

# Boston Bar Journal

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## Legal Aid Funding Is Not “Wasted Money”

By BBA President Carol A. Starkey

President’s Page

“No more wasted money,” is how President Trump has characterized his proposal to cut \$54 billion from the federal budget. To get there, the administration has placed the Legal Service Corporation (LSC) and its approximate \$366 million in federal appropriations on the chopping block. The President’s budget – released in March – eliminates this program entirely, a proposal that attempts to carve out the backbone of civil legal aid to the poor in this country. The consequences of such a proposal would, at best, render those most vulnerable amongst us unable to properly access our courts for daily needs such as housing, health care or safety, and at worst, keep them from exercising their basic rights to survive in this country.

Last month, I once again had the privilege as your Bar Leader to travel to Washington, DC to meet with members of the Massachusetts delegation and advocate for the reinstatement of funds as part of **a larger lobbying effort** with the American Bar Association. Shortly after those visits, a deal was struck in Congress to fund LSC through October 1<sup>st</sup>. This is good news in the short term, but when it comes to access to justice, short term solutions are not nearly enough.

Quite simply, LSC provides necessary legal aid to low income individuals and families in Massachusetts and throughout this country at large. The LSC is an independent nonprofit established by Congress in 1974 to provide financial support for civil legal aid to low-income Americans. LSC is a grant-making organization, distributing more than 93% of its federal appropriation to eligible nonprofits delivering civil legal aid. It is the largest single funder of civil legal aid in the country, including \$5 million annually to Massachusetts-based legal services organizations.

The need for this essential service is undeniable. In the United States, 80 percent of qualified applicants – those who meet the income eligibility requirements and face serious legal problems – are turned away simply because there isn’t adequate funding to take them on as clients. This figure is unacceptably high. These are people, amongst others, who are our neighbors being wrongfully evicted from homes, women and children in our communities already made vulnerable by poverty trying to safely escape abusive partners, parents trying to advocate for a beloved child with special needs, and veterans, many of whom come home struggling with serious mental and physical health issues, trying to secure the benefits that are rightfully theirs, so as not to end up homeless.

This urgent need alone is enough to justify keeping this line item, which represents about one hundredth of one percent of the entire federal budget. But what if Congress and the President also knew that preserving LSC would actually save taxpayer money *and* support the economy? That’s just what three independent economists conducting separate evaluations have found. In 2014, the Boston Bar Association (BBA) released **Investing in Justice**, a report which showed that taking a preventive approach to legal issues would help families, save government funds and ensure fairness in our justice system. Simply put, investing in civil legal aid programs pays dividends by avoiding back-end costs.

The BBA report – representing the work and opinions of legislators, judges, business leaders, academics, and legal services representatives – is the result of 18 months of intensive research

into the problems and unseen costs that arise when people do not have access to adequate legal assistance.

For example, in Massachusetts, when studying the impact on state expenditures of representation by a civil legal aid attorney in eviction and foreclosure cases, economists at The Analysis Group concluded that for every dollar spent on civil legal aid in eviction and foreclosure cases, the state stands to save \$2.69 on the costs of other state services, such as emergency shelter, health care, foster care, and law enforcement.

In addition, the firm Alvarez & Marsal analyzed the costs of domestic violence and what savings could occur if additional civil legal aid representation was available in such cases. They determined that every \$1 spent on legal aid yields \$2 in medical and mental health care savings, including \$1 to the state and \$1 to the federal government.

The Boston Bar Association has long argued that legal assistance is an essential service for those who are struggling to deal with the issues that go to the heart of their families and livelihoods, like housing and personal safety. But we can also make the case that it is the fiscally prudent thing to do.

Others can, too. We need our leaders – both in Washington and here at home – to understand that advocating for every American to have access to justice is not only a just cause, but a sound investment that is worth our resources.

As lawyers, you have a valuable perspective to bring to this issue, one that lawmakers will find substantive and relevant. To that end, I'm pleased to share the Boston Bar Association's podcast: **[How to Talk to Your Legislators About Civil Legal Aid](#)**, featuring an interview with Equal Justice Coalition Chair Louis Tompros of WilmerHale.

I hope you enjoy it, and then reach out to both your state representative and your senator in support of increased funding for legal aid. Your voice is needed to tell legislators and others how much we care about legal aid funding, backed up by our findings that investing in civil legal aid actually saves money while improving people's lives.

*Carol A. Starkey is the president of the Boston Bar Association. She is a partner at Conn, Kavanaugh, Rosenthal, Peisch & Ford.*

## **Enhancing Families Through Literature: An Innovative Way to Decrease Conflict**

**By Hon. Richard A. Simons**  
**Voice of the Judiciary**

As trial court judges, we sit in a unique position to place the litigants who appear before us on a path toward changing behaviors that have previously led to poor decision making. For example, in the context of the Probate and Family Court, judges routinely issue orders to (a) coerce a recalcitrant parent to honor his/her financial obligations toward his/her children; (b) create incentives for a parent suffering from substance abuse disorder to obtain treatment by predicating access to children upon engaging in treatment; and (c) address issues of violence in the home by ordering enrollment in intimate partner violence prevention programs. At times, these interventions have been successful in changing the trajectory of an entire family's life.

A unique feature in the Probate and Family Court is that many of our cases go on for years. While we may be successful in resolving the issues in a divorce or unmarried custody case, we often times see the parties again and again on subsequent complaints for modification or complaints for civil contempt. Not only do these frequent case filings crowd our busy dockets and drain valuable court resources, but they also foment inter-parental conflict which adversely impacts their children's emotional adjustment and development. In my time on the bench, I have even begun to hear the disputes of grown children born of parents over whose custody cases I have presided. The cycle of poor decision-making and ineffective conflict resolution continues unabated.

In the fall of 2013, my Chief Probation Officer, Amy Koenig, and I attended a Judicial Institute training program for courts considering starting a *Changing Lives Through Literature* ("CLTL") program in their court. We arrived curious yet somewhat skeptical. A few hours later however, we left the program energized and inspired. We heard from Judges Robert Kane, Rosalind Miller and Kathe Tuttmann, who passionately shared their observations of how the study of literature was used as a tool by probationers to change their behavior. College professors and probation officers joined the chorus of describing the success of this alternate sentencing program.

On the car ride back to the Berkshires, Chief Koenig and I began to brainstorm how we could make this program work in the Probate and Family Court. We faced unique challenges in our court that those in other trial court departments did not have to confront. We do not have litigants "on probation" in the Probate and Family Court. How would we mandate attendance? Who should attend the program? Mothers? Fathers? Should the parties attend together? If they were to attend the program together, what child care coverage should be made available for their children? What time of day could we have such a program when time is at such a premium for young working families?

These challenges provided opportunities to explore and create a meaningful program for young families who find themselves in the midst of a child custody dispute in the Probate and Family Court. Holding onto the essential ingredients of the successful program of CLTL, we developed a twelve week intervention program called, *Enhancing Families Through Literature* ("EFTL"). The court issues an Order requiring the parties to attend the program along with their children. Monetary sanctions (or community service orders for indigent litigants) are imposed

for any non-compliance with the court's Order. Chief Koenig and I participate with the families in each of the sessions.

The program takes place at our local library once per week for twelve weeks, from 5:00 p.m. to 7:00 p.m. The evening begins with parents enjoying a catered meal together with their children. At 5:30, the parents retire to one area of the library, and the children go to a separate area. For the first eight weeks, the parents participate in a traditional "CLTL" formatted program. Our facilitator, Professor Matthew Müller, from Berkshire Community College, leads a discussion on assigned readings, including works by Raymond Carver, William Faulkner and Franz Kafka. While the parents are studying literature, the children are participating in a program led by four certified Head Start Teachers called "Every Child Ready To Read Program" developed by the Association for Library Service to Children and the Public Library Association.

The final four weeks of the program consist of an interactive program among parents and children led by the early childhood educators. They teach about the importance of the word in parenting. Reading to children is modeled for parents. Parents and children work on projects together. At the conclusion of each of the twelve sessions, each child is given a book, so that by the end of the program the child's library has increased by 12 books.

The program culminates in a graduation ceremony at the courthouse. In addition to gifts of books awarded to all participants and children, Berkshire Community College issues a transcript to each parent documenting an earned college credit. Participants speak and share what the program meant to them and their family. One of the speakers at last year's graduation proudly shared the following:

*My time in the literature segment with Professor Müller gave me a chance to experience literature that I've never read before. His approach, great personality brought the words of those stories to life. Admittedly I couldn't understand why our selected readings were so dark and almost never had the traditional "happy ending" or resolution. Then it dawned on me recently; **Perspective**. Perspective is everything, not only in literature but it applies to real life in many ways by giving us a dose of allegorical reality. Never judge a book by its cover, and never judge a person too quickly or you might miss out on someone that could change your life forever.*

The study of literature within this magic framework of classes with a judge, probation officer and college professor challenges participants to see the world through different eyes. During class, participants hear differing views and interpretations of the same stories from classmates. Imagining how each character in a story feels often leads to eye-opening discussions. The discussions lead to listening. Listening leads to tolerance. Tolerance leads to acceptance. Acceptance leads to communication. Communication leads to better conflict resolution.

People share their thoughts, without judgment, and in doing so provide themselves and their co-parent with important insights and understanding. One year, we were discussing the short story, "Bodies" by Phil Klay, an American writer and Iraq veteran. One of the participants was a man who was deployed several times to the Middle East and rarely displayed any emotions other than anger. He began to open up and shared how his feelings toward deployments changed after the birth of his son. What I did not realize at the time was that this statement broke the ice

between him and his child's mother. She confided in the instructor that she never knew he prioritized his son in that fashion. From that point, on they began to talk and compare notes about their son.

