them,” G.L. c. 140, § 121). In some instances, the licensing authority where the respondent resides will not be the authority that actually issued the respondent’s firearms license(s) because a person could be licensed by the police department of the municipality in which the person works or because a person might move to a different municipality after licensing. G.L. c. 140, §§ 129B(1), 129B(11), and 131(d).

Individuals who are not family or household members may *not* petition a court for an ERPO, even though in appropriate instances they may seek a harassment protection order under G.L. c. 258E. Chapter 258E does not authorize a harassment prevention order to include an order to surrender firearms. *J.C. v. J.H.*, 92 Mass. App. Ct. 224, 230 (2017). As a result, if an individual who is not a member of a license-holder’s family or household believes that a license-holder

poses a risk to themselves or others, the individual should seek appropriate relief by reporting the information to an eligible ERPO petitioner.

Procedure to Issue an Order

The new law bears many procedural similarities to G.L. c. 209A. A petitioner who seeks an ERPO must file a petition signed under the pains and penalties of perjury. If on review the judge “finds reasonable cause to conclude that the respondent poses a risk of bodily injury to self or others” by possessing a firearms license, guns or ammunition, the judge may issue an emergency or temporary extreme risk protection order without first giving notice to the respondent. G.L. c. 140, § 131T(a). An emergency order issued during court hours is valid for only 10 days. Like an emergency order under c. 209A, an emergency ERPO issued after court hours by an on-call judge is valid only until the end of the next court day. If a petitioner seeks to have such an “after hours” emergency order extended beyond the next court day, the petitioner must appear during court hours for a hearing at the appropriate court with jurisdiction over the city or town where the respondent lives.

Because an ERPO suspends a person’s lawful access to guns and ammunition, an ERPO will not issue when the person has no license to suspend. Rather than issuing an ERPO, the court will provide the information to police to take whatever action is warranted when they learn information related to the illegal possession of firearms. If in these circumstances the petitioner is a household or family member concerned about their own safety, they should consider seeking a c. 209A order.

For an ERPO to be extended up to one year, the court must hold a hearing within ten days of the filing of the petition with notice to the respondent at least seven days prior to the hearing. The respondent can waive this notice period. If the respondent files an affidavit stating that guns are required in the performance of the respondent’s employment, the hearing must be held within two days of the petition being filed. At the hearing, the petitioner must establish by a preponderance of the evidence that the respondent poses a risk of bodily injury to self or others by possessing guns or ammunition. If the judge so finds, the judge must issue an order for up to one year. Either party may move to modify, suspend or terminate an active order. Appeals of ERPO proceedings may be taken to the Appeals Court just as c. 209A orders may be appealed.

Effect of an Order

Whenever a court issues an ERPO, the licensing authority and the criminal justice information service database (CJIS) must be notified. This triggers suspension of any Massachusetts firearms license and disqualifies the respondent from obtaining a new firearms license in Massachusetts. This is the same process that occurs when a c. 209A order issues: CJIS and licensing authorities are notified of c. 209A orders as such orders generally require immediate suspension of a firearms license and surrender of guns and ammunition. G.L. c. 209A, §§ 3B and 3C.

The new statute allowing courts to issue extreme risk protection orders does not replace a licensing authority’s ability to suspend a firearms license. Therefore, under G.L. c. 140, § 129B

(firearm identification cards) or § 131 (licenses to carry), the chief of police who issued the license or their designee may still suspend a person's license and require surrender of guns and ammunition upon finding the licensee "unsuitable." This determination by the licensing authority results in immediate suspension of the firearms license without the need for a court ruling.

Restoration of Firearms License

While issuing an extreme risk protection order is a process separate from the licensing authority's determination of suitability, the two processes converge upon an ERPO's expiration or termination. After an ERPO is issued, a firearms license, guns, and ammunition may be returned to the respondent only after the licensing authority where the respondent resides determines that the respondent is suitable. A determination of unsuitability must be based either on reliable information that the person "has exhibited or engaged in behavior to suggest the [person] could potentially create a risk to public safety" or on "existing factors that suggest that the [person] could potentially create a risk to public safety." G.L. c. 140, § 129B(1½)(d). If denied reinstatement, a respondent presumably could seek judicial review under existing license appeal procedures, although the new statute does not explicitly provide for such judicial review.

Reports on the New Law's Use

By December 31, 2018, we will learn more about the utility of this new law. The court must provide an annual statistical report on its use, including the number of petitions filed, petitions granted, and petitions that led to surrender of guns, as well as demographic information about respondents and petitioners. In the meantime, information about extreme risk protection orders and the forms a petitioner is required to file can be found on [the court's website](#).

Bethany Stevens is the Director of Legal Policy and Deputy General Counsel to the Administrative Office of the District Court, and is a member of the BBA's Criminal Law Section Steering Committee. Previously, she served as the Deputy Chief of the Middlesex District Attorney's Appeals Bureau where she litigated closed courtroom claims at the trial level as well as at the Appeals Court and Supreme Judicial Court.

Reflections on the Supreme Judicial Court Committee on Grand Jury Proceedings
By Hon. Robert L. Ullmann
Voice of the Judiciary

Advising the Commonwealth's highest court about an institution older than the Massachusetts Constitution, and one that operates in secrecy, was the daunting mandate given to the 14 members of the Supreme Judicial Court Committee on Grand Jury Proceedings ("SJC Grand Jury Committee").

The Supreme Judicial Court ("SJC") appointed us last year to gather information about how prosecutors present evidence to and instruct grand juries, and to seek to identify "best practices" for grand jury presentments.

Not surprisingly, given the committee's composition of prosecutors, defense attorneys, sitting and retired judges, and one law professor, the search for best practices involved extensive and at times passionate debate. Perhaps surprisingly, the committee was able to reach consensus on a significant number of best practices in six core areas of grand jury activity, with extensive input from the bar, in particular the Commonwealth's prosecutors' offices.

The committee's [Final Report](#), issued in June, is available on the Supreme Judicial Court website.

Grand juries hear and view evidence presented by prosecutors and decide whether probable cause exists to return indictments on felony charges. Like trial jurors, grand jurors are chosen from randomly selected groups of citizens (venires) summoned to courthouses in each county. Unlike trial court proceedings, however, judges and defense lawyers are not present for grand jury proceedings, and a grand jury witness's lawyer may be present solely to advise the witness. The judicial branch oversees the grand jury, but prosecutors run the grand jury's day-to-day activities.

In identifying best practices, the committee recognized that grand jury presentment is a prosecution function that the SJC has described as subject to "limited judicial review." *Commonwealth v. Noble*, 429 Mass. 44, 48 (1999). However, committee members also recognized that the grand jury is "an integral part of the court," and that judges have a "duty to prevent interference with [grand jurors] in the performance of their proper functions, to give them appropriate instructions, and to assist them in the performance of their duties." *In re Pappas*, 358 Mass. 604, 613 (1971).

The best practices address issues such as what to do when grand jury subpoenas yield evidence that the prosecutor deems too inflammatory to present to the grand jury; when grand jurors should be instructed on defenses to the crime or on lesser included offenses or other less serious charges than the most serious potential charge; what warnings should be given to targets of investigations; and when and how grand jurors should be instructed on the law.

All of the recommended best practices are currently employed by one or more prosecutors' offices, demonstrating that the state's prosecutors were already taking the initiative in exploring

practices to ensure that grand jurors are adequately instructed and that the integrity of grand jury presentments is not impaired. The recommended best practices were selected because they assist grand juries in performing their dual functions of determining probable cause to charge someone with a crime and protecting persons from unfounded criminal prosecution. All of the recommendations are fully consistent with existing SJC and Appeals Court law.

Creation of the committee and its work

The committee arose from the SJC's opinion in *Commonwealth v. Grassie*, 476 Mass. 202 (2017), in which the Court stated that it would convene a committee on grand jury practices before considering an extension to adults of the rule adopted for juveniles in *Commonwealth v. Walczak*, 463 Mass. 808 (2012). In *Walczak*, the Court required prosecutors to provide certain legal instructions to grand jurors when prosecutors seek to indict a juvenile for murder and substantial evidence of mitigating circumstances or defenses exists.

Although the committee arose out of one court decision, the SJC did not limit the scope of the committee's fact-gathering and asked the committee to recommend best practices in any area of grand jury practice it wished to consider. This broad mandate raised concerns among many of the Commonwealth's elected prosecutors.

