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Voice of the Judiciary



You open your email and there it is – a special invitation from the Supreme Judicial Court. You have been chosen to evaluate those trial court judges sitting in a county in which you have recently appeared on a case.

Your participation is critical, it says. And if you do participate, your identity cannot be determined. You are skeptical of both statements. No one will take what you say seriously anyway, right?

Wrong. The SJC's Judicial Performance Evaluations program, now twelve years old, is more robust than ever. It is the cornerstone of a larger effort to improve and enhance the judiciary on a state wide basis.

If you complete the evaluation, your responses together with the responses of other attorneys who have appeared before that judge in the preceding two years are shared not only with the evaluated judge but also with that judge's chief. The results of the evaluation can have a real impact on deciding what steps judges should take to further develop their judicial skills.

The current evaluation instrument asks attorneys to rate a particular judge on sixteen attributes indicative of judicial performance. Does the judge dispose of judicial matters in a timely manner? Does she treat lawyers and litigants with respect? Does the judge appear to have a good grasp of the law? Is he free from bias?

The instrument also gives lawyers a chance to explain their ratings with written comments. These comments can be valuable – provided they are constructive. To say that a judge is “bad” provides no guidance as to how that judge might modify his behavior. On the other hand, constructive comments can provide a judge with valuable insight into how he or she is perceived by others.

And yes, the evaluating attorney's identity remains confidential. No one will know who you are. When you fill out the evaluation, you are randomly assigned a number by the evaluation software and it is

literally impossible to track backward to your name once you have responded. But that anonymity carries with it certain responsibilities. This is a lawyer's chance to be helpful, not hurtful.

So you fill out the evaluation. What happens to it? There is a general misimpression among the bar that the results go into a black hole – or at least into someone's drawer, never to be looked at again. That is far from the truth.

First, the results are tallied and a report is put together. That report contains a wealth of information. It shows not only how many attorneys responded but also gives a breakdown as to how many years they have been practicing, what percentage of their practice is focused on litigation, and how many hours in the last two years they were able to observe the judge whom they evaluated.

That's important to the individual judge. If a large percentage of the respondents are experienced litigators (as they often are), then it is hard to brush off what they have to say.

The report will also show how a particular judge fared compared to her colleagues – indicating not only the composite results for all judges in her department dating back to 2001, but also the results of judges in other departments evaluated in that round. Judges take pride in their work: to realize that that one is not measuring up in comparison to others doing the same job can be a real motivator for change.

Before the report is distributed to the judge, he is asked to do his own self-evaluation. This too can be a tool for self-improvement. If there is a large gap between the scores a judge gives himself and those that he actually received, then the judge knows that there is reason to look more closely at his behavior.

Once the judge and that judge's chief receive the report, a time and date is set for the two to sit down and discuss the results. These meetings are not perfunctory. They are lengthy and involve a frank interchange regarding any difficulties that the judge has encountered on the job.

Because each judge gets evaluated at least once every three years, the judge can compare the current results to those of prior years to see if there has been any noticeable change. If there has been a change for the worst, then the meeting provides the opportunity for the judge and her chief to talk about why the change might have occurred and to brainstorm about what could be done to turn things around.

Attorney comments too may help identify a problem area for the judge. A couple of critical comments may not tell much, but if there are many attorneys saying the same thing, then the comments may illustrate to the judge that something needs to be done.

The SJC has set a minimum standard that all judges are expected to meet in their ratings on the judicial attributes set forth in the evaluation instrument. A very large majority exceed that standard by a large measure. But for those few who fall below that standard, a written enhancement plan must be developed by this judge and his chief.

This plan will describe the steps the judge will take to remedy any deficits in performance. Perhaps the judge needs more training in a certain substantive area, or some assistance in writing. The judge may be assigned a more experienced judge as a mentor, or urged to shadow another judge for a time. Follow-up meetings will be scheduled between the judge and his chief.

Precisely because judicial evaluations are taken so seriously within the judiciary, the SJC has recently formed a committee that is reexamining the evaluation instrument to see how it could be improved. This committee, which consists of judges, law professors, and two members of the bar, is also considering what kinds of additional information could be gathered as part of the evaluation process so that each judge and her chief have the most complete picture of how that judge is performing her duties.

The judiciary has not always embraced judicial evaluations, of course. The statute that mandated them, G.L. c 211 §26, was enacted in 1988. Each court department fashioned its own program, but the lack of uniformity and consistency provoked a demand from the bar that something more needed to be done.

In 1999, then Chief Justice Herbert Wilkins appointed a committee of judges, each of whom represented one of the seven trial court departments, and in 2001, the first set of evaluations went out to Bristol and Plymouth Counties. Every judge in the state has been evaluated – most of them multiple times – since every three years, the process begins anew.