The benefits of this program continue to unfold. Parents begin to see themselves as a team raising their child rather than adversaries in a courtroom. In addition, the wonder of reading to children is spread to families that might not have experienced this joy before. Parents experience how snuggling and reading with a child opens up communication between parent and child as well. Most important, the overwhelming majority of these families resolve their pending cases by agreement as they begin the journey of resolving future conflicts through communication and negotiation.

As with other worthwhile programs offered in the Trial Court, *Enhancing Families Through Literature* empowers litigants to make lasting changes in their behavior, leading to better decisions for them and for their children.

*Judge Simons is the First Justice of the Berkshire Division of the Probate and Family Court. In 2016, he and Chief Koenig were recognized by AFCC for innovation in a court-connected program.*

## Can Judges Tweet? Judicial Ethics in the Social Media Age

By Hon. Robert B. Foster

Voice of the Judiciary

The rise of social media has created questions for judges that would not have occurred to anyone ten or fifteen years ago. May a judge have a Facebook page? Must judges delete their Linked-In accounts after being appointed to the bench? Is it possible to use a Twitter account consistent with the **Code of Judicial Conduct**? These three questions are a modern twist on the dilemma judges have always faced: how does a judge maintain the integrity, independence, and impartiality of the judiciary without losing all contact with the world about which the judge is asked to pass judgment?

The answer to these questions starts with the Code, most recently revised effective January 1, 2016. The **Committee on Judicial Ethics** (CJE) is the SJC-appointed body charged with interpreting the Code and answering specific questions about the Code's application. Much of its work consists of letter opinions, issued in response to judges' questions. In 2016, the CJE issued letter opinions answering these three questions yes, no, and yes, but only under certain conditions that ensure that the judge acts online consistently with the Code.

The first letter opinion concerns **judges' use of Facebook**. For the few people left who are unfamiliar with it, Facebook is an online social media platform. Participants create a page about themselves on which they can post news and personal information. Importantly, Facebook members "friend" other members, so that they can see their friends' posts and their friends can see theirs, and can comment on or indicate they "like" others' posts. In the letter opinion, the CJE set forth some of the provisions of the Code that use of Facebook implicates. These include Rule 1.2, requiring judges to "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary" and to avoid even the appearance of impropriety; Rule 1.3, which bars the abuse of the judicial office to advance the personal or economic interests of the judge or others; Rule 2.3, barring bias, prejudice or harassment; Rule 2.4, requiring judges not to permit personal, financial, or political interests or relationships to influence or appear to influence their judgment; Rule 2.9 against ex parte communications; Rule 2.10 against judicial speech on pending matters; Rule 2.11 on disqualification; and Rule 4.1 prohibiting judges from participating in political and campaign activities. All these are swept up in Rule 3.1, "which provides that a judge must conduct all extrajudicial activities in a manner that does not interfere with Code principles and provisions."

Applying these provisions, the CJE found that judges could use Facebook, even identifying themselves as judges, so long as they do not do things like comment on pending matters, make political or commercial endorsements or comments, do anything that looks like an ex parte communication or suggests that anyone is in a position to influence the judge, or post anything that conflicts with the dignity of judicial office. Moreover, a judge must not "friend" any attorney who might appear before the judge. In short, the CJE reminded judges that Facebook is public, and any comment, and even any "like" of another person's post, is a public communication that must be made within the strictures of the Code.

The next letter opinion concerned a **judge's use of Linked In**. Linked In is a kind of professional Facebook, a "business-oriented social networking site." Applying the principles set

forth in its Facebook letter opinion, the CJE stated that the Code allows the use of Linked In so long as the judge is “not . . . connected with any attorney who is reasonably likely to appear before the judge.” The judge must not only avoid connecting with such attorneys, but must also disconnect with any attorneys with whom the judge is currently connected.

The last of the three letter opinions concerns a **judge’s use of Twitter**. As the CJE quite cogently explains, Twitter is a social network that permits users to post “tweets” of up to 140 characters, plus images or videos. “Twitter is meant to be shared; users follow selected other users.” A user’s homepage includes a “feed” that displays tweets from the Twitter accounts the user is following. A user can post selected tweets from the feed, a practice known as “retweeting.” Importantly, “[u]nless the user indicates otherwise, the act of retweeting generally suggests that the user endorses the views expressed.” A user’s tweets and retweets show up on the feeds of the user’s followers, and are also publicly available to anyone who visits twitter.com.

The letter opinion addresses how a current judge uses Twitter. It begins by reiterating the Code provisions implicated by the use of social media that the CJE discussed in its Facebook opinion. It repeats that judges are not barred from using social media, so long as that use is consistent with the Code. It goes on to note, however, that use of Twitter raises some particular issues. The Twitter account in question identifies the user as a judge, and “when a judge is posting publicly as a judge, the judge must be exceptionally cautious” because “the public may perceive the judge’s communications to have the imprimatur of the courts.” Therefore, in general “a public, unrestricted Twitter account of an identified judge may be used only for informational and educational purposes.” Specifically, a judge may share upcoming and past bar events and news of general interest to the bar, report on case decisions of the SJC or other courts, and advise lawyers on trial practice. The judge must be careful, however, not to do so in ways that appear to compromise the judge’s impartiality or demonstrate a personal bias or opinion for or against a person or a political issue. The letter opinion also reminds judges that these considerations also apply to retweets, and to the list of other Twitter accounts that a judge follows, as all of these are public.

As the CJE recognizes, it does no good for a judge to withdraw completely from society. Judges must maintain contact with the world that they are asked to judge; they must have some understanding of the social circumstances of the people who appear before them. Thus, judges are entitled to have friends, to have conversations at parties, to attend public and social events. The caveat is that they must do so within the confines and requirements of the Code and in a way that does not call into question their fairness and impartiality or that of the judiciary. Social media in their various forms are an amplification of the direct social contacts and interactions of a judge. Social media make it possible for a judge to interact with friends over a far wider range than in person. The big difference is that these interactions are far more public than a conversation at a dinner party. The simple rule for judges who use social media is to keep this in mind and not to say anything on Facebook or Twitter that they could or would not say in any other public setting.

*Hon. Robert B. Foster is an Associate Justice of the Massachusetts Land Court. Before his 2011 appointment, he practiced with Rackemann, Sawyer & Brewster, P.C. He is a graduate of Haverford College and Harvard Law School.*

**Virtually There: e-Filing Becomes a Reality in the Massachusetts State Courts**  
**By Hon. Maura S. Doyle, Francis V. Kenneally, Joseph Stanton and Kim J. Wright**  
**Voices of the Judiciary**

In the spring of 2014, the Massachusetts Judicial Branch contracted with Tyler Technologies, Inc., to pilot e-filing through Tyler’s Odyssey File and Serve platform. Although the Federal PACER system is well established, it is not available to states, necessitating that Massachusetts develop its own system. Three departments of the Trial Court, and each of the appellate courts, designated certain case types – and in the case of the Trial Court departments, pilot locations – for their respective e-filing pilots. Over the next 18 months, pilot court personnel teamed with the Courts’ Judicial Information Services Department and Tyler Technologies to establish both a general e-filing system for the Judicial Branch and specific systems tailored to each pilot court’s particular filing requirements. After extensive testing and training of volunteer attorneys for each pilot court, attorneys who regularly filed pilot case types in those pilot courts were invited to e-file. The e-filing system allows a user registered with Tyler to remotely upload a pdf for a court filing in a specific case, select the appropriate court description of the filing from a dropdown menu, electronically serve it on other parties, and file it electronically with the court, generating an appropriate entry on the docket and a link to the pdf in the court’s document management system, without any paper original or duplicate being filed. Tyler charges a modest convenience fee for civil filings that the courts can waive for indigent parties and government filers.

Beginning in the fall of 2015 and continuing through the spring of 2016, the various pilots were conducted on a phased basis. In June 2016, participants conducted an assessment of the pilots, toward a decision whether to proceed with Tyler beyond the pilots to full implementation. Attorneys were asked specifically for input on the registration process, the value of any assistance received from the vendor and specific questions about the e-filing process, including adding service contacts, serving documents through the Odyssey File and Serve, uploading pdfs and making payments.

Overall, responses to the survey were positive. The overwhelming majority of attorneys indicated that they did not encounter problems in registering as a filer, found filing cases to be “easy” or “moderately easy,” had little difficulty uploading PDF documents, and did not encounter problems with making a credit card payment. Comparatively modest concerns were identified for adjustment and improvement during continued implementation. Based on the positive results of the assessment, the Supreme Judicial Court, the Appeals Court and the Trial Court decided to move forward with Tyler Technologies and expand e-filing.

## **A Closer Look**

### **Appellate Courts**

Before describing the current – and future – state of e-filing in the Appellate Courts it is worth taking a brief look back at the foundation the Courts built over the past decade, in preparation for e-filing. During that time, the Courts have adopted a number of paperless practices, including: scanning decision-related documents (e.g., briefs, transcripts, and record appendices); coordinating with the Trial Court for production of transcripts in PDF; adopting standing orders for court notices and filings by e-mail; permitting electronic signatures and service; encouraging

Judges and court personnel to utilize PDFs and electronic editing features in their daily work, and equipping them with the necessary software and hardware to do so; storing PDFs in the Courts' document management system for access by all court personnel; electronic distribution of, and remote access to, case documents by Justices; and, within the Appeals Court, reducing the number of required paper copies from 7 to 4. Briefs in non-impounded cases scheduled for argument are made available to the public on the Courts' website. For the past year or two, the overwhelming majority of judges on the Appeals Court, and a majority of the Justices on the SJC, have prepared for, and participated in, oral argument working exclusively from PDFs on an iPad, and iPads also are used by staff attorneys and other personnel to assist in their paperless practice. The Reporter of Decisions electronically edits and publishes the Courts' opinions, and has transitioned to a completely paperless release of advance sheets.