When the committee sought public comment on a draft of its proposed best practices in March, a considerable number of district attorneys criticized the proposals as an unconstitutional intrusion by the judiciary into the exclusive role of the executive branch in making charging decisions. A few district attorneys also saw the proposed best practices as an attempt to impose on them "one size fits all" practices similar to federal grand jury requirements. In addition to raising these broad concerns, the district attorneys offered detailed critiques of specific proposals. The committee also received comments from the Committee for Public Counsel Services, the Boston Bar Association, and several individuals. The committee carefully reviewed all and adopted many of these comments, resulting in an improved set of best practices and commentary which were submitted to the SJC in June.

The committee also considered the broader concerns raised by district attorneys but ultimately concluded that recommending best practices on the presentation of evidence and instructions to grand juries fell squarely within the SJC's charge to the committee. Moreover, given the judiciary's role in ensuring the integrity of grand jury proceedings, the committee believed that recommending best practices from existing prosecutors' office practices did not violate the separation of powers, intrude upon prosecutorial discretion in charging decisions, or impose a "federalized" one-size-fits-all approach to grand jury practice.

Personal Reflections

Having served on criminal law reform committees for over three decades, I was deeply gratified to see experienced prosecutors and defense attorneys (and the rest of us) forcefully express opposing views, but carefully listen to each other and put aside parochial concerns to reach principled compromise. There is a nationwide trend toward prosecutor best practices, but the practices typically cover areas other than the grand jury, and non-prosecutors are rarely involved

in the process. Because our committee had representation among a range of participants in the criminal justice process, the practices that we unanimously viewed as exemplary should have added credibility.

Our committee had no authority to require the implementation of best practices, and the Final Report explicitly states that it is “not intended to give substantive or procedural rights to people accused or convicted of crimes or to serve as the basis for motions to dismiss indictments.” Over time, courts may look to the best practices we identified to render legal decisions, but that was not the purpose of our work. I believe that I speak for the entire committee in expressing the hope that the Commonwealth’s prosecutors on their own initiative will recognize what is exemplary among practices already in use, broadly adopt those practices, and continue the process of developing new best practices in the future.

Robert L. Ullmann has been an Associate Justice of the Massachusetts Superior Court since 2013. He was chair of the Supreme Judicial Court Committee on Grand Jury Proceedings.

In addition to the author, the other committee members were Hon. Peter W. Agnes, Jr., Appeals Court; Janice Bassil, Esq; Berkshire District Attorney Paul J. Caccaviello ; Hon. Judd J. Carhart, Appeals Court (retired); Assistant Attorney General David E. Clayton; Middlesex Assistant District Attorney Kevin J. Curtin; Deputy Chief Counsel Randy Gioia, Esq., Committee for Public Counsel Services; Hon. Bertha Josephson, Superior Court (retired); Clinical Professor Diane S. Juliar, Suffolk University Law School; Bristol Assistant District Attorney Mary E. Lee, Kevin M. Mitchell, Esq.; and Suffolk Assistant District Attorney Donna Jalbert Patalano (prior to her departure from the district attorney’s office.) Maureen McGee, Esq. was counsel to the committee.

Major Changes to Superior Court Motion Practice

By Victoria Fuller

Practice Tips

Superior Court Rule 9A was amended effective November 1, 2018. Although the Rule has been amended several times in the last few years, the most recent changes are big. Really big. Everything from cross-motions to summary judgment to basic formatting have been revised. Superior Court practitioners who fail to familiarize themselves with these changes risk having motions returned or denied.

Summary Judgment Packages Get Leaner

The biggest change to Rule 9A affects summary judgment procedure. These changes are geared to slimming down filings and simplifying the issues before the Court. First, the Statement of Facts, as served, cannot exceed 20 pages, and cannot include several types of facts:

1. Immaterial Background facts;
2. Quotations from, or characterizations of, transactional documents (“except if admissible through percipient witnesses”); and
3. Quotations from statutes, regulations or rules.

Parties may submit these types of material, without argument or commentary, in an addendum to the party’s memorandum.

Second, the rule limits the permissible scope of responses to the Statement of Facts by prohibiting some common responses that have complicated the Court’s ability to determine what facts are actually disputed in good faith. Opposing parties may state whether a fact is disputed, and if so, cite supporting record evidence. They may not, however:

1. Deny a fact, or state that a fact is not supported by the cited materials, without a good faith basis;
2. Comment on whether the fact is relevant or material. The opposing party may, however, state that the fact is admitted solely for purposes of summary judgment;
3. Assert additional facts; or
4. Include legal argument or advocacy concerning the sufficiency, relevance or materiality of the fact.

Third, opposing parties are no longer permitted to serve Statements of Additional Facts, except in support of a cross-motion for summary judgment. They may, however, include additional facts in their opposition with supporting record citations. The rule also directs the parties to cite both the joint appendix exhibit number *and* the corresponding paragraph in the Statement of Facts in their memoranda.

In addition, three types of summary judgment motions may now be denied by the Court on the papers:

1. Multiple motions made by the same party, or a motion filed by a party sharing similar interests with a party who has already moved for summary judgment, which raises issues previously resolved by the Court;
2. Motions for partial summary judgment that will save little to no trial time, will not simplify trial, or will not promote resolution of the case; and
3. Motions where a genuine dispute of material fact is obvious.

Finally, the rule has updated sanctions for non-compliance with the summary judgment provisions. The court may not consider the motion or opposition, may return the submission to counsel with instructions for re-filing, or may impose other sanctions for flagrant violations.

Cross-Motions Are Integrated Into a Single Filing Package

The rule has now filled a procedural gap affecting cross-motions. For example, if a party serves a motion to compel, and the opposing party serves an opposition and a cross-motion for protective order: Under the old rule, the cross-motion was not required to be included in the same 9A package. As a consequence, the motion to compel could be filed and heard before briefing on the cross motion was complete.

Under the new rule, opposing parties serve cross-motions with their opposition to the original motion. The original moving party then serves the reply (if any) and opposition to the cross-motion. The original moving party files both motions and oppositions as part of the same 9A package.

Cross-motions for summary judgment generally follow the same process, but in addition, a Consolidated Statement of Facts is prepared.

Parties Must Now Confer on Dispositive Motions

The new Rules 9A and 9C extend meet and confer obligations to dispositive motions (with limited exceptions). Motions lacking a 9C certificate under the new rule, as under the old, will be denied without prejudice.

New Procedure for Requesting Leave

Parties must still seek leave to file additional briefing and pages, which will be granted only in “exceptional circumstances.”

Rule 9A(a)(6) also sets forth a new procedure for requesting leave. Letter requests are gone. Now, requests must be captioned as a pleading, not exceed one page, state the grounds for the relief sought, and include a certificate of service. The request is sent to the session clerk, captioned “ATTN: Session Judge.” If the Court grants a request for additional pages, this will apply to the opposing party’s memorandum as well, unless otherwise ordered. The permitted pleading must state the date on which leave was allowed. Note that a request for leave does not extend the date for filing the Rule 9A package, unless permitted by Court or by agreement of the parties.

Formatting Changes

Under the old rule, papers had to be typed in “no less than 12-point type.” Now, papers must be 12-point type – no more, no less. In addition, quotes and footnotes must also be 12-point type. An addendum that sets forth “verbatim and without argument, pertinent excerpts from key documents, statutes, regulations or the like” need not be included in counting permitted pages.

Finally, email addresses must be included in the signature block or the attorney must certify that he or she lacks one.

Service on Non-Parties Now Required In Limited Circumstances

Unless excused by court order, or where *ex parte* relief is authorized by statute or rule, the new rule requires service on non-parties under three circumstances:

1. the motion seeks to add the non-party as a party to the case;
2. the motion seeks an order or other relief against the non-party; or
3. the motion addresses issues which affect the personal information or other interests of the non-party.

Electronic Service Now Permitted

Many practitioners will rejoice that email service is now permitted. The parties must agree in writing, and parties must include “served via email” on their filings for the clerk to accept scanned signatures. That said, parties filing papers signed under the penalties of perjury, such as affidavits, and all required 9A certifications, must bear original signatures.

Motions Exempt from Rule 9A

Finally, the new Rule 9A adds two categories of motions as exempt: motions governed by e-filing rules, and review of decisions of administrative agencies.

The new rule also seeks to prevent parties from trying to skirt Rule 9A by declaring a motion an “emergency.” Now, parties filing emergency motions must certify that they have made a good faith effort to confer with all parties, and must state whether any party assents to or opposes the motion.

