

BostonBarJournal

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A Publication of the Boston Bar Association

Timely Justice Threatened by Fiscal Challenges

A Move to Streamline the Civil Justice System

***Crawford* Comes to the Lab: *Melendez-Diaz* and the Scope of the Confrontation Clause**

Residual Class Action Funds: Supreme Court Identifies IOLTA as Appropriate Beneficiary

Challenges and Opportunities for New Lawyers

Maintaining Client Confidences: Developments at the Supreme Judicial Court and First Circuit in 2009

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Boston Bar
ASSOCIATION

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Thank You Kathy Weinman



A wise former BBA President told me there would be at least one event or major issue that would occur during my year of service, be completely unforeseen, and require the immediate attention and refocusing of the priorities of the BBA.

Truer words were never spoken about the year that Kathy Weinman just finished as the BBA's 87th President. When she began her term on September 1, 2009, neither she nor anyone else at the BBA expected the collapse of Lehman Brothers six weeks later, and the ensuing steep economic decline that has severely affected state and municipal budgets, depressed the market for legal services, and placed a hold on the employment prospects of new, mid-career, and seasoned lawyers.

Because it was such a significant year, and because Kathy Weinman achieved so much under such trying circumstances, it is fitting that what she did and how she did it be made part of the record.

At the outset, Kathy promised a year of renewal and institutional soul-searching for the BBA itself. She oversaw the creation, the adoption, and the initial implementation of a comprehensive, strategic plan for the BBA — its first in five years. For starters, working groups convened to study and report back on the needs of BBA sponsor firms. An initial analysis was made of the BBA's systems for communicating with its members and the public, so that a comprehensive upgrade can be made this year.

Kathy's major (and most visible) physical accomplishment was the construction and opening, on time and on budget, of the BBA's beautiful new space on the second floor of its Beacon Street facility, overlooking the State House and Joseph Hooker statue. That project was completed in space wisely purchased some years ago by the BBA, but not built out until the resources to do so had been diligently saved by prior BBA Councils and Presidents, thereby avoiding both construction loan fees and future debt service. This space is critical to meeting the greatly-increased demand for BBA brown bag lunches, continuing legal education offerings, and special events. Attendance at meetings increased at an astonishing rate during Kathy Weinman's tenure, demonstrating that the BBA, especially in trying times, is truly the crossroads of the legal profession in Boston.

Kathy led the effort to create a Diversity and Inclusion Section to carry out the work of the Task Force on Diversity, which completed its work last year and submitted an action plan that was met with widespread praise. This new Section has already established a group mentoring project that now extends to approximately 40 diverse lawyers, with the goal of keeping them in Boston and guiding them through their career choices. Conversations also are underway with the leadership of six affinity bar associations (AALAM, MAHA, MBLA, MBWA, MLGBA, and SABA). These leaders sit on the steering committee of the Diversity Section, and work to coordinate the sharing of programs, membership, and resources between the BBA and the affinity bars.

In December, 2008, Kathy had the insight and leadership to see what was lacking in the debate on the budget for the Courts of the Commonwealth – a succinct case statement by the private bar about why courts are essential in good times, and absolutely necessary in challenging economic times. She appointed a talented group of lawyers, who, in only a few weeks, wrote and published a case statement for the courts — a brief which was consistently referred to by the leadership of Commonwealth’s Courts, in the ensuing months of advocacy for adequate budgets for the courts, legal services, CPCS, and the District Attorneys’ offices.

Kathy also lent her voice to the first ever Court Advocacy Day at the State House, modeled on the Walk to the Hill for Legal Services, which saw an outpouring of judges and lawyers to describe the consequences of inadequate funding of the state court system. The importance of Kathy’s repeated, unified messages of support for the judiciary, court staff and facilities, and the public service members of the legal profession cannot be overstated.

Constant support for legal services also was at the center of Kathy’s agenda, with an historic turnout for the Walk to the Hill being the most visible example. Kathy offered testimony and advocacy on behalf of the lawyers who represent the poorest citizens of the Commonwealth in some of the toughest cases handled by the Bar. Her work included travel to Washington, D.C., to lobby with the American Bar Association to ensure increased federal funding for legal services in the Commonwealth.

Also on the national front, Kathy’s voice was essential in helping to persuade the Federal Deposit Insurance Corporation to adopt a rule safeguarding IOLTA funds under the U.S. Treasury’s Temporary Liquidity Program. The result was that IOLTA accounts, essential to legal services funding, are now included under the increased deposit insurance limit extended to regular bank deposits as part of the federal government’s response to the financial crisis.

Meanwhile, other BBA public policy work led by Kathy was extensive and groundbreaking. Perhaps the best example of her perseverance was the final passage of the Uniform Probate Code legislation, which had been approximately 20 years in the offing, but was brought to fruition during Kathy’s tenure. Kathy also carried on the work of those who went before her at the BBA, including the Project to Expand the Civil Right to Counsel. She enthusiastically endorsed the ongoing pilot projects in the

Lynn and Quincy District Courts, where data is being collected on the comparative results in eviction proceedings for clients who have counsel and those who are unrepresented.

Kathy, as a white-collar criminal defense lawyer, has seen the injustice of wrongful convictions, both for the defendant and for the victim’s family when the real perpetrator remains free. She convened a Task Force to Prevent Wrongful Convictions, drawn broadly from the law enforcement and criminal defense bars, whose report, with its specific suggestions for follow-up legislation, will soon be available. This will be an enduring legacy of Kathy’s year as BBA President.

Kathy also led the effort to promote alums of the BBA’s Public Interest Leadership Program into leadership positions throughout the BBA, giving young lawyers their opportunity to make a mark in substantive legal education, public service, and public policy work. Her recognition of the graduates of the PILP Program on the stage at the BBA’s Law Day Dinner in June was the catalyst for the doubling of applications to the Program.

Kathy also created an outreach committee to address the employment needs of young lawyers. Its first step was to develop a series of five monthly programs for deferred associates and recent law school graduates, to help smooth their transition to new positions.

Ever mindful of the need to expand the roster of BBA sponsor firms and increase individual memberships, in order to ensure the BBA’s financial health, Kathy was instrumental in having Skadden Arps, Ogletree Deakins, Ruberto, Israel & Weiner, and Sugarman & Sugarman join the BBA as sponsor firms. Other new members added to the sponsor firm roster included the legal departments of EMC Corporation and the Massachusetts Department of Environmental Protection, and the third and fourth year classes of New England Law | Boston.

Kathy, in her personal style, brought to the BBA grace, dignity, focus, discipline, a sense of humor, and collegiality that was respectful of and admired by all who worked with her, whether as staff or volunteer lawyers. She encouraged the expression of different points of view, but had a skillful way of achieving consensus after a debate.

So to Kathy, from all of us who take our brief turn of service at the BBA, we say, as Garrison Keillor does on his local radio spot: “Be well. Do good work. Stay in touch”. ■

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

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

Jack REGAN

A Lawyer Who Leads by Both Vision and Example

Jack Regan Takes Office as BBA President

Two months before starting a one year term as the BBA's newest and 88th President on September 1, 2009, John J. Regan and his wife, Joan, took a trip that speaks volumes about their values. Accompanied by eight students and a faculty member from the Roxbury Latin School, where Joan runs the community service program, they traveled to Botswana. Under the auspices of Habitat for Humanity International, they helped build two houses for families living in poverty — in addition to visiting an AIDS orphanage, a high school and a wild game preserve.

Closer to home, Jack, a partner at WilmerHale, has earned a reputation as an intellectual property litigator with the smarts, judgment and experience to handle major patent cases in Massachusetts and elsewhere. A quick glance at the WilmerHale web site indicates that he has represented companies involved in virtually every area of technology in the Massachusetts economy.

Personifying the BBA's Core Values

At the same time, Jack serves as co-chair of the firm's pro bono and community service committee, managing the contributions of time and talent of more than 1,000 lawyers and as many staff spread across 13 WilmerHale offices worldwide. Humble, witty and no-nonsense in his demeanor, he exudes enthusiasm about the broad menu of pro bono and community service opportunities available to lawyers interested in helping people in need — not to mention the positive impact on team-building within a law firm.

In short, he exemplifies the BBA's own core values of professional excellence,



Essential Details about John J. Regan

Partner, Litigation/Controversy Department, WilmerHale

Co-Chair of the firm's Pro Bono and Community Service Committee

President, Boston Bar Association, September 1, 2009 through August 31, 2010

(Succeeds Kathy B. Weinman as BBA President)

Born in Providence, Rhode Island

BA, summa cum laude, University of Notre Dame, 1971, Phi Beta Kappa
JD, New York University School of Law, Root-Tilden Scholar; Articles Editor, NYU Law Review

Clerkship, The Hon. Andrew A. Caffrey, US District Court for the District of Massachusetts, 1977-1978

Lives in Milton with his wife of 37 years, Joan Regan. A nurse who did intensive care nursing in Boston, California and New York, before teaching medical and surgical nursing, Joan is now assistant to the Headmaster at the Roxbury Latin School.

Jack and Joan have two sons:

Michael, a lawyer in the risk management unit at Fidelity Investments, is married and lives in Hingham.

Christopher, who worked on the team that designed a new ribbon microphone at Soundwave Research and sold the technology to Shure, Inc. He most recently worked for APT, a technology company that manufactured and sold equipment for high definition television and radio broadcasting. Chris, who is pursuing his MBA at Babson, is engaged and lives in Somerville.

Extra-Curricular Activities: Kayaking, running, golf, hiking, and reading history and biography.

advancing access to justice, and serving the community. His very first day back in the office after Botswana, he made the time to attend the kick-off breakfast for the BBA Summer Jobs Program, along with WilmerHale's director of public service, a social worker named Anne Bowie. While there he couldn't resist talking about his firm's Summer Leadership Institute for 17-year olds from Boston's inner city high schools.

Several years ago, when the BBA's charitable affiliate, the Boston Bar Foundation, wanted to incorporate Discovering Justice, a civic education nonprofit founded by the federal judiciary and housed at the Moakley U. S. Courthouse, BBF leadership turned to Jack. They also asked him to chair the first board of trustees and recruit other board members.