In addition, the SJC for the Commonwealth has transmitted briefs and transcripts to the U.S. Supreme Court via cloud-based technology. Within the SJC for Suffolk County, more than 3,000 annual petitions for admission to the bar are scanned and electronically stored, before being digitally reviewed by the Board of Bar Examiners, single justice decisions are electronically transmitted upon request, and most written communication between counsel and the clerk's office occurs by email. More than 4,000 annual filings of required bar admission data from law schools and the National Conference of Bar Examiners, formerly in hard paper copies, now are filed in digital format and are stored in the court's case management system, and partial electronic processing has led to a reduction by more than fifty percent in hard copy paper filings incident to requests for Certificates of Admission and Good Standing. Finally, the Appeals Court stored over 17,000 pdfs of court filings in 2016.

In sum, the paperless foundation and experience developed over the past decade has prepared the Appellate Courts for the advent of electronic filing.

The Supreme Judicial Court for the Commonwealth launched its e-filing pilot on November 2, 2015. For the first time, attorneys e-filed applications for direct and further appellate review, a significant departure from past practice where the appellate rules require 18 paper copies – on average over 1000 pages per application. The build-up to the launch required extensive planning by the clerk's office and assistance from attorneys, civil and criminal alike, who beta-tested and provided critical feedback that led to improvements in the e-filing system. On October 14, 2015, Clerk Kenneally conducted a free e-filing seminar sponsored by MCLE and attended by hundreds online and in Boston. MCLE continues to offer **the archived program** free of charge on its website. Perhaps the most telling statistic to illustrate the success of e-filing to date is the high rate of attorney participation particularly in light of national averages where e-filing is not mandatory. Tyler Technologies, the project's e-filing vendor, estimates that participation rates in states where e-filing is not mandatory is about 15%. The clerk's office for the Commonwealth presently has an estimated 80% participation rate that has led to substantial savings in time and money for attorneys who no longer have to worry about the burden of printing paper, delivering applications, and rushing to the courthouse by closing time. For the Justices of the Supreme Judicial Court, accustomed to reviewing over 100 paper applications monthly, e-filed versions are now loaded onto iPads that provide portability and ease of use. At present, expansion from applications to briefs and appendices in full court cases is under review and the clerk's office hopes to offer further relief from paper production in the future.

In January, 2016, the Supreme Judicial Court for the County of Suffolk initiated its e-filing pilot, encompassing all bar docket cases filed on and after January 1, 2016. This required extensive training of the staff at the Clerk's Office, Office of Bar Counsel and the Board of Bar Overseers (BBO). Because bar discipline actions are initiated by only two entities, the Office of Bar Counsel and the BBO, all such actions are now filed electronically. Any responsive pleadings that are not e-filed are scanned by the County Clerk's Office, thereby making all pleadings entered in any bar docket cases filed on or after January 1, 2016, entirely electronically available. In 2017, Clerk Doyle will be implementing the e-filing of petitions for admission to the bar on motion and, thereafter, petitions for admission to the bar by examination.

Among all the Courts, e-filing is perhaps furthest along at the Appeals Court. The Appeals Court launched its e-filing pilot in March 2016, allowing attorneys to initiate and file most documents electronically in civil, non-impounded panel appeals, without any paper original or duplicate filing. The court has since expanded its program to include criminal appeals, self-represented litigants (SRLs), and imminently, the single justice ("J") docket (e.g., interlocutory petitions). The Appeals Court now accepts electronic filing of nearly every type of document from attorneys and SRLs in all non-impounded cases, with no paper required. Thus, briefs, record appendices, transcripts, motions, status reports, and payment of entry fees may be filed electronically.

Attorneys and SRLs are enthusiastic and e-filing at high percentages, with participation tripling over the winter as several hundred e-filings are submitted monthly. E-filed briefs already exceed the number of paper briefs filed each month and the parties—including CPCS and government filers—are saving significant costs by not providing multiple paper copies of record appendices. To file and serve electronically, filers first need to become familiar with new procedures and software programs. Creating a PDF with optical character recognition, merging a word-processed brief with a scanned addendum into a single PDF, or creating an e-filing account and identifying service contacts for each submission involve new steps—but once completed are easily reproduced the next time. The Appeals Court's website provides **detailed e-filing explanations and user guides** about the court's procedure and format requirements. Upon entry of every new case in all three appellate courts, the clerk's office notifies the parties in writing about the availability of e-filing and includes information on how to become a registered user and to view **information on e-filing, including court rules and training videos**, through Tyler Technologies. The Clerk's Offices in all three appellate courts also provide daily telephone assistance to e-filers and have held several public training seminars.

The Appellate Courts' e-filing programs have increased access to justice by providing SRLs the opportunity to e-file and substantially reducing their copying and shipping costs. Further, indigent parties may obtain waiver of e-filing related costs. Additionally, the Clerks' Offices provide a public computer with a scanner where any litigant or attorney can scan and e-file documents. In addition, the Appeals Court has launched a pilot program allowing Trial Courts to electronically transmit the assembly of record on appeal, and the SJC and Appeals Court send electronic notices of orders and decisions to lower court clerks, judges and counsel (in the case of the SJC for Suffolk County, Bar Discipline orders and decisions similarly are sent electronically to the Board of Bar Overseers, the Office of Bar Counsel, respondent, and counsel).

## **Trial Court**

The Trial Court piloted the program at three separate courts – Worcester District Court in September 2015, the Brighton Division of the Boston Municipal Court (BMC), and the Essex Division of the Probate and Family Court in early 2016. The Quincy District Court became an additional site in March 2016. In the District and Boston Municipal Courts, the pilots included civil case types, while the Probate and Family Court designated Estate Cases to be e-filed.

For the past several months all Trial Court departments have been actively engaged in planning expansion and implementation, with the pilot court departments taking the lead. In those departments, the expansion includes additional case types and locations. Over the next six months, the District Court and BMC will work to provide e-filing for all civil cases, including small claims and supplementary process in all locations. The Probate and Family Court will expand to all locations and will increase available case types from the designated Estate Matters to Divorce complaints filed pursuant to G. L. c. 208, § 1B, and adult guardianship matters.

The expansion of e-filing in these departments will be done through a series of phases beginning in the spring and continuing throughout the year until the opportunities for e-filing are available at all of those court locations throughout the state. The expansion is being planned by geographical regions in order to provide attorneys with the opportunity to use the electronic filing in the various courts they frequent. In March, Probate and Family Court locations in Bristol, Norfolk and Duke Counties and District Courts in Fall River, Attleboro, Taunton, New Bedford, Edgartown Brookline, Dedham, Stoughton and Wrentham all went live. The second phase, scheduled for early May, will bring e-filing to Probate and Family Courts in Plymouth, Barnstable and Nantucket, and District Courts in Barnstable, Falmouth, Orleans, Nantucket, Wareham, Brockton, Hingham, Plymouth, Milford and Uxbridge.

Plans are also underway to expand e-filing to the Land, Housing and Superior Court Departments. Implementation teams are meeting and plans for intricate code set up and integration and testing are in place. A comprehensive effort to train employees across the state is planned and Tyler Technologies will provide materials and free training opportunities for the bar.

The Superior Court pilot will offer e-filing for all tort actions. The Superior Court will begin by piloting the process in Middlesex and Barnstable Counties and then expand to the remaining County locations.

The Housing Court pilot will make e-filing available in Small Claims and Summary Process matters. The initial pilot site will be the Boston Housing Court.

The Land Court is in the early planning stage but its singular location will ensure a quick roll out once set up, testing and training is completed.

Tyler Technologies has also provided the Trial Court with access to its online guided interview tool, Odyssey Guide and File, for self-represented litigants. The Guide and File technology provides the opportunity for the Trial Court to improve Access to Justice for self-represented litigants through the creation of on line interviews that populate the court form that will eventually be e-filed into the system. The first such interview technology has been designed for use in Small Claims actions. The Trial Court also plans to use this tool to develop a similar

instrument for Summary Process matters, another case type of interest to a large percentage of self-represented litigants.

**Interim Electronic Filing Rules for Pilot Courts** were approved by the Supreme Judicial Court in February 2015 with accompanying Standing Orders in each of the pilot court departments. As the courts move ahead with the expansion of e-filing, proposed amendments to the interim rules, and adoption of Rules of Electronic Filing Procedure, **are posted for public comment** until May 31, 2017, and thereafter will be submitted to the SJC for approval.

The Trial and Appellate Courts have established a listserv to provide updates and information as e-filing progresses. If you would like to receive periodic updates on e-Filing as they become available, you are welcome to join the e-filing news list serve. To join, just send an email to **[efilenews-join@jud.state.ma.us](mailto:efilenews-join@jud.state.ma.us)**

The e-filing pilot courts appreciate the efforts of the court personnel, the Judicial Information Services Department, Tyler Technologies, and participating attorneys in establishing the e-filing system. The Judicial Branch welcomes the commencement of electronic filing in the Massachusetts state courts, and invites you to begin e-filing at **[efilema.com](http://efilema.com)**.