Judicial evaluations tell only part of the story, however. In recent years, the SJC through various working committees has developed additional programs aimed at enhancing judicial performance.

For example, every trial court department now has a peer observation program, where judges are paired up to watch each other in court and provide feedback. Constructive criticism that comes from a colleague is more likely to be heeded than advice from any other source.

Several court departments have also implemented a program whereby a judge is videotaped, then reviews the tape with a colleague. And every court department has developed a comprehensive training program for all new judges, each of whom is assigned a trained “mentor” judge who meets regularly with the new judge throughout the first year.

Programs that focus on demeanor and temperament are now a regular part of judicial education. And there are far more opportunities than there had been in the past for judges to meet across court departments and discuss issues of common concern.

In short, the judiciary has come a long way from that not so distant past when judicial evaluations were considered an anathema.

The irony of it all is that, just as the judiciary is accelerating its efforts to make sure all judge perform at the highest level, interest among the bar in the evaluation process has steadily declined.

Initially, about one third of attorneys who received an evaluation form filled it out and returned it. Now that figure is close to a quarter or even a fifth. When evaluations first began, a judge would typically receive ratings from well over a hundred attorneys. That number has decreased to 70 or 80 – well over the 25 responses required in order for a report to be compiled – but nevertheless cause for concern.

This decline has taken place even as the program has gone online, with the ability to generate reminder notices to those who receive the invitation to participate.

With fewer responses, the evaluation results are less likely to reflect the views of a broad cross section of the legal community, thereby making the results less helpful.

So next time you get that special invitation in your email, don't delete it. Take the time to complete the evaluation. Think through the comments you make so that they will be of some help to the individual judge who reads them. Your response is important. After all, it is in everyone's interest that the judges in this state do their jobs well.

Hon. Paula M. Carey is Chief Justice of the Trial Court. She was appointed to that position on July 16, 2013. Prior to that, she was the Chief Justice of the Probate and Family Court, appointed on October 2, 2007. She was appointed an Associate Justice of the Norfolk Probate and Family Court in 2001.

Judge Janet L. Sanders has been a justice of the Superior Court since 2001. Between 1995 and 2001, she was a District Court judge, assigned first to Waltham and then to Concord as the Presiding Justice. She is currently the Administrative Justice of the Business Litigation Session.

Facilitating the “Fresh Start”: Representing Pro Bono Bankruptcy Debtors Through the Volunteer Lawyers Project

by Meg McKenzie Feist and Megan B. Felter

The Profession



Our potential client is visibly nervous as we show her to the conference room where we will hold an initial meeting to discuss her financial situation. She looks alternately at us, the view out the window, the stack of invoices and bills she has brought with her, and her cell phone, which vibrates periodically to announce yet another creditor collection call. Following introductions, we ask simply, “What brought you here?” She is taken aback for a moment, obviously unused to the opportunity to offer her story without interruption. With some encouragement, however, she reveals the events and circumstances that brought her to our offices. Listening carefully, we realize that finances are but one aspect of the difficulties in her life, which include mental and physical disabilities and a history of having been physically abused. Unable to work, she relies on government benefits and feels powerless beneath the weight of her debts. By the end of the initial meeting, we have gathered the information necessary to determine whether we can represent her on a *pro bono* basis to consider debt relief, potentially through bankruptcy. As we walk her to the elevators and shake her hand goodbye, it is clear that she already feels a sense of relief. The rest is up to us.

The Volunteer Lawyers Project

Our experiences advising needy individuals on a *pro bono* basis with respect to their debt relief options under federal bankruptcy law have been deeply rewarding. In the greater Boston community, there exists a great need for lawyers to volunteer this service. Congress enacted bankruptcy laws to provide “honest but unfortunate” debtors with a “fresh start” from burdensome debts. For individuals who cannot afford a lawyer, however, this relief may be beyond reach. The Volunteer Lawyers Project (VLP) of the Boston Bar Association (BBA) facilitates access to justice by pre-screening and referring qualified individuals to a

volunteer lawyer. The lawyer advises the individual in considering bankruptcy relief typically under Chapter 7, which is a court-supervised procedure by which a debtor receives a discharge of debts after his or her “non-exempt” property has been liquidated to pay creditors.