Though extensive, these changes should streamline and improve Superior Court motion practice. Prudent practitioners will ensure that they, and other attorneys in their firm or organization, familiarize themselves, and comply, with the new rule.

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Massachusetts High Court Rules Judges Can Require Sobriety as Part of Probation in *Commonwealth v. Eldred*

By Martha Coakley and Rachel Hutchinson

Case Focus

On July 16, 2018, the Massachusetts Supreme Judicial Court unanimously ruled in [*Commonwealth v. Eldred*, 480 Mass. 90 \(2018\)](#) that judges can require individuals with substance use disorders to remain drug-free as a condition of probation. Although the Court stressed that judges should consider the challenges of addiction, the Court nevertheless found that judges must also “have the authority to detain a defendant” who has violated probation by using drugs. *Id.* at 99. It appears that the SJC is the first state supreme court to reach and decide this issue.

I. The Addiction Debate

Remaining drug-free is an almost universal requirement of probation. Many courts, including [specialty courts such as drug courts](#) that take a public health approach to substance abuse, require offenders to stay clean, and respond to relapses with sanctions ranging from warnings to jail time. But as the opioid crisis has swept the nation, many have begun to question the central role that courts play in battles with substance abuse.

Eldred cut to the heart of this growing debate. The defendant, Julie Eldred, argued that requiring her to remain drug-free as a condition of probation violated her constitutional rights. According to Eldred, addiction is a chronic brain disease that interferes with one’s ability to abstain from drugs. Eldred argued that punishing addicts like herself for a relapse punishes them for something over which they have no control and negates willfulness. The prosecution disagreed, arguing that addiction is a condition that ranges in intensity and is responsive to penalties and rewards. According to the prosecution, sanctions like jail time are an important tool that judges can use to encourage recovery and promote public safety.

Many of the *Eldred* amici weighed in on the science of addiction, focusing on the degree of control addicted individuals have over their drug use. For instance, the Massachusetts Medical Society argued that relapse was a symptom of a disease that must be treated, not punished. Other amici, however, pointed out that the scientific community has not yet reached consensus about whether addiction leaves someone powerless over their drug use. The National Association of Drug Court Professionals noted that supervision and drug testing combined with graduated sanctions helps keep individuals in recovery, and cautioned the SJC against allowing “any particular theory of addiction to influence its decision.”

II. The *Eldred* Decision

Eldred arose out of the 10-day incarceration of Julie Eldred after she failed a court-ordered drug test. Eldred, who had suffered from substance use disorder since age 15, had originally been convicted of larceny for stealing jewelry to support her addiction. Eldred’s probation required her to enroll in outpatient treatment, submit to random drug screenings, and remain drug-free. Although Eldred originally complied with her probation, enrolling in a program and

starting on a course of Suboxone, she relapsed shortly thereafter and tested positive for fentanyl, a powerful opioid. Because no inpatient drug treatment facilities had open spots, the judge overseeing Eldred's detention hearing ordered her held in custody until one became available 10 days later. *Eldred*, 480 Mass. at 93.

At the full hearing on her probation violation, Eldred argued that this 10-day detention was unlawful because her substance use disorder "rendered her incapable of remaining drug free." *Id.* at 92. The judge disagreed, finding that Eldred had violated her probation, but nevertheless granted Eldred's motion to report the question regarding the lawfulness of the drug-free condition to the SJC. The SJC found that the question was improperly reported, but agreed to consider it nonetheless because it presented "issues of significant magnitude." *Id.* at 94.

Although the parties and amici focused their arguments on the addiction debate, the SJC declined to weigh in on the science. Instead, the *Eldred* decision focused on a judge's role in setting probation conditions. Based on longstanding precedent, the SJC decided that judges may continue to require individuals to remain drug-free while on probation, and may detain individuals who violate that condition until their probation hearing.

The SJC framed the reported question in three parts. First, when someone who is addicted to drugs commits a crime, may a judge require her to remain drug-free as a condition of probation? Second, if an individual violates the drug-free condition, can she be subject to probation revocation proceedings? Third, may she be held in custody while awaiting admission to an inpatient treatment facility? *Id.* at 94.

The SJC answered all three questions in the affirmative. While the Court noted that judges who deal with those who suffer from substance use disorder should act with "flexibility, sensitivity, and compassion," the Court ruled that judges "must have the authority to detain a defendant facing a probation violation based on illicit drug use." *Id.* at 95, 99. The Court disagreed with Eldred that the judge's decision to detain her constituted a punishment for her relapse. Rather, the Court likened it to a bail decision, since no final determination on whether Eldred had violated her probation had been made. The Court noted that the judge simply sought to detain Eldred until an inpatient facility became available. It also held that "although the appellate record before the court was inadequate to determine whether SUD affects the brain in such a way that certain individuals cannot control their drug use," the trial court did not abuse its discretion in concluding that there was a wilful violation of the defendant's probation. *Id.* at 104.

Finally, although the SJC agreed with Eldred that substance use disorder itself cannot be criminalized, it pointed out that "relapse is dangerous," both for addicted individuals and the community in which they live. *Id.* at 99. The Court noted that judges, who are on the front lines of the opioid epidemic, "face unresolved and constantly changing societal issues with little notice and, in many situations, without the benefit of precedential guidance." *Id.* The Court characterized these decisions as "especially unpalatable" when an offender is addicted to drugs. *Id.* While the Court, pointing to its own [Standards on Substance Abuse](#), acknowledged that relapse is an accepted part of recovery, the Court stressed that relapse was dangerous nonetheless, and ruled that judges must continue to have the authority to detain defendants after a relapse that violates their probationary terms.

III. Eldred's Implications

Although *Eldred* maintained the status quo for judges dealing with addicted offenders, it is unlikely to be the final word on the subject. As the opioid epidemic grows, the way we view addiction is changing. Even the Attorney General's Office acknowledged in its briefing that "exclusively punitive responses to addiction ... do not make us safer." While the criminal justice system may be on the front lines of the crisis for now, that role may change as other jurisdictions, legislatures, agencies, and disciplines grapple with the same questions faced in *Eldred*.

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Understanding Expressions of Bias and Hate on Campuses Today

By Melissa Garlick

Viewpoint

Since 2017, college and university students across the country, including in Massachusetts, have noticed their campuses papered with fliers declaring, “It’s OK to be white” – a phrase with a long history in the white supremacist movement¹.

What may be surprising to some is that –although the seeming purpose of this coordinated effort by white supremacists is to propagandize, stoke fear, spread hate, and divide campus communities – these fliers are constitutionally protected speech.

While hate speech on campus is generally protected speech, that is not the end of the matter. Administrators and the campus community must recognize and prepare to address the harm that can stem from such speech on campus. A clear and forceful response to constitutionally protected hate speech will prevent protected speech from escalating to bias-motivated crimes and will ensure an inclusive climate where all community members feel safe and welcome.

Free Speech vs. Hate Crimes

The flyer incidents illustrate the important –yet often overlooked – dividing lines between free speech and hate crimes. Even some of the most heinous speech is not criminal, but rather, is largely protected by federal and state constitutions. The ability to express controversial and even offensive ideas is a cornerstone of our nation’s democratic ideals; it is one of the principal ways our nation is distinguished from many countries around the globe where expression of unpopular viewpoints can be – and often is – punished.

In order for an incident to be considered a hate crime, there must be a criminal offense – designated by statute – specifically and intentionally targeting an individual or property in whole or in part because of the victim’s actual or perceived race, religion, national origin, gender, gender identity, sexual orientation, or disability. *See e.g.*, M.G.L. c. 265, § 39; 18 U.S.C. § 249. Such criminal acts become hate crimes only where the perpetrator intentionally selects the victim because of the victim’s personal characteristics. *Id.* Even more common than hate crimes on colleges campuses, are bias incidents (also referred to as hate incidents), in which a person makes bigoted or biased comments to another individual, distributes hate literature (like the aforementioned flyers), or conducts other similar other non-verbal communication. Although they are not hate crimes and often do not violate criminal or civil law, bias incidents nonetheless can be deeply hurtful and offensive.

¹ The fliers are a byproduct of a [larger trolling campaign that emerged out of 4chan](https://www.adl.org/blog/from-4chan-another-trolling-campaign-emerges), a popular internet discussion forum infamous for the studied offensiveness of many of its members and its association with the white supremacist alt-right movement. *See* “From 4Chan Another Trolling Campaign Emerges,” ADL, Nov. 6, 2017, available at <https://www.adl.org/blog/from-4chan-another-trolling-campaign-emerges>.