*The Honorable Maura S. Doyle is the elected Clerk of the Supreme Judicial Court for the County of Suffolk, an attorney and a member of the Supreme Judicial Court's Standing Advisory Committee on Civil and Appellate Rules, Information Technology Steering Committee for the Appellate Courts, and Standing Advisory Committee on Professionalism.*

*Francis V. Kenneally is clerk of the Supreme Judicial Court for the Commonwealth and is an attorney admitted to practice in Massachusetts, Maryland and the District of Columbia.*

*Joseph Stanton is Clerk of the Massachusetts Appeals Court. He serves on numerous Trial Court and Supreme Judicial Court committees, including as co-chair of the e-filing rules subcommittee.*

*Kim J. Wright is the Senior Assistant for Judicial Policy in the Executive Office of the Trial Court working closely with the Chief Justice of the Trial Court and the Court Administrator to ensure the integration and coordination of judicial policy planning and initiatives. She is a graduate of Suffolk Law School.*

## **SJC Remakes Search-and-Seizure Law to Keep Pace with Modern Realities of Smartphone Technology and Race Relations**

**By Ruth O'Meara-Costello and David Rangaviz**

In recent decisions, the Supreme Judicial Court (“SJC”) has cast an increasingly skeptical eye on law enforcement activities in two areas of perennial controversy: the search and seizure of cell phones and electronic data, and police encounters with young black men. The SJC’s review of search and seizure matters has been stringent, as the court has demanded a specific evidentiary basis for searches in both the digital and physical realms. These cases implement in practice the principles that absent reasonable suspicion, an individual may voluntarily terminate a police encounter; before obtaining a warrant, the police must have a particularized reason to believe that evidence will be found in a place to be searched (including a specific folder within an electronic device); and officers need individualized suspicion of a suspect’s involvement in a crime before stopping and seizing the individual. In a series of cases, the court has breathed new life into these oft-stated and staid legal rules, particularly in the context of digital searches.

The court has also explicitly addressed the role of race in interactions between the police and the minority residents of the communities they serve. In doing so, the court has recognized the reality in which many black targets of police investigations live. The SJC has forced the criminal justice system – and the overwhelmingly-white players within it – to imagine what it is to be African-American in an over-policed and underrepresented community. By analyzing what probable cause means in the context of digital searches and relying on social science to understand interactions between police and African-American suspects, the court has brought an added degree of rigor in applying Fourth Amendment principles to the realities of modern American life.

### **Digital Searches**

First, in *Commonwealth v. Dorelas*, 473 Mass. 496 (2016), the SJC reviewed whether a warrant to search an iPhone was supported by probable cause. Police had reason to suspect the defendant was involved in a shooting, and that his iPhone might contain incriminating evidence because the victim had been receiving threatening calls and texts. But the warrant did not authorize a search of just call and text history; it allowed officers to search all of the phone’s other contents, including photographs. Executing the warrant, officers found a photo of the defendant holding a gun and wearing clothing similar to that of the alleged shooter. The defendant sought to suppress the photograph, arguing that there was no probable cause to support the search of the photographs (as opposed to call or text history) and that the warrant did not identify the items to be seized or places to be searched with sufficient “particularity.”

The SJC rejected both arguments in a 4-3 decision, but announced a more demanding standard for searches of the digital contents of a smartphone.<sup>1</sup> The majority noted that given the vast “volume, variety, and sensitivity” of information stored in or accessed through a smartphone, permitting a digital search to extend anywhere targeted information could be found is a “limitation without consequence” in the digital world, because “data possibly could be found anywhere within an electronic device.” In light of those “properties that render an iPhone distinct from the closed containers regularly seen in the physical world,” searches of such electronic data require “special care” and must satisfy a “more narrow and demanding standard” than physical

searches. But the majority reasoned that the search into the phone's stored photographs met that standard because threatening photos received or sent via text could have been stored separately from the texts themselves.

The dissent argued that the potential connection to a threat did not justify a search of the phone's photographs. It emphasized a forensic examiner's testimony that extraction of call and text history would have retrieved photographs attached to messages, eliminating any need to search all photographs separately stored on the device. The dissent also argued that the warrant failed to satisfy the Fourth Amendment's "particularity" requirement because it authorized a general search of the entire iPhone. Given the expansive capacity of today's smartphones, the dissent likened this to "limiting a search to the entire city." The dissent thus fully rejected the traditional "container" analogy that generally permits a search of any "container" or file that is capable of containing the evidence sought.

*Dorelas* reflects a closely-divided court struggling over how to translate analog constitutional rules to modern digital reality. Both the majority and dissenting opinions appreciated the need for a heightened standard on cell phone searches, though they took different approaches when considering the obligation to limit the search's intrusiveness.

A few months later, in *Commonwealth v. Broom*, 474 Mass. 486 (2016), the SJC provided further guidance on the kind of evidence needed to justify a cell phone search. The defendant in *Broom* was charged with the first-degree murder and rape of his former neighbor. His statements to police put at issue his whereabouts the night before the murder. A search of "cellular site location information" (CSLI) – location data associated with the defendant's cell phone – undercut the defendant's claims about that night. A search of the contents of his cell phone call log and text messages yielded a crude text message from the defendant to his fiancé suggesting that he was sexually frustrated. On appeal, the defendant challenged admission of both the CSLI and the text message.

The court concluded that probable cause did not exist to search the cell phone.<sup>2</sup> The court emphasized the heightened *Dorelas* standard, and concluded that the affidavit in support of the search warrant failed to describe "particularized evidence" that the defendant's phone would contain evidence relating to the crime. The court completely discounted the detective's statement that, in his training and experience, cell phones "store vast amounts of electronic data" and thus "there is probable cause", explaining that such a "general, conclusory statement adds nothing to the probable cause calculus." While the court found the error in *Broom* to be harmless, its decision put lower courts on notice that they cannot authorize digital searches merely based on an officer's training and experience without the kind of specific supporting information present in *Dorelas*.<sup>3</sup>

In *Commonwealth v. White*, 475 Mass. 583 (2016), the court made explicit what it had implied in *Broom*: "Probable cause to search or seize a person's cellular telephone may not be based solely on an officer's opinion that the device is likely to contain evidence of the crime under investigation." The search warrant affidavit's factual basis for the request to search the cell phone in *White* amounted to two things: (a) there was evidence that the defendant had participated with others in a robbery-homicide, and (b) the officer's "training and experience" suggested that cell phones generally contain incriminating evidence of communications in multi-

defendant cases. The court found this basis insufficient, emphasizing that the existence of probable cause to arrest does not necessarily provide probable cause to search a suspect's cell phone; the latter requires *particularized* evidence that the phone was reasonably likely to contain evidence related to the crime. Absent such *particularized* evidence, a suspect's cell phone cannot be searched.

## Police Encounters

The court has also recently taken on the challenge of applying Fourth Amendment rules to the reality of modern racial dynamics. In *Commonwealth v. Warren*, 475 Mass. 530 (2016), the unanimous court held that an African-American defendant's flight from the police does not give rise to probable cause for a subsequent search. The SJC emphasized reasons other than consciousness of guilt that an African-American might flee a police encounter: "Such an individual, when approached by the police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity." Citing an ACLU of Massachusetts **report** about the disproportionate impact of police stops on African-Americans, the court held that flight "add[s] nothing to the reasonable suspicion calculus." (That **study**, examining the Boston Police Department's "stop and frisk" activity, concluded that 63% of Boston police-civilian encounters from 2007 to 2010 targeted African-Americans, who are less than 25% of the city's population. The Department itself **acknowledged** that "[t]he study did show some racial disparities that must be addressed.") The *Warren* opinion recognizes the importance of perspective in applying legal doctrine. It attempts to defeat stereotypes that only guilty people flee police encounters, and reconciles the justice system with the reality that black men in Boston have an innocent and legitimate reason to flee the police.

The court's analytical approach is also noteworthy. As the foregoing cases make clear, the court has not hesitated to change the law to keep pace with changes in technology.<sup>4</sup>

Similarly, the SJC's opinion in *Warren* suggests its willingness to alter criminal practice and procedure based on emerging social science research. This forward-thinking perspective is unusual – appellate practitioners are trained to rely upon legal sources: statutes, legislative history, constitutional provisions, and precedent. Indeed, the defense attorney litigating *Warren* never cited the report about racially-biased police stops in **his brief** to the Appeals Court and SJC – justices of the Appeals Court cited the study in dissent, and the SJC relied on it to effect a sweeping change in doctrine.<sup>5</sup> The court's recent receptiveness to this type of outside-the-record social science information is worth noting by appellate advocates.<sup>6</sup>

Finally, in *Commonwealth v. Meneus*, 476 Mass. 231 (2017), the court held that a search of a group of young black men who happened to be located near a crime scene was unconstitutional. After gunshots struck a woman's car, she described having seen a group of young black men run away. The SJC held that such a vague description – "a group of young black males" – falls far short of justifying a search of all people fitting that description. In the court's words: "[T]he mere presence of a nondescript group of young black males standing near the scene of a reported shooting did not, standing alone, sufficiently narrow the range of possible suspects to include this group of individuals."**[vii]** As in *Warren*, the court refused to rely on the defendant's flight to find reasonable suspicion. Ultimately, despite the seriousness of the crime

under investigation, the court's decision in *Meneus* was a rebuke to the conduct of the police. In its emphasis on the need for specific evidence to support suspicion and rejection of the importance of proximity to a crime or presence in a high-crime neighborhood, *Meneus* complements *Warren* and emphasizes the court's determination to stringently uphold constitutional protections for minority groups who may be unfairly targeted by law enforcement.

The complex legal issues posed by digital searches, and the reality of racial profiling, will undoubtedly continue to confront the criminal justice system in Massachusetts and elsewhere. With a quartet of new members, and an additional seat to be filled in the near future, it remains to be seen how the SJC's search and seizure jurisprudence will grapple with these questions going forward.