Jack has served on the boards of many charitable institutions, most of which focus on youth and education. He also has done substantial hands-on pro bono work for clients of limited means, with the assistance of his firm's associates.

Demonstrating His Own Pro Bono Commitment

Adam J. Hornstine, an associate at WilmerHale, describes the experience of working with Jack to represent the surviving spouse of a Korean War veteran before the Court of Appeals for Veterans Claims in Washington, D.C. The case involved a benefits claim, denied by the V.A., which arose from serious, service-related frostbite injuries and the partial amputation of both legs of a decorated Marine veteran.

"Jack was fully engaged with this case, with the intricacies of the record," says Adam. "Although he delegated a tremendous amount of responsibility to me, and relied on me to advocate on behalf of the client with the V.A., I was always comforted to know that Jack was there as a guiding force to make sure that we were doing our best, and that our client got the benefits she was entitled to."

Thanks to their efforts, the V.A., after just reading their brief, agreed to a remand for further consideration of the surviving spouse's claim, without the necessity of proceeding further with the appeal. The V.A. also agreed to consider evidence of exposure to combat that it had previously disregarded. The case, just one of several dozen referred to WilmerHale by the National Veterans Legal Services Consortium, is especially close to Jack's heart because he knows that without legal representation, even the most meritorious veterans' cases will fall through the cracks.

It isn't every day that one finds a partner with a busy civil practice at a major law firm emptying his pockets, surrendering his BlackBerry and cell phone, and walking through a metal detector because he has a client at the Massachusetts Correctional Institution at Norfolk.

This particular pro bono client was a teenager in Jamaica Plain when he shot and killed a drug dealer. Upon learning from his counselors that the inmate had gone 13 years without any disciplinary infractions, earned a college degree cum laude from Boston University while in prison, gotten married, and mentored at risk youth brought to the prison for visits, Jack agreed to represent him at a parole hearing on his second degree murder conviction.

Plans for the Year Ahead with Jack Regan

*Consistent with BBA Strategic Plan
adopted by Council in 2009:*

Continue ongoing initiatives.

- Diversity and Inclusion
- Adequate Funding for Legal Services, State Courts, and CPCS and D.A.'s Offices
- Complete "Civil Right to Counsel" Pilot Projects in Quincy and Lynn District Courts

Use the BBA professional network to help lawyers in transition.

Help new, mid-career, and older lawyers experience success in their career moves:

- From private to public and vice versa
- To a firm of a different size
- To in-house counsel positions
- To work in academia
- To "Second Acts" of pro bono and nonprofit work

Expand Pro Bono Opportunities to Include Legal Assistance to Massachusetts Veterans and Families of Deployed Military Personnel.

- A growing number of active duty and National Guard veterans are returning from Iraq and Afghanistan with a multitude of legal problems arising out of their service, joining those with residual effects from the Gulf Wars
- The spouses and children of deployed enlisted military personnel are falling through the safety net of existing legal services programs

It is unusual for a first application for parole from a murder conviction to be granted. Not to mention the fact that parole hearings can understandably evoke emotion on the part of families who have lost a loved one.

“Jack spoke powerfully, with conviction and with respect for the parole board,” says Ariel Raphael, a senior associate at the firm. “His straight-forward, unemotional approach — telling the board what the law required them to do — succeeded in getting the client paroled from the murder conviction.”

Real cases rarely yield simple Hollywood endings. The client still faced additional prison time — at a lower security prison — related to an “on and after” firearms conviction connected to the original case. When the client became eligible for parole on that conviction earlier this summer, Jack and Ariel once again advised the prisoner regarding his appearance before the Parole Board.

Thanks to the efforts of Jack and Ariel, their client was recently granted final parole. After years of separation, the client will be able to join his wife and daughter in another state, and make a new start with the rest of his life.

A Leader and Consensus Builder

Flash back to the mid ‘90’s. The firm now known as WilmerHale was buying lots of tables at charity events and giving generously in other ways too. But the giving lacked any particular focus, and the firm had no means of assessing the impact of those contributions.

Jack was asked to chair a strategic planning group that revamped the firm’s charitable giving process. The work product was a new venture philanthropy strategy, chronicled in *Common Interest, Common Good*, a book published by the Harvard Business School Press in 1999.

John Hamilton, WilmerHale’s former managing partner, recalls asking Jack to assemble a group of partners and senior staff to restructure the firm’s charitable giving and public service program. The assignment included interviewing prospective nonprofit partners, being informed by WilmerHale lawyers about what needs they would like to support, and then combining his research on both fronts into a practical and successful program. The nonprofit recipients had to be small enough so that the firm’s funds, in tandem with volunteer time, could make a real impact. Yet the recipients needed to demonstrate enough growth potential to justify the firm’s investment.

Still working well today, the strategy focuses on inner city youth and education, and, in the firm’s Boston Office, includes four partners: Citizen Schools, Discovering Justice, Teen Empowerment, and Cathedral High School. The firm gives the four nonprofit partners significant financial support. But the relationship also provides volunteer opportunities for lawyers and staff, pro bono legal assistance if the organization wants it, and an offer to use WilmerHale’s administrative capabilities, such as computer training classes, graphics support, and office management advice.

Hugh R. Jones, Jr., a BBA past president who is now of counsel at WilmerHale and worked with Jack to revamp the firm’s charitable giving process, says Jack is possessed of qualities that make him a superb leader for the BBA. “Jack is uniquely talented in his ability to suggest opportunities for different people and different organizations to work together in a common mission.”

In addition to being extremely well-organized, Jack is hard-working, and chairs meetings effectively. Known for making participants feel heard and

“Jack is one of the most organized and motivational leaders I’ve ever had the pleasure to work with. He has a style that is inclusive. He empowers all participants to sign up and do more than they ever expected, and then graciously gives them credit for the success.”

— Laurie Burt, Commissioner,
Massachusetts Department of
Environmental Protection,
former Foley Hoag Partner
and former Board Member,
Discovering Justice

“At a time when severe economic pressures are causing the profession to rethink and reorder its priorities, Jack will serve as a wise, articulate, tireless advocate for all segments of the bar.”

— Judge Margaret R. Hinkle,
Head of Superior Court Business
Litigation Session

“The fact that someone with Jack Regan’s stature at WilmerHale is a leader of the firm’s pro bono and community services program sends an important message to young lawyers. It tells them that pro bono and community service are viewed as core to the firm’s mission — not a frolic or a detour.”

— David Cohen, Assistant
Secretary, Terrorist Financing
and Financial Crimes,
United States Department of
the Treasury, and former
WilmerHale partner who
previously co-chaired the firm’s
pro bono and public service
initiatives with Jack.

“Jack Regan has been one of the most important factors in the success of the Inner City Scholarship Fund and a strong leader of the Catholic Schools Foundation. During the seventeen

What Others Say About Jack Regan

years of his involvement, we've provided over \$75 million in scholarship assistance, technology upgrades to our schools and counseling for needy, at-risk children who, in our Boston schools, are over 70% minority and over 25% non-Catholic."

– *Peter S. Lynch, Chairman, The Inner-City Scholarship Fund; President, The Catholic Schools Foundation; and Vice Chairman, Fidelity Management and Research*

"Upon meeting Jack Regan, I was immediately taken by his enthusiasm, warmth, humor, and charm. Within about ten minutes, I needed to add intelligence, vision, and tenacity. Jack has been instrumental in establishing Discovering Justice's partnerships with the federal and state judiciary, the legal community, and community organizations. His commitment to civic education, particularly for underserved youth in Boston, and his uncanny knack for getting people to say 'yes' to virtually any request, has helped Discovering Justice become the vibrant, transformative organization it is today."

– *Elisabeth Medvedow, Executive Director, Discovering Justice, and former Executive Director, Women's Bar Association of Massachusetts*

"Jack has a calming presence that instills confidence. He's a good strategist who knows when to try to settle a case or when to take a hard line. He's very experienced and can always tell you about similar cases and what you might expect in terms of work load and cost."

– *Mark E. Sullivan, General Counsel, Bose Corporation*

"Jack is highly competent, focused and efficient in addressing client concerns. He's very courteous with other people and respectful of their concerns. He understands the business objectives so that his legal advice will advance the company's business goals to the extent that it can. He's what a lawyer should be."

– *William A. "Bill" Wise, Senior Counsel, Holland & Knight and former Corporate Counsel, Analog Devices Inc.*

"Jack and I had a case against each other involving an eight-day patent infringement trial at the International Trade Commission in Washington, D.C. I found him to be a very good lawyer in all respects, good in the courtroom, congenial in all respects, very ethical and reliable when he made a commitment. In short, I think

very highly of Jack. Every case should have an opposing counsel like Jack. It was a pleasure to work with him."

– *Alan D. Albright, Managing Principal, Fish & Richardson, Austin, TX*

"My experience opposing Jack in litigation was relatively short in time, measured in months. Yet even a case that short can reveal much of a person's character when it involves a highly expedited trial schedule, high stakes damages claims, and emotional intensity. Through it all, Jack was a credit to his profession in every way: highly knowledgeable, formidable, practical, honest, and personable even in the most adversarial of times."

– *Daniel W. McDonald, Partner, Merchant & Gould, An Intellectual Property Law Firm, Minneapolis, MN*

"Jack is extremely professional. He is very bright, ethical and appropriately aggressive as opposing counsel."

– *Mark J. Tamblyn, Wexler Wallace, Sacramento, CA*

"I was with Jack on 9/11 at the start of what became an 85 day arbitration. Jack is a fine lawyer and even better person. When you spend that much time with a guy as opposing counsel, you learn a lot about him. He's a family man involved in a host of civic matters. Pretty much the face of his firm with respect to pro bono type matters."

– *Anthony M. Feeherry, Partner, Goodwin Procter*

"Jack provided the adult supervision on law review."

– *Eliot Polebaum, Partner at Fried Frank and classmate of Jack's at NYU Law School*

"Jack always treated people the way he wanted to be treated. When an older gentleman from South Bend who worked in the dining hall became ill and died during the school year, it was Jack who organized a trip to funeral home so we students could pay our respects."