Hate Incidents on College/University Campuses

Every year, thousands of students are the victims of hate crimes and bias incidents on college campuses, including bias-motivated slurs, vandalism, threats, and physical assaults. According to Federal Bureau of Investigation (FBI) statistics, schools and colleges/universities remain the third most-frequent location for hate crimes.

Over the past year, the Anti-Defamation League (ADL) has tracked not only a spike in anti-Semitic and hateful incidents on campus, but has documented the changing nature of incidents and their profound impact on communities. Reports of hate rhetoric and bias incidents, including anti-Semitic and racist graffiti, extremist speakers, and racist fliers, have increased markedly. Although most of those incidents would not qualify as hate crimes or be even criminally punishable, they are deeply painful to individuals and campus communities.

For example, on Valentine's Day in 2017, gift bags were distributed to students at a Central Michigan University student group meeting including a card that read, "my love 4 u burns like 6,000 jews" [sic] and featured a photograph of Adolf Hitler. Even though the creator/distributor of the valentine card turned out not to be a student, the impact of the incident resonated through the campus community. University President George Ross issued a forceful statement and more than 100 faculty members issued an open letter to the University community. The letter stated: "First and foremost, we stand in unflinching solidarity with Jewish communities on our campus and beyond. We uphold you now and always. We will do everything in our power to protect you" This incident did not involve speech that crossed the First Amendment line into criminal behavior. However, the strong University response underscores the significant impact of such incidents on a person's sense of value and belonging in a place of learning that they also call home. When hate speech appears on campus that is demeaning to a group of people and contradictory to the values of diversity and inclusion – though it may be protected by the First Amendment – trust is eroded and communities need to heal.

ADL also has tracked a [dramatic uptick in incidents of white supremacists targeting college campuses](#) via the distribution of literature, speaking engagements, or trolling/harassment efforts. Colleges and universities are traditionally seen as bastions of free speech; white supremacists capitalize on that by intentionally designing their efforts and words (*e.g.*, the "It's okay to be white" fliers) to fall under the umbrella of free speech. Since September 2016, ADL has tracked more than 500 incidents of white supremacist propaganda on college and university campuses, with almost 300 such incidents occurring during the 2017-18 school year. The vast majority of white supremacist campus actions involve hateful fliers ("Imagine a Muslim-Free America") and stickers ("Make American White Again"), but white supremacists also have sent anti-Semitic faxes and delivered highly publicized on-campus speeches.

Considerations for College/University Administrators

As early as the 1600's, John Milton introduced the now familiar concept of the "marketplace of ideas" which, in essence, posits that "the ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J.

dissenting). Yet, this marketplace is not self-executing. It depends on people's willingness to *respond* to words which are intended to demean, humiliate, and deride. Educational institutions must take into account that historically marginalized and other minority groups are under a greater burden and may be unable to adequately respond when speech targets their personal identities and sense of self. It is critical that colleges and universities speak and act, both against hate and toward a civil learning environment that values inclusion, equity, and open expression.

Reporting hate crimes on campuses, for example, is a crucial part of successful prevention of hate incidents. In 1998, Congress enacted an amendment to the Higher Education Act requiring all colleges and universities that receive federal aid to collect and report hate crime statistics to the Department of Education (ED). *See* Clery Act, 20 U.S.C. § 1092 (f)(1)(F). Currently, colleges and universities must report hate crime statistics for all campus crime categories.²

Unfortunately, however, the ED's current hate crime statistics reflect substantial underreporting. Indeed, the majority of hate crime victimizations go unreported.³ Colleges and universities have tended to either report the crime without indicating that it was bias-motivated or fail to report the crime at all.⁴ Such underreporting is underscored by the fact that the limited ED data conflict with campus hate crime information collected by the FBI under the Hate Crimes Statistics Act, 28 U.S.C. § 534, although the same reporting criteria apply.

Reporting hate crimes and training campus police should be a part of broader response protocols established by colleges and universities to quickly and effectively address hate crime incidents and build trust within campus communities. Campus police should take seriously all reports and allegations of hate crimes and incidents, bias, vandalism, graffiti, and flyering.

University administrators and campus stakeholders have a responsibility to use their own expressive rights to challenge and confront heinous ideas, rather than attempt to ignore them or stifle discussion. Faculty and students should be educated on the parameters of their First Amendment free speech rights and campus response policies and plans should be updated.⁵

Ultimately, the most effective responses and prevention measures by colleges and universities are those that clearly recognize the harmful impact bias incidents have on campus communities, regardless of legal distinctions between hate crimes and bias incidents. It is only through strong

² *See* Clery Act Requirements, Crime Categories Covered, available at <https://clerycenter.org/policy-resources/the-clery-act/>.

³ *See* "Majority of Hate Crime Victimizations Go Unreported to Police," Office of Justice Programs, Bureau of Justice Statistics, June 29, 2017, available at <https://www.bjs.gov/content/pub/press/hcv0415pr.cfm>.

⁴ *See, e.g.,* Rocheleau, Matt, "UNH stats showing no hate crimes in recent years raises red flag, experts say," The Boston Globe, June 8, 2017, available at <https://www.bostonglobe.com/metro/2017/06/08/unh-stats-showing-zero-hate-crimes-recent-years-raises-red-flag-experts-say/oEnPB4mYd0keau6vFpA4CP/story.html>.

⁵ For additional guidance, *see* Hate/Uncycled: ADL Resource for Administrators and Law Enforcement Teams, available at <https://www.adl.org/media/11138/download> (2018); Hate Crimes On Campus: The Problem and Efforts to Confront It, U.S. Department of Justice Bureau of Justice Assistance, available at <https://www.ncjrs.gov/pdffiles1/bja/187249.pdf> (October 2001).

action and counter-messaging that trust can be maintained, communities can heal, and the rising tide of hate on campuses may be stemmed.

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Thoughts on Some Less-Obvious Threats to Campus Free Speech

By Jeffrey J. Pyle

Legal Analysis

Debates about free speech on campus have long centered on “speech codes”—overt policies that restrict constitutionally-protected speech deemed offensive to others. Groups such as the American Association of University Professors (AAUP), the American Civil Liberties Union (ACLU), and the Foundation for Individual Rights in Education (FIRE), consistently oppose such policies because, in the [AAUP’s words](#), “On a campus that is free and open, no idea can be banned or forbidden. No viewpoint or message may be deemed so hateful or disturbing that it may not be expressed.”

Speech codes, however, are not the only restraint on freedom of expression on today’s college campus. Public and private universities and state governments have adopted policies that pose a less direct but substantial threat to peaceful protest and debate on important issues. This article discusses two of them: the practice of charging student groups that invite controversial speakers to campus for security costs based on the likely reaction to the speech, and state anti-“Boycott Divestment Sanctions” legislation that applies to public universities.

1. Security Fees Based on Likely Reaction to Speech.

In *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992), the Supreme Court struck down a Georgia county ordinance that permitted the assessment of security fees for demonstrations on public property. Under the ordinance, county administrators had discretion to impose higher fees for events featuring controversial speakers, based on the anticipated hostile reaction to the speech. This, the Court held, amounted to unconstitutional content regulation: “Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.” *Id.*, 505 U.S. at 134-35.

In recent years, courts have applied this principle to speeches on public university campuses. In *Young America’s Foundation v. Napolitano*, No. 17-CV-02255-MMC, Doc. 62 (N.D. Cal. Apr. 25, 2018), the University of California, Berkeley, billed \$15,738 to a conservative group that had invited right-wing commentator Ben Shapiro to campus, allegedly to cover necessary security for the event. The relevant university policy adhered to *Forsyth’s* directive that the amount of the fee cannot be based on the likely reaction of hecklers. However, Berkeley failed to explain why it charged three times as much for Shapiro as it had charged for a different high-profile speaker, U.S. Supreme Court Justice Sonya Sotomayor. Accordingly, the Court denied Berkeley’s motion to dismiss the as-applied First Amendment challenge to the fee assessed on the conservative group.

Private universities, of course, are not legally bound by the First Amendment, but they still face the important policy question of whether to pass security costs onto organizers of campus events. Significant security costs will often be unaffordable to student groups, and a policy imposing them can sometimes work to prevent the exchange of ideas on campus. Such fee policy may also embolden persons seeking to shut down speech through threats of violence, thereby perpetuating

the “heckler’s veto.” Accordingly, even private universities should craft their policies on this subject with regard for their impact on First Amendment principles.