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1. The Majority opinion was written by Justice Cordy, and joined by Chief Justice Gants and Justices Spina and Botsford; Justice Lenk wrote the dissent, joined by Justices Duffly and Hines. The defendant was represented by an attorney in the CPCS Public Defender Division Appeals Unit. David Rangaviz, co-author of this piece, had no involvement in the case.
  2. As to the CSLI, the SJC had previously ruled that the Commonwealth may obtain CSLI only pursuant to a warrant. *Commonwealth v. Augustine*, 467 Mass. 230 (2014). The *Broom* court held that the Commonwealth should have sought a warrant for the defendant's CSLI, but that the error did not require reversal. The SJC found no prejudice in the evidence's admission because (1) the CSLI was only for the day of and day before the murder, and (2) in light of the defendant's DNA on the victim police had sufficient probable cause to retrieve his CSLI for those two days anyway. The court thus seemed to suggest that there was no prejudice because a warrant *would have* issued if sought. (The court has, however, previously rejected the notion that "an illegal warrantless search could be cured by proof that a search warrant, if sought, would have been issued and the evidence inevitably discovered." *Commonwealth v. O'Connor*, 406 Mass. 112, 115 (1989).)
  3. The admission of the contents of the defendant's cell phone was thus error, but the court upheld the conviction based on the strength of other evidence against the defendant, coupled with the fact that only a single text message was erroneously admitted.
  4. Another recent opinion follows this trend. In *Commonwealth v. Martinez*, 476 Mass. 410 (2017), the court held that probable cause that the user of a certain IP address possesses child pornography is generally sufficient to justify a search of the residence assigned that IP address. The court nonetheless recognized that its holding may not "always" hold true as future technology "may further erode the connection between an IP address and a physical address" and "analysis hinges on fluid and rapidly changing technologies." The court has recently heard argument in *Commonwealth v. Keown* (SJC-10593), in which the defendant argues that a warrant to search his laptop was insufficiently particularized, and therefore is likely to weigh in again on this issue in the near future.
  5. Justices Peter Agnes and Peter Rubin first cited the study in their dissenting Appeals Court opinions. After their views did not carry the day – a three-justice majority of Chief Justice Rapoza and Justices Cypher and Green disagreed – a unanimous SJC embraced the dissenters' opinion and rationale.
  6. The SJC's interest in evidence-based rulemaking is also apparent in recent decisions (all written by Chief Justice Ralph Gants) regarding eyewitness identification. In *Commonwealth v. Crayton*, 470 Mass. 228 (2014) and *Commonwealth v. Collins*, 470 Mass. 255 (2014), the court cited social science to limit the admissibility of in-court identifications. In *Commonwealth v. Gomes*, 470 Mass. 352 (2015), the court changed its model jury instruction regarding eyewitness identification to incorporate updated research, while "acknowledg[ing] the possibility that, as the science evolves, we may need to revise our new model

instruction[] . . .”. Similarly, in *Commonwealth v. Silva-Santiago*, 453 Mass. 782 (2009), the SJC described a protocol, designed to decrease the risk of misidentification, for police to use before providing an eyewitness with a photographic array of potential suspects. The court recently reaffirmed this protocol’s importance in *Commonwealth v. Thomas*, 476 Mass. 451 (2017). The court will determine whether to extend *Crayton* and *Collins* in *Commonwealth v. Dew* (SJC-12225), currently pending.

7. The court also discounted the relevance of a police claim that the events occurred in a “high-crime area” and reiterated calls for caution regarding that claim in a reasonable suspicion analysis.

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*Ruth O’Meara-Costello is a partner at **Zalkind Duncan & Bernstein LLP**. Her practice focuses on criminal defense and student disciplinary matters*

## **We Are Family: Partanen v. Gallagher Applies Chapter 209C to protect children of never-married LGBTQ families**

**By Patience Crozier**

### **Case Focus**

Nothing is more important in the life of a child than the security of their parental relationship. The parent-child relationship is foundational and the source of love, emotional and material support. The recent Supreme Judicial Court (SJC) case *Partanen v. Gallagher*, 475 Mass. 632 (2016), addressed the security of a previously vulnerable class of children – the children of never-married non-biological parents – and clarified that the Massachusetts parentage statutes ensure their equal access to legal parentage.

The facts of the case were representative of those many families in the Commonwealth and beyond. Two women, Karen Partanen and Julie Gallagher, were in a committed relationship. They planned together to have children and, with mutual involvement and consent, Ms. Gallagher conceived via assisted reproduction using donor sperm and gave birth to two children. Ms. Partanen was present at both births, and together the couple cared for the children, made mutual decisions to further their well-being, and held themselves out to family, friends and institutions such as schools and health care providers as a family. The couple did not marry or complete co-parent adoptions. Shortly after they moved back to the Commonwealth from Florida, the couple's relationship ended. Ms. Partanen filed two actions to secure the children's rights to continue their relationships with her, one to establish de facto parentage, and later, another to establish full legal parentage under G. L. c. 209C, arguing that Ms. Partanen is a presumed parent under the statute. The trial court dismissed the legal parentage action, holding that Ms. Partanen could not seek parentage under Chapter 209C because of her lack of biological connection to the children. Ms. Partanen appealed and the SJC took the case on direct appellate review.

Section 6(a)(4) of Chapter 209C provides that “a man is presumed to be the father of a child” if “he, jointly with the mother, received the child into their home and openly held out the child as their child.” To establish herself as a presumed parent under that provision, Ms. Partanen first had to allege that the children were born to parents who are not married to each other and, second, that she satisfied the “holding out” provision of the statute, which requires proof that she, jointly with the birth mother, received the children into their home and openly held them out as their own. Ms. Gallagher maintained that Ms. Partanen could not be a presumed parent because she had no biological connection to the children. Ms. Partanen disagreed, arguing that her complaint sufficiently alleged that she was a presumed parent under the statute.

The SJC closely examined the plain language of G.L. c. 209C, § 6(a)(4). The main question was whether Ms. Partanen could establish herself as a presumed parent without any biological relationship to the children. In analyzing § 6(a)(4), the SJC reiterated the familiar rule that statutes must be read in gender-neutral terms. The Court concluded that the statute's plain language applies to children born to same-sex couples who lack biological ties with their children. Because no statutory language required a biological connection between parent and child, the Court declined to read into the statute such a requirement, particularly when doing so would undermine the statute's purpose by making this class of children more vulnerable. The SJC further noted that insofar as a father may validly execute a voluntary acknowledgment of

parentage absent a biological relationship, same-sex parents must be able to do the same. The Court reasoned that lack of a genetic tie cannot rebut the presumption of parentage when the parentage claim is not based on a genetic tie. Numerous other state courts have interpreted similar statutory provisions to allow the establishment of parentage in similar circumstances, including California, Colorado, New Hampshire and New Mexico.

Turning to the facts of this case, the Court concluded that Ms. Partanen adequately alleged parentage under the statute. The SJC held that she met the two-step test articulated in § 6(a)(4) because she and Ms. Gallagher created a family together with shared involvement, consent and intention, satisfying the requirement that the children were “born to” them. Ms. Partanen also adequately alleged that she “received the child into their home and openly held out the child as their child” in her assertions that they lived as a family, actively cared and made decisions together for the children, and represented themselves to others as their parents.

The implications of *Partanen* are far-ranging. It is now clear that non-marital same-sex couples can execute voluntary acknowledgments of parentage in the hospital at birth, the key administrative route for establishing a non-marital parent-child relationship and one that saves families the expense and delay of establishing parentage through the court system. Further, these parents can also seek an adjudication of parentage in the courts under G. L. c. 209C, § 6(a)(4), a clear and established means of asserting parentage that is more affordable, accessible and reflective of the family’s reality than de facto parent litigation. Finally, never-married, non-biological parents may now be able to receive counsel and participate in child welfare and juvenile court proceedings regarding their children. A class of parents previously cut out of involvement and decision-making in their children’s lives can now access the full range of protections of legal parentage. *Partanen* also further highlights the great diversity of families in the Commonwealth, where legal parentage can arise from marriage, adoption, genetic ties and through conduct. *Partanen* represents a major step forward in ensuring security and equality for all children.

*Patience Crozier served on the team of appellate attorneys for Karen Partanen along with co-counsel Mary L. Bonauto, Elizabeth Roberts and Teresa Harkins La Vita. Amici in support of Ms. Partanen’s legal arguments indicate the depth and breadth of support for her position. Amici included the Attorney General of Massachusetts, Greater Boston Legal Services, Children’s Law Center, Massachusetts LGBTQ Bar Association, Women’s Bar Association of Massachusetts, Community Legal Aid, Carolyn Famiglietti, Maureen McBrien, Massachusetts Bar Association, American Academy of Assisted Reproductive Technology Attorneys, Boston IVF, Fenway Health, IVF New England, New England Fertility Society, Path2Parenthood, Resolve: The National Infertility Association, Resolve New England, and Forty-two Law Professors.*

## **Go Solo, You (Probably) Won't Starve!**

**By Tejal Mehta**

### **The Profession**

You may have a great boss. You may have a lucrative job. You may work at a law firm or a public agency, with job security and benefits. You may have all of the above. But haven't you ever wondered how great life would be if you could call your own shots? Your. Own. Firm.

Of course it is daunting. You will ask yourself, "What will be my niche?" "How will I find clients?" "What if my clients become unhappy and sue me?" "Will a home office do?" "Who will buy my paperclips?"

Relax and take a deep breath. Thanks to countless new websites, online products and phone applications, hanging out a shingle is easier, safer, and even more rewarding than was possible even a few years ago. If you are even considering taking the leap, read on.

### **Budget**

One lesson learned the hard way by many new solo practitioners is that you don't want to start off by spending too much money. Because you will be on your own, you will probably have a few lean months in the beginning. Your necessary expenses will include marketing, malpractice insurance, bar dues, a post office box, office supplies, travel and parking. Create a startup business operating budget of \$5,000-\$10,000 for your first year, and stick to it.