– *Anthony F. Jeselnik, Counsel, United States Steel Corporation, Pittsburgh, PA, Jack's classmate at Notre Dame, and Best Man at Jack's wedding.*

"Jack has been an extraordinary lawyer and partner at WilmerHale. He exemplifies the quality of lawyer, the dedication to public service and the commitment to pro bono that our firm values. He understands that we are still a profession and is dedicated to the highest values of that profession."

– *William F. Lee, Co-Managing Partner, WilmerHale*

respected, he is the consummate pro at synthesizing the various ideas that emerge.

A Naval Officer between College and Law School

Jack grew up in Providence, Rhode Island, where his father drove a truck for the New England Telephone Company and his mother taught first and then second grade. He went to LaSalle Academy, an all-boys school very similar to B.C. High. From there it was on to Notre Dame, from which he graduated summa cum laude with membership in Phi Beta Kappa. Upon graduation, he received his commission as a naval officer, and then spent three years as a Navy lieutenant, primarily on the USS Bagley (DE-1069).

Joe Carroll, a retired career Naval officer and Annapolis graduate, who is now a Vice President at Science Applications International, served with Jack on the USS Bagley, when they were home ported in San Diego and when they deployed to the Western Pacific, Gulf of Tonkin, and Indian Ocean. They were together in October, 1973 when the Arab-Israeli (Yom Kippur) War began, and their destroyer became the first U.S. ship to enter the Red Sea — confirming the right of free maritime passage.

“Jack was rock solid in just about everything he did, and everybody liked and respected him,” recalls his fellow officer. “As part of the commissioning crew in Seattle, he walked aboard a new ship with a new crew. He not only had to set up all the processes and procedures, but he also had to train his sailors, identify whom he could trust to put in positions of accountability, and (of course) have all of that up and running almost immediately so the ship could go to sea.”

A Standout at NYU Law School

By the time Jack arrived at New York University Law School as a Root-Tilden Scholar in 1974, he and Joan had been married for two years, and she was ministering to intensive care patients as a nurse at nearby Saint Vincent’s Hospital in Greenwich Village. Gilda Brancato, today a career, public international lawyer at the State Department, was on Law Review with Jack and describes him as “the great conciliator,” able to achieve harmony among board members.

“Regardless of a person’s social, cultural or political views, Jack was widely respected across the board,” she says. “He was really a Rock of Gibraltar in that law school class. He brought with him a maturity, stability, and selflessness. He had such excellent judgment.”

With a reputation for being salt of the earth and very principled, he had a calm and equanimity punctuated by his quick wit. In addition to disabusing his classmates of

any stereotypes they might have had about the military — through the force of his character and his compassion — he also offered them perspective.

“Jack knew the difference between not getting footnotes done on time, and life’s real problems, his classmate, Gilda, adds. “He would tell people to relax, saying ‘What Joan faces every day with her patients at Saint Vincent’s is reality — not what we worry about.’”

Clerking for Chief Judge Andrew Caffrey

In 1977, Chief Judge Andrew Caffrey of the U.S. District Court for the District of Massachusetts had two law clerks, Jack Regan and Margaret Hinkle, now one of the Superior Court Judges who sits in the Business Litigation Session. The two clerks shared an office.

Judge Hinkle says that even then, Jack’s leadership and organizational skills were very apparent. Unusually resourceful in accomplishing whatever tasks were delegated to him, he was also extraordinarily productive in terms of written work.

The federal court in Boston was relatively small at the time, and Jack was liked and respected by everybody — including the court reporter and those working in the clerk’s office — in part because of his self-effacing manner. He made people feel comfortable in turning to him for advice.

BBA Record of Involvement

Now in his 31st year practicing law at WilmerHale, Jack also has a solid record of leadership at the BBA. He co-chaired the Intellectual Property Litigation Committee and then the BBA Litigation Section, served on the Children and Youth Task Force, chaired the Nominating Committee for Officers and Council members, and was a very active participant on the committee that developed the BBA Strategic Plan endorsed by the Council in 2009. He also serves as a trustee of the Boston Bar Foundation.

“The BBA is a very big tent providing extraordinary opportunities for lawyers to achieve personal and professional growth and to balance their busy practices with public service,” he says. “Sixteen Beacon Street is the crossroads of the Boston legal world, where lawyers from the public sector, in-house counsel, members of the bench, legal services lawyers, new and seasoned lawyers, and those in private practice — as solo practitioners and at law firms of all sizes — connect in ways that would otherwise not be possible in the separate worlds in which they work. Together they accomplish a lot of good for the community and the legal profession.” ■

By Chief Justices Margaret H. Marshall and Robert A. Mulligan

Timely Justice Threatened by Fiscal Challenges



Margaret H. Marshall is Chief Justice of the Supreme Judicial Court. A BBA Past President, she is a former partner at Csapler & Bok and later at Choate, Hall & Stewart, and before her appointment to the SJC, she was Vice President and General Counsel of Harvard University.



Robert A. Mulligan is Chief Justice for Administration & Management of the Trial Court and chairs the Massachusetts Sentencing Commission. He has been a member of the Superior Court since 1982, serving as Chief Justice of that court from 1994 to 1999, and was first appointed to the Boston Municipal Court in 1980.

Although economists seem to agree that the worst of the economic downturn may be over, we expect that the worst still lies ahead for the Massachusetts court system. After a marathon year of unprecedented expense cutting measures, the projections for the Commonwealth's finances remain bleak into 2012. The dire financial conditions threaten the court system's ability to achieve our essential purpose. Despite the best efforts of chief justices, judges, clerks, probation and court staff to minimize public impact of deepening staff cuts, the courts' ability to provide access to justice, timely delivery of justice and courthouse security is steadily declining.

Beyond the courtroom dramas that reach the media, tens of thousands of people are affected daily by delays in the administration of justice, mainly in civil sessions. They include tenants facing eviction, parents wanting to be reunited with children, unemployed parents who cannot make support payments, and elderly and mentally ill patients who need guardians.

In fact, nearly 42,000 people, excluding jurors and employees, already travel to our courthouses each day, and we know that court business increases during fiscal crises. We also know that the growing number of self-represented litigants who need more staff time and resources is driven higher by the economy.

Against the backdrop of increasing needs for access to justice, the current fiscal crisis threatens to overtake our capacity to meet those needs. More than 400 fewer Trial Court employees now serve the public than in 2008. Funding for the fiscal year beginning July 1, 2009, currently stands at \$554 million — almost \$50 million less than our original appro-

priation for last year. This is an immense cut for our branch of government, which represents only two percent of the state budget.

Improved management practices have helped us reduce costs and increase effectiveness. Such measures include energy efficiencies, centralized procurement, and wider use of technology to schedule court events from bail hearings to pre-trial conferences. Mass-Courts and case management data now enable analysis of caseload and backlogs to assist resource deployment, and multi-department courthouses allow better utilization of facilities and security staff. However, there are few resources to redeploy or better utilize.

We appreciate the Legislature's supplemental budget for the courts and consolidation of budget line items to allow streamlined fiscal management. Legislators also have understood the need to consolidate some courts to eliminate lease expenses. In addition, many private landlords have made significant concessions in court leases to their own financial detriment.

However, at its core the delivery of justice is people oriented and people intensive. All Trial Court departments are struggling with staffing issues, as we reach one year of the hiring freeze, lose experienced staff to retirement incentives, seek voluntary work hour reductions and terminate positions. The Trial Court had run a lean operation, targeting 85 percent of the level recommended by the National Center for State Courts' staffing model. This year, staffing will likely drop below 70 percent systemwide.

Escalating vacancies are eroding the courts' ability to deliver justice. Our court officers and probation officers are essential to assure public safety and the availability of defendants,

witnesses, and jurors for court appearances. In recent months the Superior Court has delayed trials due to the unavailability of court officers.

Administration of justice requires the availability and attention to detail of experienced, knowledgeable staff. Countless behind-the-scenes duties handled by courthouse employees to initiate a case and keep it on track are backlogged due to a shortage of case specialists and clerks. Updating dockets, contacting parties, creating calendar events, generating notices, judgments, defaults and executions — each step needs personal attention and accuracy to ensure due process.

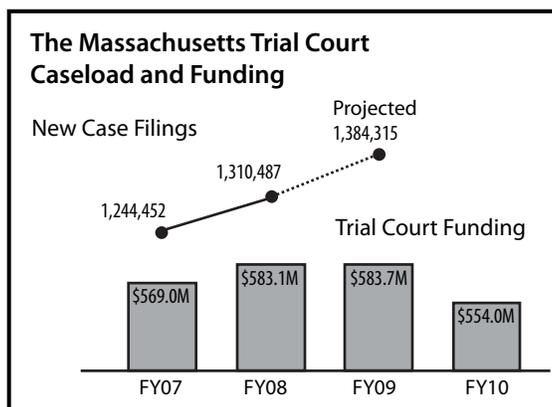
Due to lack of staffing in some Probate and Family Courts, it now takes weeks, not a day, to initiate complaints for modification and summonses, delaying the effective date of any approved change in child support payments. Delays initiating divorce cases and issuing a summons affect the entry of automatic restraining orders on assets. And inadequate resources also jeopardize the well-being of children who need advocates to investigate allegations of abuse or to assess educational needs.

Foreclosure cases in the Land Court now take six to nine months rather than six weeks. Delays in time-consuming land permitting cases postpone economic investment and job creation, which communities desperately need

Faced with staffing shortages throughout the Trial Court, court employees are doing more with less. They

are displaying remarkable dedication and cooperation in taking extraordinary measures in these challenging times.

However, the delivery of justice cannot and should not rely on stopgap measures over the long term. It is unrealistic and unreasonable to expect that such efforts can be sustained. Growing delays are all but guaranteed.



The bar's impressive range of pro bono assistance strengthens our renewed efforts to expand access to justice at a time when it is most needed. We also must expand our partnership with the bar to innovate and streamline practices and case management. Bar leaders have demonstrated tremendous commitment to the courts, even as the economy has taken a heavy toll on the legal community. Continued support and assistance from the bar are

critical to obtaining the essential court resources required to protect the economic well-being of families and businesses.