2. Anti-“Boycott Divestment Sanctions” Statutes

The First Amendment includes the right to organize boycotts that are intended to change government policy. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (holding that boycotts intended to “influence governmental action” are protected under the First Amendment). However, according to the [National Coalition Against Censorship](#), at least 17 states have passed statutes that seek to penalize those who join the “Boycott Divestment Sanctions” (“BDS”) campaign, a movement that seeks to influence Israel’s policy toward the Palestinians through economic pressure. A Texas statute, for example, provides that any company wishing to contract with the state must certify that it “does not boycott Israel,” and will not do so during the term of the contract. *See* Tex. Gov’t Code Ann. § 2270.001 *et seq.*

The provisions of state anti-BDS statutes differ, but they generally apply by their terms to public universities, as to any other state institution. Last year, the University of Houston [required an external speaker](#) to pledge she would not support BDS before she could be paid for conducting a workshop on campus. She refused, and an administrator faked her signature to process payment. (The administrator later resigned.)

Anti-BDS statutes are of doubtful constitutionality even outside academia. [Koontz v. Watson](#), C.A. No. 17-4099-DDC-KGS, Doc. 15 (D. Kan. Jan. 30, 2018) (issuing preliminary injunction against Kansas anti-BDS statute). Within the academy, their application would frustrate the free interchange of ideas by depriving students of the ability to hear speakers—on any subject—who happen to support the BDS movement, or who on principle object to signing pledges as a condition of speaking. The AAUP recently released a [statement](#) condemning any requirement that academic speakers sign anti-BDS pledges, while reiterating its opposition to all academic boycotts, including those against Israel. At the very least, states with such laws on the books should clarify that they have no application in the academic context.

* * *

To protect free speech on campus, universities must do more than foreswear speech codes. They must also ensure that other policies governing campus life do not impinge on the interchange of ideas “that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508–09 (1969).

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Extensive Amendments to the Massachusetts Rules of Appellate Procedure Effective in 2019

**By Joseph Stanton & Patricia Campbell Malone
Heads Up**

The Supreme Judicial Court has approved extensive amendments to the Massachusetts Rules of Appellate Procedure (“Rules”), which become effective on March 1, 2019. This article summarizes by topic the most significant amendments.

Background. The amendments are the product of a four-year study of the Rules conducted by the Appellate Rules Subcommittee (“Subcommittee”) of the Supreme Judicial Court Standing Advisory Committee on Civil and Appellate Procedure, in conjunction with the Standing Advisory Committee on the Rules of Criminal Procedure. The Subcommittee included appellate judges, appellate and trial court clerks, and attorneys with expertise in civil and criminal appeals.

The Subcommittee reviewed the Rules and prepared amendments to: facilitate the just and expeditious resolution of appeals; clarify and simplify filing and formatting requirements; eliminate arcane language and incorporate consistent style and terminology; integrate existing practices and procedures; and facilitate the implementation of paperless court processes. Valuable public comments were received from the Boston Bar Association and other organizations and attorneys.

Universal Amendments. Global revisions to the Rules include: use of gender-neutral references; removal of provisions rendered obsolete by technological developments and work processes; numbering and collapsing of lengthy freestanding paragraphs to facilitate ease of reference; consistency in the numbering of provisions; revising the Rules’ shorter filing deadlines (i.e., non-brief or notice of appeal) to be in increments of 7 days to increase the likelihood that the deadline falls on a business day; and changing all use of “opposition” to “response” to reflect that a nonmoving party may respond to the moving party’s request, but not necessarily oppose that request.

Time Period for Filing Notice of Appeal. Amendments to Rule 4 clarify that if multiple post-judgment motions are filed, the time for filing a notice of appeal for all parties begins on the date when the lower court enters the order that disposes of the last remaining motion enumerated in the Rule, and that the filing of a motion under Mass. R. Civ. P. 60(a) to correct a clerical error does not toll the time period.

Assembly of the Record, Timing and Contents. To prevent delay in completing assembly of the record, amendments to Rule 9(a) establish a 21-day deadline for the clerk of the lower court to complete assembly of the record. The time period begins to run from the later of certain occurrences, including either the receipt of the entire transcript, approval of an agreed statement of the record, or a notice that the appellant does not intend to order a transcript. In addition, amended Rule 9(e) identifies in a checklist format the items and information that the lower court clerk must include in the assembly package.

Transcripts. Amendments to Rule 8 were adopted from recommendations made by the Trial Court Working Group on Assembly of the Record, convened by the Chief Justice of the Trial Court to coordinate with the Appellate Rules Subcommittee to modernize and streamline the transcript production processes. Amended Rule 8 is simplified by focusing on an appellant's duty to file with the clerk and serve on all parties within 14 days an order of all relevant proceedings to be transcribed, a statement certifying that no court proceedings are relevant, or a statement certifying that all relevant transcripts are already on file with the lower court. Reference to service of designation (and counter-designation) of parts of the cassette to be transcribed was deleted and amended Rule 8 simply directs an appellee to, if necessary, order the transcript of any additional relevant proceedings within 14 days of the appellant's order. An Administrative Order of the Chief Justice of the Trial Court now governs technical details such as submission of the transcript order form (which depends on the type of proceeding and method by which it was recorded), payment, indigency, and delivery of the electronic transcript.

Docketing the Appeal. In Rule 10, the time period for appellants and cross-appellants in civil cases to docket their appeal was increased from 10 to 14 days and a new provision was added to deem payment or request for waiver timely if mailed with a certificate attesting that the day of mailing was within 14 days of the filer's receipt of the notice of assembly. These changes are intended to provide appellants additional time to docket the appeal, reduce the need for motions to docket appeals late, and obviate the need for parties to physically travel to the courthouse if attempting to docket an appeal on the final day.

Word Count Limit and Proportionally Spaced Font Alternative to Page Limits. One of the most significant amendments to the Rules appears in Rule 20(a)(2). It allows, as does Fed. R. App. P. 32(a)(7), the option for filers to submit documents using a word-count limit and a proportionally spaced font (e.g., Times New Roman) as an alternative to the traditional page limit and monospaced font (e.g., Courier New) requirement. This option is incorporated into each Rule that previously contained a page limit. For example, an appellant or appellee filing a brief in a non-cross appeal could, instead of using the 50-page limit, use an 11,000-word limit in a proportionally spaced font. When a proportionally spaced font is used, the font size shall be 14 or larger, all margins 1 inch or larger, and the Rule 16(k) certificate must state how compliance with the word limit was ascertained. These amendments are intended to improve documents' readability and to eliminate the considerable time parties sometimes spend using formatting devices solely to comply with the current page limits. Notably, the specific word-count limits differ from the Federal Rules applicable to the various briefs and other filings because adopting the Federal word-count limits would lead to substantially longer filings than currently authorized by the traditional Massachusetts standards. The Rules continue to permit a filer to seek leave to exceed the maximum word-count or page limit, upon a showing of extraordinary reasons.

Filing and Serving Documents. Rule 1(c)'s definition of "[f]irst class mail" was expanded to "[f]irst class mail or its equivalent" to explicitly allow the common practice of using third-party commercial carriers to file documents. For the same reason, Rule 13 was amended to allow electronic service (such as through eFileMA.com or e-mail) with the consent of the party being served. The required contents of a certificate of service were modified to promote consistency with the appellate courts' electronic-filing procedures.

“Inmate Mailbox Rule.” The amendments incorporate in all civil and criminal appeals the so-called “inmate mailbox rule” to the filing of a notice of appeal (Rule 4) and all other documents (Rule 13) by self-represented parties confined in an institution. These amendments are intended to incorporate the concerns highlighted by the Supreme Judicial Court in Commonwealth v. Hartsgrove, 407 Mass. 441, 445 (1990), as to the limitations of a person confined in an institution to effectuate the “mailing” of a document on a certain day. Documents will be deemed filed on the date an inmate deposits the document in the institution’s internal mail system, and then the time period for any party to respond to an inmate’s filing runs from the date the filing is docketed by the appellate court.

Motions. Although Rule 15(b) continues to allow an appellate court to act on motions for procedural orders without awaiting a response, Rule 15(a) was amended to encourage parties to state in their motion whether it is assented to, opposed, and, if opposed, whether the other party intends to file an opposition. This is intended to encourage the parties to communicate about whether a response will be filed prior to the filing of a motion to avoid the unnecessary consumption of time, effort, and expense to both the parties and the appellate court.