### **Your Business Plan**

You will already have thought about this, in the course of deciding to go solo. But while you are working through your startup list, keep thinking critically about your niche. What do you like to do? What are you good at? And where do you want to practice? If you want to practice criminal defense and be in court regularly, perhaps apply to be a bar advocate. Starting up a civil practice may be a little more challenging, but that is where marketing comes in.

### **Your Marketing Plan**

Network, network, network. A professional support system is crucial. Start by drawing upon the colleagues and connections you already have. Join the local bar association of the geographic area where you plan to practice, and attend events as regularly as you can. Call your colleagues from your prior firm or from law school, and let them know they can send you cases and you will give them a portion as a referral fee. You will start building your practice and your reputation.

As you continue to network, you will likely meet attorneys who are willing to send you their overflow cases. Do not be afraid to ask for this, and for general advice. Before I launched my solo practice, I scheduled a dinner meeting with a solo practitioner colleague who walked me through his startup, informed me how he handled his billing and taxes, and provided me sample fee agreements and boilerplate motions for court.

Join the Massachusetts Bar Association or the Boston Bar Association and attend events or section meetings. The Massachusetts Bar Association has a valuable "Lawyer Referral Service" through which you can receive case referrals for your legal specialty.

Is there a legal topic you know well enough to teach to others? Write a letter to the MCLE programming coordinators and explain that you would like to volunteer your time, by chairing a panel or speaking as a panelist, on that particular topic. This will make you more visible in the legal community.

Websites such as Avvo.com are gaining popularity among attorneys. You can create a basic profile, with your photo, for free. They also have services to make you highly visible online and help you stand out in your desired geographic area and practice niche. This can be more of an investment, so do your research on these sites before diving in. Another widely used networking tool is LinkedIn.com, which allows you to create an online profile for free and connect with lawyers and other professionals who are on this platform.

Do you have a Facebook account? Make your Facebook page your business page! Use your logo and bio, provide details of your expertise, and broadcast your new venture to the network you have already established. It is free advertising, and even if it brings in one new client it will be worthwhile in your first six months. Keep it professional and you can use it along with your business website to reach out to Facebook users. I would suggest using it in addition to, not in lieu of, your business website, as the audience you connect with on Facebook may be different from the audience you would reach through a customary website.

### **The Nuts and Bolts of Your Actual Startup – In Order**

Plan your start date for 30 to 60 days out. Then set the wheels in motion.

*Contact information.* Set up a free Google voice number or use a similar service, as your work line on your existing phone. Use caution when giving out your personal cell phone number. Clients will call you at all hours of the day and night. Also set up a work email – a professional name on a gmail account will work. Courthouses still send and receive faxes, so it may be worthwhile to set up an efax on your computer at some point.

*Firm name.* This is a personal choice. You can be creative, or just use your last name, e.g., Smith Law Offices.

*Office/Post Office Box.* Having a physical office can be expensive and is not really necessary in the beginning. Wait and see what your needs are. You will need a space where you can meet clients, so in the meantime, you can meet them in a courthouse conference space or in public establishments such as coffee houses or the library. To keep your relationships professional, do not meet clients at your home or theirs. Also, you can ask a colleague to lend you a conference room and pay them for that day. Or, you could pay to have use of a virtual office and conference space, on an as-needed basis. You can list it on your business cards and thus have a mailing address at a professional building. If you do not initially rent an office or use a virtual office, you will still need a mailing address. Rent a post office box in a convenient location. The small or medium sized post office boxes offered should suffice, and will cost about \$100-\$160 annually.

*Bank Account.* Go to the bank of your choice. Take your checkbook. There will be a minimum balance requirement, likely at least \$1,500, to set up the business account. Inform the bank you need a small business checking account and an Iolta account with a low minimum balance and

no fees. The bank will need your firm name. If you have not incorporated, then you can call your firm a “dba” (“doing business as”), e.g., John Smith dba Smith Law Offices.

Do you need to incorporate your business? Not immediately. Many attorneys do it, but not all. The key question to answer is, what assets do you want to protect? The purpose of incorporating is to shield your business from liability in the event of a lawsuit. If you have very little to protect, you may not need to incorporate right away. It costs approximately \$500 to \$1000 to incorporate with the Secretary of State. You can defer that cost at the onset of your new practice. You may also seek to obtain a higher liability insurance policy initially, while deciding whether to incorporate.

*Malpractice Insurance.* Massachusetts Lawyers Weekly contains liability insurance recommendations. Or, you can ask a colleague for a recommendation. Do not be afraid to shop around. You should purchase a minimum of \$100k/\$300k coverage. A basic policy should cost approximately \$600 for your first year. It will rise after that.

*Business cards.* Look at colleagues’ cards for ideas. Create a simple design – logo optional – and limit the text. Use an easily legible font. A business card that is handsome and easily readable is an asset – one that is too busy or uses type too small to read is useless. You can find economical printing options at Staples or Costco. You can print 500 cards for as little as \$15. *Letterhead.* Again, look at your colleagues’ letterhead for ideas. You can easily tailor yours and print it from your own computer.

*Website.* The vast majority of potential clients look for their attorneys online, or, if they have been referred to an attorney, they Google that attorney to see what they can learn about him or her. Get a professional headshot. Or, take a friend to a law library, stand in front of the reporters, and have the friend take your photo. Then create a website and post your photo on it. A site such as WordPress will construct a basic website for \$100. As time goes on, you may want to make it more expansive, with client testimonials, information about cases you have handled, and even a blog. Some of my colleagues use professional website companies that engineer the site to put them at the top of the list in online search engines. I nearly fell over when I found these services cost upwards of \$15,000 per year. This type of cost can be deferred until later.

*Essential items.* You will need a computer, printer, office supplies, and a datebook or online calendar to keep track of appointments and payment dates. You will need access to a scanner and a fax machine, either in your home or at a place such as Staples. You may also wish to purchase a credit card reader from a service such as Lawpay, in the future. Make sure to save all of your receipts for tax time.

## **The Rest Is History**

Starting your own law practice takes guts, and the beginning may be a bit rocky. But if you set up your firm with care, have a vision of your practice, and plug away at networking, you will begin to enjoy success. Before you know it, your name will be out there and new attorneys will be asking you for advice on how to launch. Good luck!

Note: this article reflects the author’s personal opinions and experiences, and is not to be construed as an endorsement of any specific services or companies set forth herein. If you have

any specific questions relating to starting your own practice, please feel free to email the author at [tmehta.law@gmail.com](mailto:tmehta.law@gmail.com).

*Tejal Mehta, a trial attorney, has worked at civil litigation firms and the Middlesex District Attorney's Office, and now operates a thriving solo practice. She is a former member of the Boston Bar Association.*

## A Clear View of a Narrower Path: Examining the Baker Pardon Guidelines

By William G. Cosmas

### Practice Tips

Two years ago [in this journal](#), I examined the process of obtaining a pardon in the Commonwealth of Massachusetts from the perspective of having represented one of the first successful petitioners for such relief since 2002. This article examines the Executive Clemency Guidelines issued by Governor Charles D. Baker (the “**Baker Guidelines**”) as compared to those that his predecessor, Governor Deval L. Patrick, issued in January 2014 (the “Patrick Guidelines”).

In Massachusetts, a governor’s Executive Clemency Guidelines (the “Guidelines”) largely govern the process from petition to clemency. Statutes and regulations set forth the procedure through which the Parole Board, acting as the Advisory Board of Pardons (the “Board”), reviews, evaluates, and considers petitions for clemency. The Guidelines set forth the qualitative framework for that analysis, through an expression of the governor’s philosophy concerning clemency and the criteria that he or she will use to determine whether a petitioner merits recommendation to the Governor’s Council (the “Council”) for relief. On the day after his inauguration, Governor Baker rescinded the Patrick Guidelines, under which Governor Patrick had issued four pardons at the close of his term, halting administrative review of existing petitions until he could draft and issue his own Guidelines. *Baker Rescinds Ex-Gov. Patrick’s Clemency Guidelines*, Associated Press, Jan. 16, 2015. Governor Baker described his decision as “standard operating procedure,” because with a new governor comes a new understanding of the nature and contours of the governor’s pardon power. *See Gov. Baker To Submit New Pardon Guidelines In Coming Weeks*, Associated Press, Jan. 23, 2015. The Baker Guidelines were issued in December 2015.

### An Apparent Attempt to Streamline

While the Baker Guidelines offer streamlined, procedural clarity and hew closely to relevant law, the Patrick Guidelines contemplated a holistic review of each petitioner, “intend[ing] to inform” the Board—the “public officials who are most able to make informed decisions on the persons seeking relief”—in its preliminary analysis of each petition. *See* Patrick Guidelines (“PG”) at 1-2. In contrast, the Baker Guidelines emphasize his prerogative to “direct” the Board’s analysis, in language that agrees with the Board’s recently-revised regulations (*see, e.g.*, 120 CMR 900.01(2) (2017) (“The [Board] shall be directed by the Governor’s Executive Clemency Guidelines in its consideration of petitions for executive clemency.”) *See* Baker Guidelines (“BG”) at 1-2. Such emphasis also reflects the governor’s constitutional power, under Article 73 of the Amendments to the Massachusetts Constitution, to determine which clemency petitions merit submission to the Council for approval. *See In re Op. of the Justices*, 210 Mass. 609, 611 (1912); *see also* M.G.L. ch. 127 § 152.