Despite all these difficulties, we remain steadfastly focused on the courts' core mission — the delivery of justice — as our guiding principle in the demanding days ahead. And while collaboration between the Commonwealth's courts and formidable legal community reinforces our perseverance, the upcoming months and years present unprecedented challenges to our ability to deliver justice, as prescribed by our state constitution, "promptly and without delay." ■

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By Joan A. Lukey

A Move to Streamline the Civil Justice System



Joan Lukey, a partner at Ropes & Gray, will become President of the American College of Trial Lawyers on October 10. She is a Past President of the BBA.

For the past several years, certain questions have reverberated nationwide within the halls of justice, the confines of private law firms, and the boardrooms of corporations and institutions: Is the civil justice system broken; and, if it is, what can we do to fix it?

In the spring of 2008 the American College of Trial Lawyers Task Force on Discovery joined ranks with a Denver-based think tank, the Institute for the Advancement of the American Legal System, to determine the views of senior members of the trial bar — median years in practice, 38 — regarding the first question. When the survey revealed “widely-held opinions that there are serious problems in the civil justice system generally,” the Task Force and the Institute turned their attention to the second question. Specifically, they embarked on the task of developing principles to address the most serious problems with the civil justice system.

Their Final Report, which was issued on March 11, 2009 (www.ACTL.com/publications), sets forth a series of Proposed Principles to streamline the civil justice process from beginning to end. The goal of the project is to “provide Proposed Principles that will ultimately result in a civil justice system that better serves the needs of its users.”

As one moves through the categories of Proposed Principles, certain themes are apparent, and they represent the heart and soul of the Report. One size does *not* fit all when it comes to crafting rules for case management; rather, rulemakers must have flexibility to fashion rules geared to particular cases. Fact-based pleading and mandatory early identification of actual trial issues must be implemented to ensure that discovery (particularly e-discovery) is properly curtailed and specifically targeted to the issues actually in play. To ensure further that discovery does not become the tail that wags the dog, but is rather proportional to the nature and size of the claim, the default must be curtailing discovery, rather than allowing it to proceed in a largely unfettered format. In the self-proclaimed “radical” and “most significant” proposal, document discovery (including e-discovery) would consist *only* of initial disclosure of “documents used to support the producing party’s claims or defenses” followed by limited discovery of “documents that

support the requesting party’s claims or defenses,” with all further document discovery being a matter of agreement or court order. A single judicial officer must be assigned to a case from beginning to end; and, as in our Business Litigation Session, that officer must at the outset set realistic dates for completion of discovery and for trial. A critical criterion in the selection of that officer must be actual trial experience.

The Report is not intended to better the position of any group of litigants. The drafters included lawyers who represent both plaintiffs and defendants. More importantly, the survey results upon which the Proposed Principles are based reflect an unexpected consensus on all topics except summary judgment, as to which the drafters consequently offer no substantive opinions. Hence, while some plaintiffs’ groups have expressed concern, particularly with fact-based pleading, the impetus for change has come from a cross-section of the bar.

The issuance of a “Final Report” is often the end of a project, but such is not the case here. More than fifteen state and federal judges have indicated their interest in overseeing pilot programs based on the Proposed Principles. The precise form of such programs may vary. For example, federal programs will likely require participants to consent, while some state programs may be mandatory. To assist with these efforts, the drafters expect to issue suggested rules that will turn theoretical concepts into practical applications. The courts that participate in the pilot programs may choose to tweak the rules, but they will be urged to adopt the Proposed Principles from soup to nuts, i.e., from fact-based pleadings, to stream-lined and restrained discovery, to one-judge case management.

When the pilot programs are fully operational, and sufficient time has passed to assess them, this collaborative project will enter its most critical phase: the design and implementation of a system to measure whether the Proposed Principles work in practice. If they do not, it will be back to the drawing board. But, if they do, we may be witness to the greatest sea change in the civil justice process since the Federal Rules of Civil Procedure took effect in 1938.

Stay tuned. Interesting times may lie ahead. ■

By Christina Miller and Michael D. Ricciuti



Christina Miller is Chief of District Courts and Community Prosecutions for the Suffolk County District Attorney's Office and former co-chair of the BBA's Criminal Law Section. The views expressed in this article are her personal views and do not necessarily represent the views of the Suffolk County District Attorney's Office.



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Crawford Comes to the Lab: *Melendez-Diaz* and the Scope of the Confrontation Clause

In 2004, the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004) was a watershed. It held that the introduction of "testimonial" hearsay was a violation of the defendant's Sixth Amendment Confrontation Clause rights unless the declarant was unavailable for trial and the defendant had already enjoyed a prior opportunity to cross-examine the witness. But *Crawford* did not spell out what "testimonial" meant, a weakness seized upon by Chief Justice Rehnquist¹ as an ambiguity which promised to throw criminal cases into chaos. In some respects, it did create chaos. One of the many issues *Crawford* raised was whether affidavits of various sorts, routinely allowed in criminal cases, would be admissible at trial without testimony. Lower courts split on the answer.

Five years after *Crawford*, in a case from the Massachusetts state courts, the Supreme Court finally decided whether one type of affidavit routinely admitted without testimony in criminal cases — laboratory analyses of drugs known as drug certifications or "drug certs" — constituted "testimonial" hearsay within the meaning of *Crawford*. In *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009) the Supreme Court held that *Crawford* applies to drug certs and that a defendant's Confrontation Clause rights would be violated if a drug cert were admitted into evidence without providing the defendant an opportunity to cross-examine the analyst at trial or, if appropriate, at a prior proceeding. By this decision, the Court overruled the Massachusetts Appeals Court ruling in *Melendez-Diaz* and implicitly overruled the precedent on which it was based, *Commonwealth v. Verde*, 444 Mass. 279, 283-85 (2005).

The Supreme Court's opinion left open many questions which courts across the country have been forced to confront immediately. Like *Crawford* before it, *Melendez-Diaz* has thrown state and federal prosecutions into disarray as familiar modes of proof are called into question. See, e.g., *Tabaka v. District of Columbia*, 976 A.2d 173, 175-76 (D.C. Cir. 2009) (reversing an operating a motor vehicle without a permit conviction on *Melendez-Diaz* grounds because certificate of no-record inadmissible); *Grant v. Commonwealth of Virginia*, Record No. 0877-08-4, 2009 WL 2742377, at *4 (Va. Ct. App., September 1, 2009) (reversing driving while intoxicated conviction because certificate of the results of a breathalyzer-type device admitted into evidence without the testimony of the breathalyzer operator in violation of *Melendez-Diaz*). More fundamentally, *Melendez-Diaz* raises new questions about just how far *Crawford* reaches.

Crawford and *Melendez*: The Confrontation Right

In *Crawford*, the evidence at issue was a tape-recorded statement made by a witness to the police. It was played at trial in lieu of the witness' live testimony. Rejecting prior law permitting such evidence, the *Crawford* Court, through Justice Scalia, established a new rule — that a defendant has a Sixth Amendment right to cross-examine any witness who provides "testimonial" evidence. Such evidence implicated a defendant's Confrontation

Clause rights, thus requiring that the defendant have an opportunity to cross examine the witness at trial or, if the witness were unavailable for trial, had an opportunity for cross-examination at a prior point in the proceedings. The Court left for another day exactly where to draw the line between “testimonial” evidence, which implicates the Sixth Amendment, and “non-testimonial” evidence, which does not.

Two years later, in *Davis v. Washington*, 547 U.S. 813, 822 (2006), the Court, again through Justice Scalia, offered some helpful guidance on this distinction: “[s]tatements are ... testimonial when ... the primary purpose... is to establish or prove past events potentially relevant to later criminal prosecution,” such as statements made by a witness in response to police interrogation. Non-testimonial statements can include statements made in response to police questioning for other purposes, such as to secure a volatile scene or to determine the need for medical attention.

Despite this guidance, questions remained about whether laboratory reports of the results of scientific tests involving drug certificates or similar tests, such as those analyzing DNA, blood or other bodily fluids, ballistics reports, and the like, were testimonial.

In *Melendez-Diaz*, the Court considered whether drug certificates identifying a substance as an illegal drug could be admitted into evidence without the live testimony of an analyst, as was permitted under Massachusetts law (MASS. GEN. LAWS ch. 111, § 13 (2009)). The Court, in a 5-4 opinion, held that they could not. While the dissent argued that the Sixth Amendment governed “more conventional witnesses” and not analysts, the Court, again through Justice Scalia, maintained that such reports are precisely the sort of evidence anticipated by *Crawford* — a witness statement swearing to the truth of a fact necessary to prove a fact in a criminal trial. A criminal defendant is entitled to confront such witnesses through cross-examination.

Immediate Reaction and Impact

Melendez-Diaz elicited as much dismay from prosecutors as it did elation from most defense attorneys.

Attorney General Martha Coakley, who argued *Melendez-Diaz* in the Supreme Court, claimed that the ruling will result in dismissal of drug cases because of unavailability of analysts.² The raw numbers illustrate her concern. In 2007, Massachusetts district courts saw 46,685 narcotics cases. The two laboratories which performed narcotics analysis employed just 23 people; in 2007, one of

these laboratories analyzed 42,583 items, resulting in delays for certificates of approximately four months.³ According to the Attorney General, arranging for the testimony of these analysts at every drug prosecution is “virtually impossible with current staffing.”⁴ Deploying analysts to travel to and wait to testify in courts around the state could result in increased delays in the issuing of drug certifications. Where a single analyst was required to testify at multiple trials, trials would either have to be scheduled in a way that accommodated the analysts’ statewide travels or delayed.⁵ Cases could be dismissed with prejudice under Speedy Trial principles if the delay became excessive.

The majority in *Melendez-Diaz* seemed unmoved by the prosecutions’ fears, noting that defense attorneys and their clients often stipulate to drug analysis and would continue to do so to avoid highlighting these facts or antagonizing the judge or jury by insisting on a witness. The Court also noted that, at the time of its ruling, the confrontation requirement it described already existed in ten states, suggesting that adapting to its ruling would not impose a monumental burden.⁶

This view overlooks obvious opportunities for the defense to exercise its right to cross-examine analysts to test whether the state can comply, with dismissal of the case in the offing if it cannot. Of course, there are risks for the defendant in taking this tack; asking for accurate drug analysis information may risk the imposition of minimum mandatory sentences based on quantity or composition, and proceeding to trial risks imposition of a greater sentence. Engaging in the risk-benefit analysis generated by *Melendez-Diaz* can thus pose challenges.