Throughout the Rules, references to Rule 27 “Petitions for Rehearing” were changed to “Motion[s] for Reconsideration or Modification of Decision” to more appropriately describe such filings which rarely, if ever, seek an oral argument and rehearing of a case before the justices and instead typically request a reconsideration or modification of the decision.

Amended Rule 29(b) requires a motion for voluntary dismissal in a criminal case to be accompanied by an affidavit by the defendant-appellant or include an attestation by counsel stating that the defendant-appellant assents to the dismissal of an appeal with prejudice. This new requirement codifies the appellate courts’ long-standing requirement for such supporting documentation. It does not apply when the motion states that the appeal is moot.

Content of Briefs. Rule 16(a) was reorganized to detail, in checklist format, the contents of an appellant’s brief. The amended Rule explicitly states existing requirements that were not previously referenced in the Rules, such as the need for a corporate disclosure statement in accordance with S.J.C. Rule 1:21, and the decisional-law requirement that any request for an award of appellate attorney’s fees be made in the brief. The amendments also create new requirements that a party identify the standard of review for each issue raised, and include record references in the statement of the case section. Similar to Appeals Court Rule 1:28’s requirement that a brief’s addendum include copies of any cited Appeals Court unpublished decision, Rule 16 now requires a brief’s addendum to include a copy of any unpublished decision cited in the brief. A summary of the argument is now required for briefs with argument sections exceeding 20 pages (previously 24 pages) or 4,500 words if the brief is produced in a proportionally spaced font.

Rule 16(b) incorporates the requirements of an appellant’s brief and applies them to an appellee’s brief, except as otherwise provided, and includes a new requirement that the appellee include an addendum just like an appellant, even if the materials included were already included in the appellant’s addendum.

New Rule 16(j) clarifies that a party may file only one brief in response to the service of multiple briefs, and may not file separate briefs in response to each brief. Finally, new Rule 16(n) details the procedures for filing an amended brief, including that a motion showing good cause is required, and clarifies that unless otherwise ordered, the filing of an amended brief has no effect on any filing deadlines.

Record Appendices. Rule 18 was reorganized to detail, in checklist format, the required contents of a record appendix. The Rule also now cautions parties that the lower court does not transmit the entire record to the appellate court and that the failure to provide sufficient transcripts can result in waiver of issues. These warnings are intended to remove sources of confusion that often befuddle attorneys and self-represented litigants.

Briefing in Cross Appeals. Another significant amendment to the Rules concerns briefing in a cross appeal, delineated in Rule 20(a)(3). Consistent with Fed. R. App. P. 28.1, the amended Rule recognizes that in an appellee/cross-appellant's principal brief, the appellee must both respond to the arguments in the appellant's brief and present the appellee's arguments in the cross appeal, and that the appellant/cross-appellee's reply brief must both respond to the arguments in the appellee's principal brief in the cross appeal and reply to the appellee's arguments in the appeal. Accordingly, Rule 20(a)(3) enlarges the limit of the appellee/cross-appellant's brief to 60 pages or 13,000 words, and the appellant/cross-appellee's reply brief to 50 pages or 11,000 words.

Amicus Briefs. Rule 17 now clarifies that a motion for leave to file is not required when an appellate court has solicited amicus briefs in the case. It also features a uniform filing deadline for all amicus briefs of 21 days prior to oral argument, unless leave is given for later filing. While making the formatting provisions of Rule 20 applicable to an amicus brief, the amendments provide that an amicus brief need only include certain enumerated content requirements of a party's brief in Rule 16 (i.e., amicus briefs need not provide statements of the case, facts, or standard of review). Consistent with Fed. R. App. P. 29 and Supreme Judicial Court precedent, Rule 17 now requires disclosure of certain information relating to an amicus curiae or its counsel's relationship to a party or interest in the relevant legal issue or transaction.

Format of Filings. Amendments to Rule 20 modify and clarify the format requirements for filings and are intended to promote consistency with the appellate courts' electronic-filing procedures. Importantly, the amended Rule states that page numbers shall appear in the margin and begin pagination with the cover as page 1, and pages thereafter numbered consecutively through the last page. Any addendum should continue the pagination of the document itself without beginning again at page 1. In cases involving multi-volume appendices, each volume shall be separately paginated. Color covers remain a requirement for paper-filed briefs, but no color cover is required for any electronically-filed brief.

Number of Paper Copies of Brief and Record Appendix to be Filed. Amendments to Rule 19 reduce the number of paper copies of a brief and record appendix filed in the Appeals Court from 7 to 4, and in the Supreme Judicial Court from 18 to 7. Due to advances in the appellate courts' paperless practices, fewer copies of each document are needed to process and review filings. Notably, as of September 1, 2018, the Appeals Court Standing Order Concerning

Electronic Filing requires all attorneys with cases in the Appeals Court to register in eFileMA.com and to e-file all briefs and appendices in non-impounded criminal and civil appeals, and encourages the e-filing of impounded documents in all cases.

E-Filing Costs Taxable in Civil Cases. Amendments to Rule 26 include as taxable costs the fees incurred using the electronic-filing system, which include administrative fees and convenience fees, such as credit card convenience fees.

Distinguishing “Decision” from “Rescript.” Rules 1, 23, 27, and 27.1 were amended to clarify the distinction between the appellate clerk’s release of a decision to the parties and the public, and the clerk’s issuance of the rescript to the lower court. It is the release of the “decision” as defined in Rule 1(c) that commences the timeframe to file a motion for reconsideration or modification of decision (formerly known as a “petition for rehearing”) or an application for further appellate review.

Electronic Notice from Clerk. Rule 31 was amended to provide that the clerk shall send notice to the electronic business address of an attorney that is registered with the Board of Bar Overseers, and may send paper notice by conventional mail.

Effective Date. The amendments will become effective March 1, 2019 and govern procedures in appeals to an appellate court then pending and thereafter commenced. In advance of the effective date, parties are invited by the appellate courts to immediately begin filing their appellate documents in compliance with the formatting and filing provisions of the amended Rules, on a voluntary basis. This includes use of the new word count alternative to the page limit and the filing of a reduced number of copies of briefs and appendices in the Supreme Judicial Court. However, amendments affecting time deadlines do not become effective until March 1, 2019 and until that date parties must continue to use the existing time deadlines.

Where to Find the Amended Rules. The Rules in their proposed form and the Supreme Judicial Court’s approval may be viewed on the Judicial Branch’s [website](#).

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Tax Cuts and Jobs Act of 2017: New Tax Law May Affect Charitable Giving

By M. Bradford Bedingfield

Legal Analysis

In December 2017, Congress changed the tax laws in a number of ways that affect incentives for individuals and businesses to make charitable contributions. [Pub. L. 115-97](#) (Dec. 22, 2017) (Tax Cuts and Jobs Act of 2017) (“Act”). A variety of studies published since the new law was enacted predict an overall drop in 2018 charitable giving of [as much as \\$22 billion](#) (down about 5 percent from 2017 levels), and reports from the first two quarters of 2018 do appear to show a significant drop in charitable giving compared to 2017. While many attribute this drop to the Act, opinions differ on whether the changes in legal tax incentives are truly driving, or will drive, changes in charitable giving patterns. So what incentives changed beginning 2018, and how might those changes affect decisions whether and when to give to charity?

Changes in Tax Incentives

The Act increases certain incentives for charitable giving, and decreases others. However, all of the changes described below – other than the reduction in the corporate income tax rate – are temporary, and, barring further action from Congress, will expire at the end of 2025.¹

Decreased Incentives

Standard Deduction. Most accounts of the impact of the Act focus on the increase in the standard deduction – from \$6,300 to \$12,000 for single filers and \$12,600 to \$24,000 for married and joint filers – which, along with the elimination or diminution of many itemized deductions, will convert many taxpayers from itemizers (those who itemize their deductions, and forego the standard deduction) to non-itemizers (those who instead claim the standard deduction, foregoing the ability to take itemized deductions). This change matters because the income tax charitable deduction is an itemized deduction, and therefore provides no tax benefit whatsoever to those who claim the standard deduction. Because each taxpayer chooses either to claim the standard deduction or to itemize, those who claim the standard deduction get no tax benefit from charitable contributions. Studies have estimated that more than 20 million taxpayers will convert from itemized to non-itemized filers this year as a result of the Act.