Both sets of Guidelines reserve that power notwithstanding their own terms, but the Baker Guidelines explicitly acknowledge that they do not bind the Council, whose “concurrent action” on a petition is required to issue a pardon. *BG* at 2; *see In re Op. of the Justices*, 210 Mass. at 611. This nod to the Council’s constitutional independence, *see Pineo v. Exec. Council*, 412 Mass. 31, 36-37 (1992), an esoteric point of law easily lost on those without experience on

Beacon Hill, may prove crucial to future petitioners who reach the final stage of review. Without this provision, a petitioner (and his/her counsel) might assume that the same Guidelines that governed the lengthy process to that point also set the rules for Council's essential consideration of a petition. In truth, there are no rules for the Council's analysis or for any related hearing other than those, if any, promulgated by the Council for the occasion.

Finally, the Baker Guidelines offer added precision by incorporating relevant statutory and regulatory provisions. For example, both Guidelines indicate that, for certain offenses, a pardon "rarely" would include restoration of a petitioner's firearms rights. Unlike the Patrick Guidelines, however, the Baker Guidelines specifically incorporate the offenses included in M.G.L. ch. 140 § 121's definition of "violent crime": "any crime punishable by imprisonment for a term exceeding one year . . . that: (i) has as an element the use, attempted use or threatened use of physical force or a deadly weapon against the person of another; (ii) is burglary, extortion, arson, or kidnapping; (iii) involves the use of explosives; or (iv) otherwise involves conduct that presents a serious risk of injury to another," *BG* at 4. Although the Supreme Judicial Court struck down part (iv) of the statute as unconstitutionally vague in May 2016, *Commonwealth v. Beal*, 474 Mass. 341, 349-51 (2016), the precision that the rest of § 121 provides may help petitioners set more accurate expectations for the process.

### **An Embrace of Retributive Justice**

Both Guidelines establish similar basic threshold considerations for pardon relief, but the Baker Guidelines imbue those considerations with a retributive theory of justice. Perhaps drawing the line for the Commonwealth's retribution at the petitioner's release from state supervision, the Patrick Guidelines first considered whether "[t]he grant of a pardon is in the interests of justice," considering "the nature of the underlying offense(s), the impact of the crime on any victim(s) and society as a whole, the petitioner's role in the underlying offense, and the fundamental fairness and equity of granting a pardon to the petitioner." *PG* at 3. By contrast, the Baker Guidelines identify the "nature and circumstances of the offense" as the first "paramount consideration," paying particular attention "to the impact on the victim or victims and the impact of the crime on society as a whole." *BG* at 3. The greater the severity of the petitioner's offense, the more time "that should have elapsed in order to minimize any impact clemency may have on respect for the law." *Id.* at 2.

The second threshold question under the Patrick Guidelines focused on a petitioner's rehabilitation, considering whether "the petitioner has been a law-abiding citizen and presents no risk for re-offense," to determine whether a pardon would be consistent with maintaining public safety. *PG* at 3. That analysis focused on the petitioner's "good citizenship" during a period of time following confinement or probation based on whether the petitioner's offense was a felony or misdemeanor. *PG* at 3. The Baker Guidelines' analogous "paramount consideration"—"the character and behavior, particularly post-offense behavior, of the petitioner"—presents a striking shift from the Patrick Guidelines. *See BG* at 3. A petitioner must have "clearly demonstrated acceptance of responsibility for the offense for which the petitioner is seeking clemency"—and appealing or challenging the underlying conviction or sentence is "[g]enerally . . . inconsistent with acceptance of responsibility." *Id.* In other words, a petitioner who exercised his legal right to appeal or challenge a conviction twenty-five years ago, no matter the justification, unwittingly disadvantaged his future clemency petition to Governor Baker in the process. The Baker

Guidelines also essentially require that a petitioner have “made full restitution” to victims economically injured by the petitioner’s crime(s), giving “stronger consideration to petitioners who have made restitution in a prompt manner.” *Id.* A petitioner’s public service will also lead to “stronger consideration,” whether that public service consists of “substantial assistance to law enforcement in the investigation or prosecution of other more culpable offenders” or “service in the military or other public service, or . . . charitable work.” *Id.*

### **Narrowed Opportunity for Petitioners**

Both sets of guidelines provide additional factors to be taken into account in determining a petitioner’s entitlement to relief, such as requiring a period of “good citizenship” since release from government supervision, but the Baker Guidelines take a narrower focus, limiting opportunities for petitioners. The Patrick Guidelines considered “either (1) a compelling need for a pardon; or (2) extraordinary contributions to society that would justify restoration of his/her reputation as a concluding step of rehabilitation.” *PG* at 2. Similarly, the Baker Guidelines require petitioners to “demonstrate both good citizenship and a verified, compelling need,” but do not expressly consider the “extraordinary contributions to society” that might have tipped the balance to clemency under the Patrick Guidelines. *BG* at 3. Instead, the Baker Guidelines require disclosure and investigation of “whether the petitioner has been the subject of any civil lawsuit, including any restraining order, during the claimed period of good citizenship,” thus imposing a greater burden than the Patrick Guidelines, which required consideration only of restraining orders or civil contempt orders. *See BG* at 4; *PG* at 4.

### **Conclusion**

On the whole, the Baker Guidelines provide additional clarity—but commensurately narrower paths to clemency—than those they replaced. It remains to be seen whether and in what circumstances Governor Baker will exercise his constitutional power to grant the “extraordinary remedy” of a pardon—and whether his Guidelines will impact his ability to do so.

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## ***Cardno Chemrisk v. Foytlin*: Supreme Judicial Court Holds that Anti-SLAPP Law Protects Opinion Writing**

**By Jeffrey J. Pyle**

### **Case Focus**

Anyone who has litigated a special motion to dismiss under the Massachusetts anti-SLAPP law knows they are typically won or lost on the question of whether the suit is based on “petitioning” activity. Passed in 1991 to protect citizens from “strategic lawsuits against public participation,” the anti-SLAPP law, **G.L. c. 231, § 59H**, provides that if a plaintiff brings a lawsuit based on the defendant’s exercise of its constitutional right to petition, the trial court must dismiss the action—and award attorneys’ fees—unless the plaintiff proves that the defendant’s petitioning was devoid of legal or factual merit and that the plaintiff suffered damages. Proof that petitioning activity is “devoid” of merit is difficult for a plaintiff to assemble at the pleadings stage, so the fight usually centers on the first part of the analysis: whether the activity in question was in fact “petitioning.”

The Supreme Judicial Court (“SJC”) has repeatedly held that the anti-SLAPP statute applies only to parties who seek redress of grievances of their own or otherwise petition on their own behalf, not to those who air the grievances of others. However, in the recent case of ***Cardno Chemrisk v. Foytlin***, 476 Mass. 479 (2017), the Court softened that rule, extending protection to opinion writing that addresses subjects of broad political and social concern.

The defendants in the case, Cherri Foytlin and Karen Savage, are environmental activists concerned about the effects of contamination from the Deepwater Horizon oil rig spill on the Gulf Coast and on cleanup workers. On October 13, 2013, they published an article in the *Huffington Post* about ongoing federal litigation against British Petroleum (“BP”) in Louisiana, in which BP asserted that only a minimal amount of oil escaped as a result of the explosion of the rig. In their article, Foytlin and Savage state that BP “does not exactly have a reputation for coming clean on the facts surrounding the disaster,” and they held up as an example a report written for BP by Cardno ChemRisk, LLC (“ChemRisk”), a scientific consulting firm, which concluded that cleanup workers had not been exposed to harmful levels of certain chemicals. Foytlin and Savage disputed ChemRisk’s independence and stated that it had “a long, and on at least one occasion fraudulent, history of defending big polluters, using questionable ethics to help their clients avoid legal responsibility for their actions.” ChemRisk sued the pair for libel.

In their anti-SLAPP motion to dismiss ChemRisk’s suit, Foytlin and Savage argued that their article was written in connection with pending court proceedings, and therefore met the statute’s definition of “a party’s exercise of its right of petition.” The Superior Court acknowledged that the defendants were activists and that they “wrote and posted the article as part of their work to influence ongoing governmental proceedings and court cases,” yet denied their motion on the ground that the article addressed the grievances of only the cleanup workers, not those of Foytlin and Savage themselves. The Superior Court relied on a line of cases denying protection to those not seeking redress of “grievance[s] of [one’s] own”—in particular, ***Fustolo v. Hollander***, 455 Mass. 861 (2010), which upheld the denial of an anti-SLAPP motion by a journalist who had written objective news stories about a controversial development project because the stories were

not written to advocate her own point of view.

On direct appellate review in *Cardno Chemrisk*, the SJC reversed, declining to extend the reasoning in *Fustolo* to the case against Foytlin and Savage. It would take “a constrained view” of the First Amendment petitioning right, the Court held, to deny protection to environmental activists sued for publishing an opinionated news article about environmental devastation against the backdrop of pending court proceedings. Citing *Town of Hanover v. New England Reg’l Council of Carpenters*, 467 Mass. 587, 594 (2014), the Court held that the anti-SLAPP law, “like the constitutional right it safeguards, protects those looking to ‘advance[e] causes in which they believe,’” including the cause of protecting the environment. The Court distinguished *Fustolo* by explaining that the journalist there had been “employed to write, and did write, impartial news articles, despite having personal views on the same subjects,” and her “objectivity was pivotal to the decision insofar as the reporter was not exercising her own constitutional right to petition when authoring the challenged articles.” That was not the case with Foytlin and Savage, whose personal views were reflected clearly in their article.

The *Cardno Chemrisk* decision is welcome news for writers of blogs, op-eds and letters to the editor about issues before government bodies. Such publications are now protected if they espouse the author’s “personal views,” even if they are not intended to protect the writer’s own “private rights.” However, the SJC did not articulate a test to determine whether writing is opinionated as opposed to “impartial” and “objective” news reporting—concepts that may have less of an agreed-upon meaning now than at any time in modern history. One can only guess, for example, how the SJC would rule in a case about a muckraking investigative article that presents hard facts in a manner obviously intended to make a case for government reform, but that does so without overtly stating that the author is presenting “personal views.”