The Likely Responses

In all events, practice will have to adapt to *Melendez-Diaz*. In the absence of the government’s hiring more analysts, those currently employed will have to be organized and trials scheduled in such a manner as to ensure that analysts are available to testify where and when needed. Indeed, when the District of Columbia refused to accept analysts’ certificates in the recent past, appearances by DEA chemists increased by 500 percent in those courts.⁷

The response is, however, likely to be more complicated than merely adjusting trial schedules for analysts. As an initial matter, it is unclear *which* analyst must testify to satisfy the requirements of *Melendez-Diaz*, a concern mentioned by Justice Kennedy in his dissent. One reasonable reading of *Melendez-Diaz* is that the testimony of the person who signed the certificate is necessary. But that

person may not have conducted all of the steps required to introduce the tests into evidence, a point made by Justice Kennedy in dissent. Justice Kennedy noted that several witnesses played key roles in producing a laboratory result, and suggested that all of them might be necessary trial witnesses under *Melendez-Diaz*.⁸

It thus seems clear that, at least in the short term, prosecutors will be forced to make hard decisions about which cases to pursue and which to ignore. In Maryland, the State's Attorney, Glenn Ivey, recognized that this sort of analysis is already taking place, but will now become more urgent: "[t]here's a triage going on in court cases. Some marijuana cases don't get tested, and we end up throwing them out."⁹ The impact of such prioritization could have predictable results in Massachusetts, given the recent decriminalization of the "possession of one ounce or less of marijuana" under MASS. GEN. LAWS ch. 94C § 32L (2009). It is likely that drug cases will have to be analyzed on a case-by-case basis, using a variety of factors to prioritize cases where a chemist will be produced for trial. The Commonwealth may proceed without a chemist in some cases, utilizing a drug expert concerning the nature of a particular drug. Appellate decisions will need to clarify the nature of the evidence necessary to sustain a conviction.

New Challenges

Though the Court's decision in *Melendez-Diaz* concerned drug certificates, its holding applies to all forensic evidence if that evidence takes the form of a declaration of facts sworn to and provided to the prosecution for the purpose of establishing or proving some fact for the purposes of criminal prosecution. Evidence such as DNA analysis, blood-alcohol or other bodily fluid analysis, breathalyzer tests, ballistic or other firearm-related tests and hair or fingerprint analysis would certainly require a witness to testify about the analysis.¹⁰ The question remains as to whether an analyst would be able to testify based on facts as developed by another analyst.¹¹

The Court's analysis in *Melendez-Diaz* is not limited to forensic analysis; the dissent expressed concern that there was no way to predict future applications of the decision. Citing two examples commonplace in criminal litigation — the establishment of the chain of custody and the authentication of copies of documents — the dissent stated that, where once a simple certification would suffice, the logic of *Melendez-Diaz* would appear to require in-court testimony. Addressing only the former, the Court stated that "gaps" in the chain of custody affect

the weight of the evidence, not its admissibility. Nevertheless, the breadth of *Melendez-Diaz* makes it difficult to discount the dissent's concerns about drawing this line.

Melendez-Diaz also presents new challenges in the myriad of cases in which the *absence* of a record is a fact that the prosecution must prove. The *Melendez-Diaz* Court noted that its holding rendered inadmissible a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and not found it, because the clerk would have created record of the failed search solely for trial. Thus, cases which turn on the *absence* of records — failure to file tax returns or illegal re-entry after deportation — will be burdened. For instance, the Fifth Circuit, in *United States v. Rueda-Rivera*, 396 F.3d 678, 680 (5th Cir. 2005), permitted the admission into evidence of a Certificate of Nonexistence of Record (CNR) indicating the absence of a record that the defendant had received the government's consent to re-enter the United States. *Melendez-Diaz* appears to have overruled *Rueda-Rivera* on this point. In any case where the absence of a record is a fact to be proven — from run-of-the-mill operating without a license prosecutions to more exotic white collar cases — *Melendez-Diaz* requires testimony, and not a certification, that the record does not exist, and may require the government to call all relevant personnel involved in the search.

Another worrisome application of *Melendez-Diaz* is whether it makes some cases unprosecutable in the future. Particularly vulnerable are cases in which a crucial scientific test cannot be duplicated and the analyst who conducted the test is unavailable. For instance, autopsy reports arguably fall within the scope of *Melendez-Diaz*' holding. If a medical examiner conducts an analysis which cannot later be duplicated, and that medical examiner dies or otherwise becomes unavailable for trial before the defense has had a chance to cross-examine him or her, the prosecution may be unable to continue with its case. Whether a medical examiner who did not personally perform the autopsy can testify to certain facts and then render his or her own opinion is an issue to be clarified in the wake of *Melendez-Diaz*.¹²

Legislative Responses

State legislatures may seek to resolve some of the foregoing ambiguities and to curb the potential strain on finite resources. One such mechanism is a "notice and demand" statute. At the request of Attorney General Coakley and the District Attorney's Association, Governor Deval Patrick filed legislation providing for notice-

and-demand which would allow prosecutors to notify the defense of its intent to introduce lab reports as evidence and provide defense counsel with an opportunity to object and demand production of the analyst at trial.¹³ These procedures, however, cannot overly burden the defense, an issue the Supreme Court will take up next term in *Briscoe et al. v. Commonwealth*.¹⁴ In that case, the Supreme Court of Virginia held that a defendant waived his right to confront forensic analysts because he failed to utilize the available statutory procedure. Statutory boundaries on the right of confrontation are, under *Briscoe*, legitimate concessions to the practical necessities of criminal prosecution, but they cannot shift the burden of producing a witness from the government to the defense. Thus, it may be problematic for statutes to require defendants to give grounds for their objection to the introduction of lab reports beyond the assertion of the confrontation right itself. And *Melendez-Diaz* itself held that statutes which merely afford a criminal defendant the opportunity to subpoena the analyst as a witness, such as Louisiana's LA. REV. STAT. ANN. § 15:501 (2008), North

Carolina's N.C. GEN. STAT. ANN. § 20-139.1 (2009), and Iowa's IOWA CODE ANN. § 691.2 (2009), are constitutionally impermissible because they shift the burden of producing this evidence from the government to the defense.

Legislatures may also address the question of who must testify. Some states, including Arkansas, Colorado, Louisiana, and North Carolina, specify by statute that the defendant may cross-examine the analyst who performed the relevant tests.¹⁵ As *Melendez-Diaz* is ambiguous on this point, it is unclear whether these statutes will survive constitutional scrutiny.

Conclusion

Like *Crawford*, *Melendez-Diaz* will change criminal practice in ways predictable and not. Criminal lawyers thus must remain alert to how the Supreme Court and lower courts continue to develop Confrontation Clause jurisprudence that began with *Crawford*. ■

Endnotes

1 541 U.S. at 75-76.

2 David E. Frank and Kimberly Atkins, *Dismissals Feared in Wake of Landmark Lab-Report Decision*, 37 Mass. Lawyers Weekly 1873, 1897 (July 6, 2009).

3 Brief of The National District Attorneys Association et al. as *Amici Curiae*, No. 07-591, filed Sept. 9, 2008, p. 11 n. 5, and 14.

4 Frank and Atkins, 37 Mass. Lawyers Weekly, *supra* note 2 at 1897.

5 Brief of The National District Attorneys Association et al. as *Amici Curiae*, *supra* note 3, at 16.

6 129 S.Ct. at 2540.

7 Adam Liptak, *Court Weighs How Juries Should Hear Lab Evidence*, N.Y. Times, November 11, 2008, at A14.

8 129 S.Ct. at 2544-46.

9 Tom Jackman, *Lab Analyst Decision Complicates Prosecutions*, The Washington Post, July 15, 2009.

10 See 129 S.Ct. at 2540, Appendices A and B, listing state cases from around the country that allowed admission of forensic reports without confrontation of the reports' author, and those that required confrontation before admission.

11 See e.g. *Commonwealth v. Nardi*, 452 Mass. 379, 393 (2008) (in response to a *Crawford* challenge, a medical examiner who testified based on facts and opinions in report developed by another medical examiner could testify to facts in the report that involved "no judgment or discretion on the part of the" medical examiner who authored the report, but could not testify to "records of investigations and inquiries conducted, either voluntarily or pursuant to requirement of law, by public officers concerning causes and effects involving the exercise of judgment and discretion, expressions of opinion, and making conclusions are not admissible in evidence as public records").

12 See *Nardi*, 452 Mass. at 393 (facts involving "no judgment or discretion on the part of" a medical examiner...like toxicology test results, may be admitted under the public record exception").

13 H.B. 4162, 186th Gen. Ct. (Mass. 2009).

14 *Briscoe v. Commonwealth*, 129 S.Ct. 2858 (2009) (cert. granted); *Magruder v. Commonwealth*, 657 S.E.2d 113 (Va. 2008).

15 Ark. Code. Ann. § 12-12-313 (West 2009); Colo. Rev. Stat. Ann. § 16-3-309 (West 2009); La. Rev. Stat. Ann. § 15:499 *et seq.* (2008); N.C. Gen. Stat. Ann. § 20-139.1 (2009).

By Jayne B. Tyrrell and Lisa C. Wood

Residual Class Action Funds: Supreme Judicial Court Identifies IOLTA as Appropriate Beneficiary



Jayne B. Tyrrell is the Executive Director of the Massachusetts Interest on Lawyers Trust Account Program (IOLTA). She is co-chair of the BBA Task Force on Expanding the Civil Right to Counsel.



Lisa C. Wood is a partner at Foley Hoag LLP and has 25 years of experience handling complex business litigation, principally in the areas of securities fraud, accountants liability, and antitrust. She has held leadership positions in both the BBA and BBF.