While the increase in the standard deduction clearly will change tax incentives for charitable giving, it is unclear to what extent that change will affect actual charitable giving. Many taxpayers make charitable gifts regardless of whether they will receive a tax benefit, and it is unclear the extent to which the value of that deduction actually encourages or discourages people from supporting causes that are dear to them. The effect of this change may also vary dramatically depending on the state in which a person resides. Taxpayers in states like Massachusetts are likely to have other significant itemized deductions, such as state and local taxes (despite the new \$10,000 cap on those deductions) and mortgage interest (despite new

¹ On September 28, 2018, the House of Representatives passed a series of bills, together dubbed “[Tax Reform 2.0](#),” that would make these changes permanent, but as of this article, there appears to be no movement in the Senate in that regard.

limitations on deductibility of interest from certain home equity loans), meaning that they are more likely to remain as itemizers..

Furthermore, a strategy known as “bunching” can provide a work-around for the impact of the increase in the standard deduction on charitable tax incentives. Imagine that a single taxpayer gives \$10,000 to charity per year and has no other itemized deductions. That \$10,000 per year provides no tax benefit, as the donor is better off just taking the \$12,000 standard deduction instead. But if the donor instead gives \$50,000 once every five years (and nothing in other years), the donor can file as an itemizer in the “on” year (claiming a \$50,000 itemized deduction), and as a non-itemizer in the “off” years (claiming the \$12,000 standard deduction in each of those years). While this “bunching” strategy will provide some incremental tax benefit for those who otherwise would fall below the standard deduction threshold, it will also create a certain “lumpiness” in charitable giving patterns, and the lumpiness is likely to be back-loaded if donors, choosing to wait to see more precisely how the Act’s changes will affect their personal returns, give their \$50,000 in later years rather than in the first year after the new changes.

Lower Taxes. Most taxpayers will find that they are paying taxes at a lower aggregate federal tax rate than before. This reduction in tax rates generally makes the income tax charitable deduction less valuable – because there is less tax liability to offset – even for individuals who itemize their deductions. (It also makes the charitable deduction less valuable for corporations, which now pay income tax at 21%, reduced from up to 39% before the Act). Whether, and how much, this decrease in the “value” of the tax deduction will affect charitable giving is debatable. In fact, some tout this as a change that may spur an *increase* in charitable giving, to the extent that lower taxes may increase cash available for charitable giving.

Estate Taxes. Federal estate taxes have been virtually eliminated for all but a very small number of taxpayers, as the federal estate tax exemption amount has increased to over \$11 million per person (or over \$22 million per married couple). Many fear that this will likewise reduce estate tax incentives to leave property to charity. However, the extent to which changes in the estate tax will affect the disposition of donors’ assets on death is likewise open to debate. The fact that donors are paying less in estate taxes might in fact increase charitable bequests, especially where donors (for non-tax reasons) choose to leave the residue of their estates to charity. Furthermore, because many states continue to have their own estate or inheritance taxes (especially in New England, the northern Midwest states, and the Pacific Northwest), donors in those states are less likely to change estate plans already optimized to minimize state estate taxes, many of which include charitable gifts as part of that optimization.

Ticket Rights. One minor decrease in tax incentives (although a significant one for many college football fans) is that Congress has eliminated the partial charitable deduction previously available for gifts to colleges and universities in exchange for priority rights to buy season tickets. In anticipation of this change, many colleges encouraged ticket holders to “pre-fund” their ticket-related contributions at the end of 2017. Otherwise, it is unlikely that this change will have a significant impact on charitable giving as a whole – as a graduate of a large, Southern state university, I am quite certain that, for most college sports fans, the incentives of securing priority season ticket rights far outweigh any reduced tax incentives.

Increased Incentives

While the general consensus is that the net effect on tax incentives for charitable giving is negative, the Act provided some minor boosts to charitable tax incentives.

Elimination of Pease Limitations. Prior to the Act, the so-called “Pease” limitations reduced certain itemized deductions, including certain charitable gifts, for high-income taxpayers, and thus potentially reduced the tax effectiveness of certain charitable gifts for those taxpayers. The Pease limitations have been suspended under the Act, which may provide a modest boost in tax incentives. On the other hand, it was never clear how much of an effect the Pease limitations actually had on charitable giving patterns, and so the effect of this change is likewise uncertain.

Increased AGI Limit for Cash Gifts. The primary “boost” to tax incentives for charitable giving relates to the percentage of a donor’s adjusted gross income (AGI) that may be deducted each year. Previously, donors could deduct up to 50% of their AGI for cash gifts to public charities (non-cash gifts, and gifts to so-called “private foundations,” are subject to less favorable AGI limits). Gifts in excess of this AGI limit are not deductible in the year of the gift, but may be deducted in future years, for up to five years.

The Act increased the AGI limit for cash gifts to public charities from 50% to 60%, potentially allowing certain donors to enjoy higher income tax deductions more quickly. However, because of the rather complicated way in which this increase was integrated into the existing tax code, the higher 60% AGI limit is available only when a donor is relying solely on gifts of cash to public charities, and not gifts of stock or other assets (or any gifts to private foundations), to make up that 60% amount. Many donors who give that much of their annual income are likely to have low-basis stock or other property, and the tax benefits of giving low-basis stock (namely, avoiding capital gains tax on the stock’s appreciation) to public charities significantly outweighs the benefit of this increased AGI limitation. In other words, on balance, most donors will still effectively be capped at the lower 50% of AGI limit. Although it is too early to know for certain, it seems likely that very few taxpayers will see any practical benefit from this increase.²

Good or Bad for Charitable Giving?

It is too early to know whether the Act will result in more or less charitable giving. Many popular strategies for saving taxes by making charitable gifts – for example, making gifts of appreciated property, or direct charitable IRA rollovers – remain effectively unchanged. For many taxpayers, the effects of the Act may not become evident until they see their first tax returns in 2019, and it may not be until then that they start to consider changing their charitable giving strategies. While it does appear that giving is down in 2018 (compared to 2017), this could be attributable to a number of things. For example, 2017 was a record year for charitable giving, in part because many tax advisors urged donors to make large charitable gifts at the end of 2017, at least in part to offset the higher 2017 tax rates. A corresponding drop in charitable

² [House Bill 6760](#), 115th Cong. (2017-2018) (Protecting Families and Small Business Tax Cuts Act of 2018), part of the “Tax Reform 2.0” initiative passed by the House on September 28, 2018, would expand the ability of taxpayers to take advantage of the higher AGI threshold – however, it is unclear whether the Senate intends to participate in “Tax Reform 2.0,” or whether this provision might make its way into some other bill with bicameral support.

giving in early 2018 might be a natural consequence of the fact that many taxpayers effectively pre-funded their anticipated 2018 contributions at the end of 2017. Other taxpayers may be temporarily holding off on giving in anticipation of “bunching” contributions in later years, or may otherwise be delaying the timing of their gifts, even if they intend to maintain past levels of giving in the aggregate.

At the end of the day, it is likely that only a particular subset of donors who will be significantly affected by these changed tax incentives. Donors who were non-itemizers before these changes are likely to remain so, and will see no meaningful change in tax incentives for charitable giving. Conversely, donors who previously were itemizers and, because of significant other itemized deductions, will remain so, still have plenty of incentives to find tax-efficient ways to reduce the burden of income or estate taxes by making charitable gifts. Anecdotal discussions with charitable giving and estate planning professionals indicate no significant shifts in donor interest in long-term charitable giving, including planned giving, among filers already likely to itemize. However, donors who are in that intermediate space between itemizing and not itemizing should take a close look at their particular tax profiles and consider “bunching” and other strategies to allow them to maximize the impact of their income tax charitable deductions over the long term under the Act.

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Standing in the Wake of Rental Property Management Services v. Hatcher: Only the Owner or Lessor May Use Summary Process to Evict Tenants and Property Agents that File Such Actions Are Engaging in the Unauthorized Practice of Law

By Lauren D. Song

Practice Tips

On May 15, 2018, the Supreme Judicial Court articulated a bright line rule strictly construing the summary process statute, [G.L. c. 239, § 1](#) (“[Statute](#)”), to hold that “[o]nly a person entitled to the property as owner or lessor may bring an action to recover possession” against a tenant, and non-attorney property agents who sign and file summary process complaints on behalf of owners are “engag[ing] in the unauthorized practice of law.” *Rental Property Management Services v. Hatcher*, [479 Mass. 542](#), 547 (2018) (“[Hatcher](#)”). In rejecting the application of agency principles that would enlarge standing in summary process to property agents, the Court also admonished that the unauthorized practice of law by such agents “seriously undermines the fairness of summary process . . . , especially where the vast majority of tenants in such cases are self-represented.” *Id.* at 553-554, n. 11. This article discusses procedural considerations in determining summary process standing in the wake of *Hatcher*.