The *Cardno Chemrisk* decision also raises questions about the scope of protection afforded to professionals, including lawyers and experts, who assist the petitioning activities of others. In an earlier decision, *Kobrin v. Gastfriend*, 443 Mass. 327 (2005), the SJC denied anti-SLAPP protection to a physician expert testifying for the government in a regulatory proceeding because he was not petitioning on his own behalf. The *Cardno Chemrisk* court distinguished *Kobrin* on the ground that the physician was acting as a mere “vendor of services” who had a “merely contractual” relationship to the issues in the case—unlike Foytlin and Savage, who were advancing a cause in which they believed. Yet the Court previously indicated that attorneys who represent parties petitioning the government must be protected by the anti-SLAPP law—despite their status as mere “vendor[s] of services”—lest their exclusion cause a “chilling effect” on petitioning. *Cadle Co. v. Schlichtmann*, 448 Mass. 242, 252 (2007). Clarification of this issue, and of the scope of petitioning rights more generally, will have to await future cases.

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## ***Commonwealth v. Lawson* and *Commonwealth v. Griffin*: Recent Changes in Criminal Responsibility and the Presumption of Sanity**

**By Crystal L. Lyons**

### **Case Focus**

This past fall, without much portent, the Supreme Judicial Court (“SJC”) created a seismic shift in the law of criminal responsibility when it eliminated the “presumption of sanity” in *Commonwealth v. Lawson*, 475 Mass. 806 (2016). As a result, the presumption of sanity will no longer carry the Commonwealth’s burden of proof and may no longer be considered as evidence of sanity. In fact, juries will no longer even receive an instruction on the presumption of sanity. *Id.* at 807, 814-815 & n.8. This article addresses *Lawson*’s explicit guidance, analyzes its application just a week later in *Commonwealth v. Griffin*, 475 Mass. 848 (2016), and anticipates the questions that both cases implicitly left open.

Before *Lawson*, when a question of the defendant’s criminal responsibility was raised, courts were required to instruct juries that they may consider that, because a great majority of persons are sane, there was a resulting likelihood that the defendant was sane. *Lawson*, 475 Mass. at 815 & n. 8. In *Lawson*, however, the SJC announced that rather than a true legal presumption, the “presumption” of sanity is instead “merely an expression” of the “commonsense understanding” that a defendant is probably sane because most people are sane.

In *Lawson*, the SJC recast a defendant’s lack of criminal responsibility as an affirmative defense, akin to self-defense. As an affirmative defense, the defendant must first proffer “some evidence” that, “viewed in the light most favorable to the defendant, would permit a reasonable finder of fact to have a reasonable doubt whether the defendant was criminally responsible at the time of the offense.” *Id.* at 807, 811. After doing so, “the Commonwealth bears the burden of proving beyond a reasonable doubt that the defendant was criminally responsible.” *Id.*

Although the SJC appeared to anchor its decision in established precedent, *Lawson* breaks new ground and will have significant effects in the future. For example, *Lawson* cited *Commonwealth v. Keita*, 429 Mass. 843 (1999), for the proposition that the Commonwealth already bore the burden of proving that the defendant was criminally responsible. Previously, however, the Commonwealth’s burden was usually a mere formality where the presumption of sanity alone was sufficient to overcome a challenge. *See Lawson*, 475 Mass. at 813; *cf. Commonwealth v. Vives*, 447 Mass. 537, 540 (2006) (characterizing mental illness as a hindrance to the defendant’s ability to form a specific intent rather than as an affirmative defense). Now, however, to prove criminal responsibility, the Commonwealth must establish either:

- 1) That at the time of the alleged crime, the defendant did not suffer from a mental disease or defect; or
- 2) That if the defendant did suffer from a mental disease or defect, he nonetheless retained the substantial capacity to appreciate the wrongfulness or criminality of his conduct and to conform his conduct to the requirements of the law.

*Griffin*, 475 Mass. at 856 (citing Model Jury Instructions on Homicide 10 (2013)).

The Commonwealth can establish the defendant's mental capacity at the time of the offense through either circumstantial or medical evidence. *Lawson*, 475 Mass. at 815-817. The types of circumstantial evidence that can support the inference of sanity are already well-known from prior cases. They include: the circumstances of the offense; efforts to plan the offense; a rational motive to commit the offense; rational decisions made proximate to the offense; efforts to avoid capture; attempts to conceal the offense or the defendant's role in the offense; words and conduct before, during, and after the offense; and evidence of malingering. *Id.* "Where, however, this [circumstantial] evidence provides only weak support for a finding of criminal responsibility," the Court made clear that "the Commonwealth proceeds at its peril if it chooses to offer no expert to rebut a defense expert's opinion of lack of criminal responsibility." *Lawson*, 475 Mass. at 817. Medical evidence is typically presented through expert testimony.

Even though criminal responsibility is not an element of any offense, because the Commonwealth bears the burden of presenting sufficient evidence for a rational fact-finder to find criminal responsibility, a defendant may now seek a required finding of not guilty on the ground that the Commonwealth presented insufficient proof. *Id.* at 812. A motion for a required finding on that basis can be raised only at the close of all evidence, however, because practically speaking, evidence of such a defense is typically first offered during the defense's case, after which the Commonwealth is permitted a full opportunity to rebut any such defense. *Id.* at 816-817. The circumstantial evidence of sanity described above is generally sufficient to overcome a motion for a required finding except when a defense expert's view of the evidence shows the Commonwealth's argument for sanity to be "incredible or conclusively incorrect." *Id.* at 817-818.

Just six days after deciding *Lawson*, the SJC applied its new framework in *Griffin*. Although the Court affirmed the defendant's first degree murder conviction for killing his young daughter, in analyzing whether the Commonwealth had met its burden of proving criminal responsibility, the Court first highlighted the Commonwealth's lack of medical expert testimony. *Griffin*, 475 Mass. at 855-856. This is noteworthy not only because the defendant had not presented an expert (though he had secured funds to hire one) but also because the circumstantial proof of sanity appeared overwhelming. The Commonwealth's evidence in *Griffin* mapped perfectly onto the categories identified in *Lawson*. It showed that the defendant: acted normally in the days leading up to the killing; before the crime, prepared a last will and testament and left a note at his home apologizing for his "sins" and asking for God's mercy; had a strong motive for the killing, which he had discussed with others; carefully planned the killing, including assembling all the necessary materials, choosing to walk to minimize the sound of his approach, turning off the electricity to the house and taking off his shoes upon his arrival to reduce the chance of being discovered, and cutting telephone lines to eliminate calls for help; and methodically cleaned the basement crime scene and repacked his materials after the murder. *Id.* at 856-857. The defendant's only evidence of lack of criminal responsibility consisted of self-serving pre-trial statements in which he had claimed that God told him to commit the murder (even though there was no indication he was deeply religious or possessed religious materials) and had described the severity of his mental illness (descriptions which were proven by evidence at trial to be overstated). *Id.* at 857. By highlighting the Commonwealth's absence of a prosecution expert in these circumstances, *Griffin* raises the question whether the prosecution should consider using an

expert even in the cases that seem to least warrant one.

The Court clarified that a prosecutor may properly address in closing argument the inferences to be drawn from circumstantial evidence and inconsistencies in the defendant's evidence as that evidence bears on criminal responsibility; in so doing, he or she "does not testify as an unqualified expert witness." *Id.* at 860. The Court also clarified that *Lawson's* elimination of the instruction on the presumption of sanity was not merely a prospective change. The Court concluded that the instruction had been erroneously provided in *Griffin*, but that it had not created a substantial likelihood of a miscarriage of justice where "the trial judge strongly and specifically instructed that the burden is on the Commonwealth to prove criminal responsibility beyond a reasonable doubt" and where "substantial evidence" supported the jury's finding of criminal responsibility. *Id.* at 862-863.

Although *Lawson's* and *Griffin's* affirmation of the convictions might suggest it will be business-as-usual in criminal responsibility cases despite the Court's shift, the cases raise several important questions. First, what quantum of proof will be necessary for a defendant to sufficiently raise "some evidence" of a criminal responsibility defense, particularly if the defendant presents no direct medical evidence or testimony (whether because expert testimony cannot be secured or perhaps because no previous treatment or diagnosis exists) and relies solely on arguably self-serving statements to sustain the defendant's burden of production? Second, under what circumstances may a defense expert's testimony show the Commonwealth's evidence to be "incredible or conclusively incorrect" and thereby insufficient to overcome a motion for a required finding of not guilty? One can imagine a situation in which an expert testifies that the inferences argued by the Commonwealth are invalid given the defendant's diagnosis and that the circumstantial evidence presents normal or expected symptoms of the claimed mental illness. Finally, what differences may exist between sufficient evidence to sustain the Commonwealth's burden of proof of criminal responsibility under the familiar *Latimore* standard—viewing all evidence and resolving all inferences in favor of the Commonwealth—and what may be necessary to establish "substantial evidence" of criminal responsibility in pre-*Lawson* cases where the presumption of sanity instruction has already been provided?

The Commonwealth will need to evaluate carefully whether to call an expert in any case that raises a potential criminal responsibility defense. Despite the Court's assurances in both cases that "the Commonwealth need not offer expert testimony in every case," *Lawson*, 475 Mass. at 807; *Griffin*, 475 Mass. at 855-856, the SJC highlighted in *Griffin* the lack of an expert for the Commonwealth. That the Court would do so in a case with overwhelming circumstantial evidence of sanity—and no defense expert testifying to the contrary—suggests that the cautious approach for the Commonwealth to avoid the possibility of reversal will be to call a prosecution expert nonetheless. *Lawson*, 475 Mass. at 817.

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