At the conclusion of a class action, it is not uncommon for a portion of the funds that have been designated for the benefit of the plaintiff class, whether by settlement or court order, to be left over and not distributed to certain class members even though they are entitled to them. In some instances, certain members of the class cannot be located. In other instances, eligible class members fail to submit claims as required by the judgment, order or settlement. And, on occasion, the court may order that no disbursement be made to certain class members because the amount of recovery due is so small that the cost of notice, disbursement and administration may exceed the value of the claim. Such left-over funds are commonly referred to as residual funds.

On November 25, 2008, the Supreme Judicial Court amended Mass. R. Civ. P. 23, which outlines the requirements for bringing, maintaining and concluding a class action lawsuit. The previous version of the Rule was silent on the issue of how residual funds should be disbursed.

The amended Rule now directs the payment of residual funds in class actions either to one or more nonprofit organizations whose activities benefit the class (which could include legal services programs) or to the Massachusetts IOLTA Committee, which provides funds for legal services programs. Parties may still formulate settlements that do not create residual funds, subject to court approval; however, the rule does provide direction to parties and the court in those instances in which there will be residual funds, for whatever reason.

Massachusetts is not alone in its attempt to address the residual fund issue in this manner. North Carolina, Illinois and California have each adopted legislation, and the State of Washington has a Supreme Court rule requiring that all or part of the residual

funds in class action cases go toward legal aid or related “access to justice” initiatives.

The Supreme Judicial Court’s amendment comes at a critical time for civil legal aid programs, which are facing substantial losses in IOLTA income due to falling interest rates and a depressed housing market. IOLTA makes up a significant portion of legal aid funding. The state appropriation for civil legal aid was also cut in this tight budget year.

Supporting legal services programs with residual class action funds is an appropriate use of such funds. Such programs can directly benefit the members of a class for whom funds have been set aside but not distributed. For example, legal services programs often provide systemic advocacy in support of low-income groups. As the states’ experts on the legal issues of low-income people, legal services attorneys and paralegals are highly effective advocates at the legislative, administrative, and judicial levels, bringing about substantial positive changes for individuals and communities.

With close to one million people in Massachusetts eligible for free legal services, there is a huge unmet need for the kind of services that IOLTA-funded programs provide. Advocates are continually challenged to find resources to help more people in need who otherwise would go without legal representation. Even before the economic downturn, almost half of the eligible applicants for legal aid were turned away due to lack of resources.

Free legal services are a necessity in critical areas such as housing, family, income maintenance, and individual rights. Such services are a good investment. They help to stabilize struggling families, improve access to public benefits programs, avoid the costs of homelessness and hunger, obtain needed health care, and secure reliable child care. The Supreme Judicial Court’s change to Rule 23 may provide the boost that civil legal aid programs so badly need. ■

By David Nersessian and Maureen O'Rourke

Challenges and Opportunities for New Lawyers



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These are challenging times to be a lawyer. They may even be transformational times. Recent upheavals in financial, industrial and real estate markets have many lawyers (and clients) not only cutting back, but also fundamentally re-thinking their business models and the ways in which legal services are provided. Until very recently, hardly a day passed without news of law firm layoffs, deferred start dates, or canceled summer programs. In-house lawyers face substantial budget cuts at the very time their departments must navigate a broader range of legal and organizational challenges. And many government and public interest employers are dealing with hiring freezes and other cutbacks that push already-strained resources to the limit.

Today's challenges may or may not lead to a fundamental re-structuring of the legal market. At the very least, they raise profound questions, including how and by whom legal services should be delivered in the future and what a transitioning market for law graduates portends for legal education. The profession's dialogue around these issues is only just beginning and no doubt will continue for some time. But these broader questions must be put aside in favor of a more modest goal for this short essay. We hope to provide attorneys who are newer to the profession with advice that will prove useful and timeless — relevant regardless of how the legal market develops.

Underpinning our thoughts here is the recognition that law — whatever its intellectual, strategic, and professional dimensions — is a relationship business. The very nature of legal practice requires strong inter-personal relationships with clients, colleagues in the workplace, and the wider legal community. The ability to develop and manage these relationships is an essential aspect of early professional development and critical to long-term success as a lawyer. So we'll focus there.

Our first suggestion involves mentoring — finding someone with whom you can talk freely about your professional development and career aspirations. Your first job will not be your last, and you may change your substantive area or type of practice (large firm, small firm, government, non-profit, etc.) several times during your career. Besides being helpful in charting your occupational path, mentors also are invaluable sounding boards when an environment, for whatever reason, becomes politically charged. Having someone who can help you navigate difficult personalities and teach you to communicate bad news accurately but in a positive way is priceless. Sometimes just a simple turn of phrase makes all the difference in how you are perceived, and someone who has “been there before” can provide useful guidance.

The ideal mentor is someone with enough substantive expertise and professional wisdom to help you navigate the early days of legal practice but with whom (and this is important) you can establish a genuine rapport. You may need more than one mentor — for example, a mid-level associate to help with the “nuts and bolts” of legal practice and a senior lawyer or partner with a broader perspective on a particular practice setting or overall trends in the profession. This may or may not be someone that you work with directly. Whatever the setting, the important thing is to seek out such relationships and actively cultivate them. And in the spirit of giving what you wish to receive, endeavor to mentor others when you can (e.g., summer associates, law students at your alma mater, etc.).

Finding a mentor can be challenging if you were not born into a family of lawyers or came late to the realization that law is the path you wish to take. It is even more so if you are still seeking

employment or if your employer does not provide mentoring opportunities (though most do — formally or informally). Hence our second point: Create your own opportunities and network.

Balancing networking time with training, client service, and professional development can be tricky. If you already are practicing, senior lawyers sometimes will discourage you from networking. In some ways, you can't blame them. Employers invest heavily in training young lawyers and lose that investment when associates leave after a short tenure. Some view networking as a euphemism for "looking for the next job" or "chatting with friends from law school." The underlying point is valid: if you are being trained and paid by someone else, you are obligated to use your best efforts on their behalf. But network anyway — the additional time required is worth it. At the end of the day, you alone will bear the downside of the failure to build strong relationships into your professional life alongside your legal skills.

This is true even if you plan for a career with a single firm or employer. Although your early focus must be on training and becoming the best lawyer you can be, you still need to network to be truly successful — both within your organization and outside of it. Technical excellence unquestionably is a necessary predicate of success. But it is not sufficient. Few promotions to partnership or senior leadership roles are available for lawyers without a solid cohort of professional relationships. Rather, it is the combination of strong relationships with expertise and experience that creates your professional identity, generates clients and opportunities for you and your employer, and helps to ensure your long-term success.

It is easy to say "Go forth and network." It's harder to do in practice, so we have a few suggestions to get you started. Chief among these is that you volunteer your time and skills with organizations whose work interests you, whether or not that work relates directly to your full-time job. Whether or not you are currently employed, this is a great way to meet lawyers in your community who are doing what you want to do. But take an active stance — contribution is far superior to participation. Rather than simply attending events, look for opportunities to serve on committees, help to organize panels and events, etc. (The Boston Bar Association offers great opportunities for getting involved!).

You also can contribute to the greater good through pro bono work or community service. You have worked hard to become a lawyer and have many valuable skills, which you can use (really!) to make the world a better place. Most lawyers who do so find that the rewards of using

their unique talents to help others far outweigh the investment of the time and energy required.

This brings us to our final point: Establish a solid relationship with yourself and engage in ongoing assessment of your legal career. Whether it be at home early on a Sunday morning, while you are out of town on business, or spending an hour alone on a park bench with a legal pad at lunchtime, it is important to periodically take time from your busy schedule to ask yourself some fundamental questions. Some of these include: What are you spending most of your work life doing? Is that the best use of your time and talents? How do you feel about the people that you work with? If you could change something about your working life, what would that be? How would the person closest to you describe your professional satisfaction? Would you balance the demands of your work and personal life differently if given the chance? And the mother of all existential legal queries: Are you happy?

You may or may not have "good" answers to these questions. The answers that you do have may change over time. None of this should discourage you. What matters is valuing yourself enough to regularly ask the questions and honestly re-assess where you are and where you are going. The process has its own value, and often only time reveals what you were "meant" to do.

Very few law graduates end up in the job they envisioned when they entered law school. This is neither surprising nor cause for alarm. Studying law is a different enterprise from practicing law. (Whether this should be the case is a question for another day). You may dislike business law courses while in school and envision yourself as a constitutional lawyer but discover later that you like making deals more than First Amendment litigation. Only the lucky few find the optimal fit early on. Most spend years sorting out the right position, discovering their professional identity through what management expert David Maister calls "stumbling upwards." Like Justice Stewart and pornography, we know the right job when we see it. Ultimately, we appreciate it all the more because of the journey we took to find it.

No one doubts that the current market presents challenges. But challenges inevitably create opportunity. For every report of layoffs, there is another about lawyers using this time to examine critically what they like and dislike about their practice and finding new paths for themselves. You too will find your way. We hope your path will be easier with a good mentor, solid networking, and an honest ongoing dialogue with yourself about your career direction. ■

By Christian M. Hoffman and Matthew C. Baltay

Maintaining Client Confidences: Developments at the Supreme Judicial Court and First Circuit in 2009



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- *Comm'r of Revenue v. Comcast Corp.*, 453 Mass. 293 (Mar. 3, 2009)
- *U.S. v. Textron*, 557 F.3d 87 (1st Cir. Jan. 21, 2009) *withdrawn, vacated and rehearing en banc granted by* 560 F.3d 513 (1st Cir. Mar 25, 2009), *superseded by* — F.3d —, 2009 WL 2476475 (1st Cir. Aug. 13, 2009)

In 2009, the Massachusetts Supreme Judicial Court (SJC) and the United States Court of Appeals for the First Circuit both issued important decisions addressing the reach of the work product doctrine to protect from discovery documents prepared for business purposes, but with litigation also in mind. The SJC also ruled on the scope of the so-called derivative attorney-client privilege that has been used to protect communications with non-attorneys, such as accountants and consultants, who assist the legal team.