Determining Whether Standing Exists In Fact

Hatcher comes at a time when the [majority of the nation’s 47.5 million residential rental units is no longer owned by “mom-and-pop” landlords](#) personally known to the tenants but by institutional and corporate owners that [often remain undisclosed to tenants](#). Such owners typically operate through property agents so tenants may not know that the party to whom they tender rent is not the owner of the property. Tenants also often are not privy to changes in the ownership interests—e.g., through foreclosures, dissolutions, mergers, acquisitions, bankruptcies, and even assignment of leases—that may affect who has standing to bring and maintain an eviction action against them. *See Billings v. GTFM, LLC*, 449 Mass. 281, 289-96 (2007) (standing must exist as of the commencement of the action and continue throughout the litigation). And as the Court highlighted in *Hatcher*, a “plaintiff’s lack of standing will not be apparent on the face of the [summary process] complaint,” because the [form complaint](#) promulgated under the Uniform Summary Process Rules (“[USPR](#)”) which govern summary process proceedings identifies all pleaders categorically as “PLAINTIFF/LANDLORD/OWNER.” 479 Mass. at 548. Notwithstanding challenges to determining whether plaintiff-standing exists in fact,” in fiscal year 2017 alone, [40,503 summary process cases](#) were filed throughout Massachusetts in which over [90% of the tenants were self-represented](#).

Summary Process Standing Cannot Be Delegated to Agents

Hatcher rejects agent standing in summary process based on the well-established principle that “[s]ummary process is a purely statutory procedure and can be maintained only in the instances specifically provided for in the statute.” *Id.* at 546, quoting *Cummings v. Wajda*, 325 Mass. 242, 243 (1950); *see also Buron v. Brown*, 336 Mass. 734, 736 (1958) (“The purpose of [the Statute] is to give possession to those whose possession has been invaded or who have a right to possession and are within a category defined therein.”). In actions against tenants, therefore, “it

is essential that there should be proof of the relation of lessor and lessee, or of landlord and tenant, between the plaintiff and defendant.” *Id.*, quoting *Ratner v. Hogan*, 251 Mass. 163, 165 (1925).

Hatcher also squarely holds that the standing requirements in summary process are jurisdictional: “where the plaintiff lacks standing to bring an action, the court lacks jurisdiction of the subject matter and must therefore dismiss the action.” *Id.* And since “[s]ubject matter jurisdiction cannot be conferred by consent, conduct or waiver,” *id.*, quoting *Litton Business Sys., Inc. v. Commissioner of Revenue*, 383 Mass. 619, 622 (1981), it is legally ineffective for owners or lessors to purport to authorize their agents to bring summary process actions to evict their tenants:

“it is legally irrelevant whether the plaintiff is the agent or attorney of the owner or lessor, or whether the plaintiff has obtained the express approval of the owner or lessor to bring the action in the plaintiff’s name. *Only a person entitled to the property as owner or lessor may bring an action to recover possession of that property.* See G.L. c. 239, § 1.”

Id. at 547-548 (emphasis added).

Who Bears the Burden of Proof on Plaintiff’s Standing?

In most civil actions, jurisdictional standing is a threshold issue typically resolved early by a motion to dismiss for lack of subject matter jurisdiction under Mass. R. Civ. P. (“Rule”) 12(b)(1), and/or for failure to state a claim upon which relief can be granted under Rule 12(b)(6). In the fast pace of summary process, however, standing is seldom challenged and if at all, usually raised in the context of a Rule 56 motion for summary judgment, as in *Hatcher*. How jurisdictional facts become controverted is important on who bears the burden of proof. [*Williams v. Episcopal Diocese of Mass.*, 436 Mass. 574](#), 577 n.2 (2002).

- Under Rule 12(b)(1), the burden remains with the plaintiff as the party invoking standing to prove its jurisdictional facts by a preponderance of the evidence, and the court does not assume the plaintiff’s factual allegations in the complaint to be true. [*Caffyn v. Caffyn*, 441 Mass. 487 \(2004\)](#).
- Under Rule 56, the burden shifts to the tenant as the moving party to establish that the plaintiff has no reasonable expectation of proving it is a “person entitled to the land or tenements” under the Statute, and the record would be viewed in the light most favorable to the plaintiff as the non-moving party. See *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991).

It bears caution that consideration of matters outside the pleadings will convert a Rule 12(b)(6) motion to a motion for summary judgment, with the corresponding burden shifting to the tenant as the moving party, but “[s]uch is not the case when deciding a motion to dismiss under [R]ule 12(b)(1)” where the conversion to Rule 56 principle does not apply. *Watros v. Greater Lynn Mental Health & Retardation Ass’n, Inc.*, 421 Mass. 106, 109 (1995). When motions to dismiss are filed under both Rule 12(b)(1) and Rule 12(b)(6), courts ordinarily decide the Rule 12(b)(1)

motion first. See *Northeast Erectors Ass'n of BTEA v. Secretary of Labor, Occupational Safety & Health Admin.*, 62 F.3d 37, 39 (1st Cir. 1995).

- Under Rule 12(h)(3), “whenever it becomes apparent to a court in a summary process action that a plaintiff may not be the owner or lessor of the property, the court is obligated to inquire into the plaintiff’s standing and, if it determines that the plaintiff lacks standing, it must dismiss the action [with prejudice] for lack of subject matter jurisdiction, regardless of whether any party raises an issue of standing.” *Hatcher*, 479 Mass. at 547.

It also bears reminder that in discharging this independent obligation, judges have broad discretion to make findings outside the four corners of the pleadings and to use any method of obtaining evidence, including ordering discovery, affidavits or other documentary evidence and taking depositions and oral testimony. *Ginter v. Commissioner of Ins.*, 427 Mass. 319 (1998).

Dismissal with Prejudice Is Compulsory If the Plaintiff Lacks Standing

Hatcher also mandates that “where the plaintiff in a summary process action is neither the owner nor the lessor of the property, the court must dismiss the complaint *with prejudice* for lack of subject matter jurisdiction” because the “lack of standing is also fatal to the merits of the plaintiff’s claim” for possession. *Id.* at 547 (italics added). This bright line rule reflects that under USPR 2, summary process actions are deemed commenced only upon service on the defendant of “a properly completed” complaint (after which the original complaint is filed in court), and a complaint that fails to name a plaintiff with a statutory entitlement to recovery of possession is not only incompetent to commence a justiciable action but also determinative that the plaintiff’s claim for possession is without legal merit. And while such dismissal with prejudice “would not bar the true owner or lessor of the property from filing a new complaint,” where the complaint fails to name the true owner or lessor of the property as the plaintiff in the first instance, the court is without discretion to permit any amendment, substitution or other corrective remedy but must dismiss the complaint with prejudice.

In contrast, if the complaint names a proper plaintiff but is improperly signed, filed and/or prosecuted by a non-attorney agent, a valid summary process action has commenced, and although the court must address the unauthorized practice of law by the agent, the judge has the discretion either to order the immediate dismissal of the action, or allow a conditional dismissal “on a designated date unless the plaintiff before that date retains counsel or proceeds pro se, and amends the complaint accordingly.” *Id.* at 551.

It bears reminder that any judgment issued without valid subject matter jurisdiction is void. *Harris v. Sannella*, 400 Mass. 392 (1987). And the defense of lack of subject matter jurisdiction cannot be waived for any reason and may be raised at any time, even after final judgment is entered and for the first time on appeal *sua sponte* by the appellate court. *Id.* at 54, n. 5, citing *ROPT Ltd. Partnership v. Katin*, 431 Mass. 601, 607 (2000); see also *Prudential-Bache Securities, Inc. v. Commissioner of Revenue*, 412 Mass. 243 (1992); *Talmo v. Zoning Board of Appeals*, 93 Mass. App. Ct. 926 (2018). While the dismissal for lack of subject matter jurisdiction is ordinarily considered a “final order” subject to immediate appellate review *de*

novo, the denial of a motion to dismiss for lack of subject matter jurisdiction is an interlocutory order.

Conclusion

In the wake of *Hatcher*, parties now have clear guidelines and strong incentives to resolve promptly any questions that may impact the plaintiff's standing. By reviewing early and updating regularly information relevant to the parties' status with respect to the property at issue, parties can avoid considerable expense, trouble, and delay in the just, speedy, and inexpensive determination of their rights and obligations under the Statute.

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