In *Textron*, the First Circuit initially issued its opinion in January 2009, holding that Textron's tax accrual work papers justifying its reported tax reserves, to be drawn upon should the IRS dispute (as it had) the company's tax reporting, constituted protected work product. *U.S. v. Textron*, 557 F.3d 87 (1st Cir. 2009) *subsequently withdrawn and vacated*.

In *Comcast*, the SJC followed federal precedent and similarly ruled that memoranda prepared by an accounting firm retained by in-house counsel to advise it on how to structure a large stock sale for tax purposes constituted attorney work product that need not be produced in the state tax authority's suit against Comcast. *Comm'r of Revenue v. Comcast Corp.*, 453 Mass. 293 (2009). While it interpreted the work product doctrine broadly, the *Comcast* court strictly construed the attorney-client privilege and narrowed the scope of the derivative privilege articulated in *U.S. v. Kovel*, 296 F.2d 918 (2d Cir. 1961), whereunder communications involving non-lawyers (such as accountants) employed to assist an attorney in rendering legal advice may qualify as privileged attorney-client communications. Interestingly, after *Comcast* was decided, the First Circuit withdrew its first *Textron* decision, granted rehearing *en banc* (560 F.3d 513 (1st Cir. Mar 25, 2009)) and then, in a sharply-split *en banc* decision, reversed its earlier ruling. *U.S. v. Textron*, — F.3d —, 2009 WL 2476475 (1st Cir. Aug. 13, 2009). In the second *Textron* decision, the First Circuit ruled that the company's tax accrual papers were subject to production, as they had been created in the ordinary course of business, not for litigation, and thus were not protected work product.

The *Comcast* and *Textron* decisions illustrate the inherent difficulty in delineating between business materials and documents prepared in anticipation of litigation in a world where

business decisions often anticipate the prospect of litigation and build that consideration into the deliberative process. Accordingly, business lawyers and litigators alike in Massachusetts, as well as accountants, tax advisers and others who work with attorneys, would do well to understand both the *Comcast* and *Textron* decisions.

Just the Comcast Facts

The principal player in the *Comcast* case was U.S. West, a Comcast predecessor. After it acquired Continental Cablevision, antitrust considerations mandated that U.S. West should sell its stock in another one of its Massachusetts companies. The sale would have significant tax consequences, notably a \$500 million capital gain. Not surprisingly, U.S. West sought to structure the transaction with taxes in mind and retained Arthur Andersen LLP for tax advice. The Andersen partners, including a lawyer precluded from practicing law while employed by the accounting firm, prepared a series of draft memoranda and then a final memorandum outlining alternative methods for structuring the transaction from a tax perspective. The Andersen memoranda included tax pros and cons of each proposed method and the relative litigation risks attendant to each.

Thereafter, U.S. West structured the sale in such a way that it paid no Massachusetts taxes on account of the capital gain realized and taxed at the federal level. Following a tax return audit, Massachusetts charged that U.S. West owed more than \$50 million in state taxes. It issued an administrative summons requiring U.S. West to produce all documents relating to its divestiture of the stock. The company resisted production of the Andersen tax memoranda, claiming they constituted protected attorney-client communications and work product prepared in anticipation of litigation.

The Massachusetts Commissioner of Revenue requested the documents in superior court, but it was denied relief. The Massachusetts Supreme Judicial Court then took direct review.

Comcast Attorney-Client Privilege Analysis

Addressing the attorney-client privilege issue first, the SJC in *Comcast* observed that, although the attorney-client privilege serves fundamental societal interests in allowing free consultation between attorney and client, the privilege is subject to narrow construction because it impedes fact finding. Citing *U.S. v. Arthur Young*, 465 U.S. 805 (1984), the court stated that a narrow construction is

particularly appropriate where information is withheld from the government in a tax enforcement proceeding. Further, the court noted the obvious: the attorney-client privilege applies only to communications between attorney and client. Comcast argued, however, that the Andersen partners had assisted in-house counsel who served his corporate client (U.S. West) and thus enjoyed the derivative privilege recognized in *U.S. v. Kovel*, 296 F.2d 918 (2d Cir. 1961). Earlier jurisprudence under *Kovel* might have allowed the attorney-client umbrella to cover non-attorneys assisting counsel rendering legal advice in this manner. Nevertheless, although it acknowledged the “logic” of *Kovel* and “its continuing vitality,” the SJC disagreed. True, as the Second Circuit had stated in *Kovel*, the attorney-client privilege may apply if “the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit.” But, just as the First Circuit had in *Cavallaro v. United States*, 284 F.3d 236, 249 (1st Cir. 2002), the SJC observed that the “necessity” element means more than “just useful and convenient.”

In the end, the *Comcast* court gave the derivative privilege a narrow interpretation. It ruled that the *Kovel* doctrine is limited to instances in which the accountant or other non-lawyer truly facilitates or translates communications between the attorney and client serving essentially as “interpreter” or “translator.” That could be the case where an accountant prepares a client’s net worth statement or analyzes a complex financial transaction to aid a lawyer in defending a client charged with financial crimes. Where, however, the non-attorney is retained to provide advice, such as state tax advice in the case of Comcast’s advisers, the attorney-client privilege does not attach. In rejecting the suggestion that its decision reduces the attorney-client privilege to a “meaningless protection,” the court observed that the U.S. West attorney “was free to seek advice on Massachusetts tax law from a Massachusetts attorney, where the privilege would apply.”

Mindful of *Comcast*, practitioners should now realize that *Kovel*, if it ever did, no longer provides support for a broad derivative attorney-client privilege in Massachusetts. While not outright rejected by the SJC, the derivative privilege appears at best to be a thin reed in Massachusetts, assuredly protecting only the facilitation or translation of information flow between client and attorney necessary for effective consultation.

Comcast Work Product Analysis

Although the *Comcast* court concluded that the attorney-client privilege should be narrowly construed, the court nevertheless gave a broad reading to the work product doctrine and held the Andersen memoranda were protected. The fact that the memoranda were prepared by a non-attorney was of no moment. Even though it is commonly referred to as the “attorney” work product doctrine and the seminal Supreme Court case, *Hickman v. Taylor*, 329 U.S. 495 (1947), involved an attorney’s work (in the form of witness interview memoranda), the Massachusetts Rules of Civil Procedure, like the federal counterpart, expressly extend work product to non-lawyers. By its terms, Mass. R. Civ. P. 26(b) (3) protects from discovery (absent a showing of substantial need) documents “prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including his attorney, consultant, surety, indemnitor, insurer, or agent).”¹

The *Comcast* court noted that two divergent tests have developed to determine whether documents are “prepared in anticipation of litigation.” The first test limits the reach of work product protection to documents prepared “primarily or exclusively” to assist in litigation. Under this test, documents prepared in order to inform a business decision, even if litigation may be a consideration or possible consequence, do not constitute protected work product. Were this test to apply, the Andersen memoranda at issue would likely not constitute protected work product because they were prepared primarily to inform a business decision.²

The second test, and the one adopted by the SJC in *Comcast*, extends the reach of work product protection to documents created “because of” considerations of potential litigation, even if the documents were prepared for a business purpose and not to assist in litigation. Viewing the Andersen memoranda as an analysis of the litigation consequences of particular tax structures, the court explained that, under the test, a litigation analysis prepared so that a party can make an informed business decision nevertheless can be said to be prepared because of the possibility of litigation and thus can constitute protected work product.

The *Comcast* court adopted the looser “because of” test without much analysis. Rather than develop the argument for its own acceptance of the “because of” test, the SJC cited *United States v. Adlman*, 134 F.3d 1194 (2d. Cir. 1998), a leading “because of” case, and announced Massachusetts would follow suit:

We need not repeat here the court’s exploration of the contours of the two tests. It is sufficient to say that we agree with both the reasoning and the conclusion [of *U.S. v. Adlman*] that the latter formulation (“because of” existing or expected litigation) is the correct test.

In so ruling, the *Comcast* court also noted that *Adlman* has been followed in several federal circuit courts including the First Circuit in *State of Maine v. U.S. Dept. of the Interior*, 298 F.3d 60 (2002) (“*Maine*”) and the initial *Textron* decision. In giving weight to these federal cases and its adoption of the “because of” test, the SJC explained that Massachusetts Rule 26(b) (3) on work product is identical to its federal counterpart and it is therefore appropriate to look to federal case law for guidance.

Turning to the facts of the case, the SJC concluded that, as set forth in the affidavit of Comcast’s in-house counsel, when Comcast commissioned the tax advice its concern focused on the reasonable possibility that the tax authority would challenge any non-payment of state taxes in light of the significant capital gain realized. It rejected the commissioner of revenue’s argument that the Andersen memoranda were designed, if anything, to avoid litigation and not in anticipation of it. Instead, the court found the memoranda were prepared to inform a business decision that turned on the assessment of the likely outcome of litigation. The court accordingly held that the memoranda were prepared in anticipation of litigation and therefore constituted protected work product.

Textron and Work Product

Textron raises the question whether the work product doctrine protects tax accrual work papers prepared by a tax payer. Tax accrual work papers list the questionable positions the tax payer takes on its tax returns, estimate the likelihood that those positions will withstand scrutiny by the IRS or state taxing authority, and calculate the amount of additional tax liability that would result if an IRS assessment had to be paid. In contrast to the circumstances in *Comcast* where the Andersen tax memoranda anticipated and helped structure a transaction that was potentially taxable, tax accrual work papers consider the tax impact of completed transactions. The First Circuit, which had already adopted the “because of” test, held in January 2009 in a split decision authored by Judge Torruella that *Textron*’s tax accrual work papers were created because of the prospect of IRS litigation and, therefore, constituted protected work product. *U.S. v. Textron*, 553 F.3d 87 (1st Cir. 2009) (“*Textron I*”).

Shortly after the issuance of the *Comcast* decision, which cited *Textron I*, the First Circuit withdrew the opinion and reheard the case *en banc*. On August 13, 2009, the full *en banc* First Circuit ruled. *U.S. v. Textron*, — F.3d — (1st Cir. Aug. 13, 2009) (“*Textron II*”). This time the court took the opposite position and held that the tax accrual work papers were not protected work product and must be produced. First Circuit Judges Torruella and Boudin now found their roles reversed with Judge Boudin writing the majority (joined by Chief Judge Lynch and Judge Howard) and Judge Torruella writing a blistering dissent (joined by Judge Lipez). The new majority focused on certain “exception” language in the Second Circuit *Adlman* case that had been recited in the First Circuit’s prior *Maine* decision to the effect that the “because of” test does not protect from disclosure “documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation,” “even if the documents aid in the preparation of litigation.”

Thus, tax accrual documents protected by the work product doctrine in *Textron I* were no longer protected because they should be seen as prepared in the ordinary course of business to support statutorily required financial statements filed with the SEC. Bolstering its case for disclosure, the majority further observed that “how far work product protection extends turns on a balancing of policy concerns rather than application of abstract logic,” adding later that “underpaying taxes threatens the essential public interest in revenue collection.” Also interesting is that the *en banc* majority seemed to employ an “I know it when I see it” test, explaining that “every lawyer who tries a case knows the touch and feel of materials prepared for a current or possible...law suit” and that “any experienced litigator would describe the tax accrual work papers as tax documents and not as case preparation materials.”

In dissent, Judge Torruella charged that the “simply stunning” majority opinion had effectively overruled the “because of” test in favor of a “prepared for” test that asks whether a contested document was “prepared for use in possible litigation.” This, Judge Torruella asserted, is even narrower than the primary purpose test and ignores both *Adlman* and the First Circuit *Maine* case that expressly adopted it, as well as the plain language of Rule 26(b) (3) of the Federal Rules of Civil Procedure, which, like Massachusetts Rule 26(b) (3), provides qualified protection for documents “prepared in anticipation of litigation *or* for trial.” Judge Torruella ended his dissent by stating that “the majority has thrown the law of work-product protection into disarray,” and suggested that it is time for the Supreme Court to intervene and “set the circuits straight on this issue which is essential to the daily practice of litigators across the country.”

The *Comcast* and *Textron* decisions highlight the difficulty delineating between work prepared solely for business purposes and that prepared in anticipation of litigation. Indeed, the First Circuit articulated different approaches and opposite results in its two *Textron* decisions. It is possible that courts may begin to move away from the dual purpose “because of” test in favor of blanket rules that certain types of materials, tax accrual work papers, for example, categorically are not (or are) protected work product. It will also be interesting to see whether the SJC revisits its *Comcast* decision in light of *Textron II* to provide uniformity across state and federal courts in Massachusetts on the important issue of the scope of work product protection. In all events, practitioners and their service providers should remain mindful of the holdings in both cases as they create materials for business purposes that arguably anticipate litigation. ■

Endnotes

1. The work product doctrine is qualified, at least with respect to facts contained in a document that do not reveal the mental impressions of the attorney or other representative of the party. With respect to fact work product, the protection may be overcome if the party seeking discovery demonstrates “substantial need” of the materials and inability to obtain them elsewhere. The *Comcast* court noted, however, that the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning litigation, so-called “opinion” work product, are afforded greater protection than fact work product and that it is an open question, at least in Massachusetts, as to whether the protection for opinion work product is absolute or whether it can be overcome by some extraordinary showing.

2. A line of Massachusetts Superior Court decisions, following *Shotwell v. Winthrop Community Hosp.*, 26 Mass. App. Ct. 1014, 1016 (1988), have applied the “primary purpose” test. See *Shipley Co. v. E.I. du Pont de Nemours & Co.*, 1994 WL 902955 (Mass. Super. Ct. Nov. 10, 1994) (McHugh, J.); *Harris v. Steinberg*, 6 Mass. L. Rptr. 417, 1997 WL 89164 (Mass. Super. Ct. Feb. 10, 1997) (Doerfer, J.); *Torossian v. Peerless Ins. Co.*, 1996 WL 1744608 (Mass. Super. Ct. Apr. 22, 1996) (Houston, J.); *Meszar v. Horan*, 10 Mass. L. Rptr. 682 (Mass. Super. Ct. Nov. 16, 1999) (Toomey, J.); *Abramian v. President and Fellows of Harvard College*, 14 Mass. L. Rptr. 230, 2001 WL 1771985 (Mass. Super. Ct. Dec. 04, 2001) (Lauriat, J.); *Vasquez v. Elco Administrative Services*, 14 Mass. L. Rptr. 173, 2001 WL 1631535 (Mass. Super. Ct. Dec. 17, 2001) (Agnes, J.). Similarly, the Superior Court in *Comcast* ruled that “the determinative question is whether the prospect of litigation was the primary motivating purpose behind the creation of the document.”

By Damon M. Seligson

If Pro Bono Is Not An Option, Consider Volunteering



Damon M. Seligson is a partner in Holland & Knight's Litigation Department. His practice includes commercial and real estate litigation, including zoning and land use matters, and representation of healthcare corporations.

"You make a living by what you get. You make a life by what you give."

— Winston Churchill

As lawyers, when we think "volunteer," or providing service "for free," presumably we think *pro bono*. Unfortunately, some lawyers hear the words "*pro bono*" and feel that while it is a great idea, it is not for them. Whether the reasons are time constraints that make *pro bono* involvement impracticable, or the legal issue falls outside of a specific practice area, a large number of lawyers simply shy away from *pro bono*.

Lawyers who do get involved in *pro bono* projects do so for a variety of reasons. Some feel a duty to ensure that members of society have access to adequate legal representation. Others feel that as professionals we need to be concerned with the public image of our profession. Regardless of the motivation, as members of our communities, we should get involved.

But, if *pro bono* is not an option, consider volunteering your time in youth sports and activities. Coaching soccer. Or refereeing little leaguers. Volunteering in youth sports is gratifying, particularly if you have young children.

Volunteering, however, is not without risks and legal considerations. Imagine that you are a volunteer coach for your child's youth soccer team and one of the children on the team breaks his leg in a practice drill. Or worse, imagine that an enthusiastic child who is participating in a fierce game suddenly suffers some form of respiratory distress or a cardiac incident and needs emergency medical help to prevent a fatality.

These are not uncommon scenarios.

What are the obligations of the volunteer coach or referee? What is the legal exposure?

Consider the recent case of *Welch v. Sudbury*, 453 Mass. 352 (2009), in which the Supreme Judicial Court examined G.L. c. 213, § 85V, which governs the tort liability of a nonprofit association conducting a youth sports program. The twelve year-old plaintiff was injured when a metal soccer goal post fell on him causing him to break his leg. The goal post was owned by two non-profit associations that ran a youth soccer program. The youth soccer team on which the plaintiff played held practices and participated in organized matches on Haskell Field in the town of Sudbury. The plaintiff sued the associations for negligence claiming that he was seriously injured because they failed to properly secure the goal post, and they failed to warn him of the possible consequent danger to his safety. The associations filed a motion for judgment on the pleadings contending that they were entitled to immunity under G.L. c. 231, § 85V.

G.L. c. 231, § 85V, provides, in pertinent part: "[N]o nonprofit association in a soccer program conducting a sports or sailing program... shall be liable to any person for any action in tort as a result of any acts or failures to act... in conducting such sports program. However, this immunity is not absolute. Nonprofit associations conducting sports programs are subject to liability for, among other things, "acts or failures to

act relating to the care and maintenance of real estate which such... nonprofit associations own, possess or control and which is used in connection with a sports program and or any other nonprofit association activity.”

G.L. c. 231, § 85V(iii). (G.L. c. 231, 85V, defines a “[s]ports program” as “baseball, softball, football, basketball, soccer and any other competitive sport formally recognized as a sports by the United States Olympic Committee as specified by and under the jurisdiction of the Amateur Sports Act of 1978 Public Law 95-606 [36 U.S.C. §§ 371 et seq.], the Amateur Athletic Union or the National Collegiate Athletic Association.)

The trial court dismissed the case on the grounds that the defendants were entitled the broad immunity conferred by the statute. The plaintiff appealed. The SJC agreed with the trial court, reasoning that the harm alleged by the plaintiff did not result from a deficiency in the care and maintenance of Haskell Field itself. Rather, the Court found that the injury stemmed from the alleged improper placement of sports equipment atop the real estate. Additionally, the Court found that the act of setting up the soccer goals by the associations was done in furtherance of a sports program.

While the plaintiff argued further that statutory immunity was inapplicable because he was not an actual participant or spectator at the time of the injury, the Court disagreed. Justice Spina wrote that, “[t]he applicability of § 85V is not based on the particular status of the individual who is injured, whether that person be a sports program participant, a spectator, or a bystander.” Rather, the statute expressly states that the nonprofit association shall not be liable to *any* person for *any* action in tort as a result of any acts or omissions in conducting the sports program.

Given the Court’s clear ruling, what does this mean for volunteers? Simply put, there is very little to be concerned about in terms of liability.

First, G.L. c. 231, § 85V confers broad immunity upon those who volunteer in a nonprofit sports program. Indeed, the Legislature has made the judgment that the elimination of liability for negligence in nonprofit sports programs is necessary to the encouragement and survival of such programs. Second, the parents of minor participants in such sports programs are typically required to sign pre-injury written releases. Releases of this type are enforceable and will likely constitute an effective defense to a subsequent action for damages. In *Sharon v. City of Newton*, 437 Mass. 99 (2002), the Court

held that a parent may waive a minor child’s claim for personal injuries — subsequently sustained while participating in the program — even though the child had specifically disavowed the release upon reaching the age of majority. Thus, unless a volunteer commits an act of gross negligence or an intentional tort, there remains no real reason to be concerned.

As long as organized youth sports exist, there will be kids to play them. With towns and cities facing massive budget shortfalls, intramural sports programs are at risk for elimination. Consequently, volunteers are needed to help keep these vital community activities alive and functioning. We as lawyers can and should help. If *pro bono* is out of the question, give back by volunteering. The law is designed to protect you, as the volunteer. Nor do you need to be an ex-jock, David Beckham, or a baseball fanatic, to be a successful coach or volunteer. Simply get involved. It will do wonders for you, and more importantly, it will do wonders for those enthusiastic participants who stand to benefit most. ■



Mediation/ Arbitration Services by a practicing trial lawyer

Jeffrey S. Stern

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