Individuals in Need

A volunteer lawyer can usually expect a *pro bono* case to have certain common features. First, most clients have very limited, often fixed, income. Some may be relegated to sporadic or part-time work after having lost a more stable job. Others may be forced to live on government benefits after becoming unable to work due to disability. Second, most clients have very limited assets. Typically, they do not own their homes and instead rent, sometimes with the assistance of a federal housing program. Although some clients own cars, many instead rely on public transportation. Indeed, in many cases, a client’s only assets may be clothing and household goods (e.g., bed, television, table, small appliances). These limited assets will likely be deemed “exempt” in the bankruptcy—that is, the client will be entitled to keep them instead of being forced to sell them to pay creditors. Finally, credit card debt is a common feature of most *pro bono* cases. Unsurprisingly, clients with limited income often use credit cards to make purchases when they do not have sufficient cash. Some clients may feel forced to use credit cards to pay for groceries at the end of the month or to cover unexpected expenses, such as car repairs. When a client misses a monthly payment, late charges and interest can quickly turn a modest balance into an unmanageable burden.

How Can Lawyers Help?

A volunteer lawyer may be able to assist a low-income debtor in finding a way out of overwhelming debt. At the initial meeting with the potential client, the lawyer must remember that the individual likely feels demoralized by his or her financial problems and anxious from creditors’ collection efforts. In many instances, the lawyer can help the situation initially simply by listening respectfully to the individual’s story.

The first step in any potential *pro bono* engagement is for the lawyer to check conflicts. Mindful of the high likelihood that a volunteer lawyer belongs to a law firm that in unrelated matters represents financial institutions who are creditors in the potential client’s bankruptcy case, the BBA in 2008 issued an **ethics opinion** analyzing conflicts in the unique context of bankruptcy. The opinion has served to encourage the participation of attorneys from large law firms in the VLP program and should be reviewed by attorneys seeking *pro bono* bankruptcy opportunities.

Once retained, the lawyer helps the client determine whether bankruptcy is appropriate and, if so, what type of relief is needed. At the outset, the lawyer must explain the benefits and burdens of bankruptcy. While the central goal of bankruptcy is to obtain a discharge of debts, bankruptcy also provides the benefit of the “automatic stay,” which is a federal injunction against all collection activity that takes effect when the petition is filed. The stay provides a debtor with a much needed “breathing spell” while dealing with his or her financial affairs. On the other hand, once a client obtains a Chapter 7

discharge, he or she is prohibited from obtaining additional Chapter 7 relief for the next eight years. Additionally, the bankruptcy filing can remain on a client's credit report for up to ten years. Finally, some debts (e.g., taxes and student loans) are difficult to discharge in bankruptcy.

The lawyer must also counsel the client in selecting the appropriate type of bankruptcy relief. Under Chapter 7 of the Bankruptcy Code, a debtor's "non-exempt" property is liquidated to pay creditors. In contrast, under Chapter 13 of the Bankruptcy Code, a debtor has the opportunity to protect his or her "non-exempt" property from the reach of creditors by paying defaulted debts over time through a repayment plan funded by the debtor's excess income. Typically, a low-income debtor will opt for relief under Chapter 7 because the debtor does not have any "non-exempt" property to protect or because he or she does not have any excess income to fund a repayment plan.

Finally, the lawyer should be sensitive to the client's non-legal concerns. For an individual debtor, the moral implications or social impact of walking away from debts may weigh as heavily in his or her decision as anything else. While there are no easy answers to these concerns, the lawyer should not underestimate their importance and should engage with the client in addressing them.

Following the decision to file bankruptcy, the lawyer helps the client complete and file the petition, which details the client's assets, liabilities, income, expenses, and other financial information, and accompanies the client to the Section 341 meeting of creditors, at which creditors and the bankruptcy trustee are given the opportunity to ask the client questions before the bankruptcy court enters any discharge order. The lifespan of a typical Chapter 7 *pro bono* case is three to four months from initial interview to discharge.

An Enriching Experience

In our experience, helping low-income debtors obtain a "fresh start" in their financial lives through debt relief is its own reward. While we are happy to serve the community in this manner, we have also found that *pro bono* representation enriches our own experiences and careers. Particularly for developing attorneys, *pro bono* representation provides an opportunity to increase substantive legal knowledge, to sharpen client counseling skills, and to gain exposure in the local legal community. We are grateful for the VLP's resources and support, which have afforded us these opportunities.

The BBA provides training for lawyers who would like to represent *pro bono* clients in Chapter 7 bankruptcy cases. For more information on opportunities with the VLP, please visit www.vlpnet.org.

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Litigating an SEC Administrative Proceeding

by Luke T. Cadigan

Practice Tips



Under its new Chair, Mary Jo White, the U.S. Securities and Exchange Commission (the “SEC”) has undertaken a more aggressive approach to enforcement, utilizing numerous new weapons at its disposal. In connection with this approach, the SEC has indicated that it intends to try more cases in the SEC’s administrative forum, a place with which relatively few attorneys are familiar.

Previously, the SEC could bring cases in this forum only when the respondents were regulated entities, such as investment advisers and broker-dealers, or individuals associated with such entities. The Dodd-Frank Act of 2010 expanded the forum’s jurisdiction so that the SEC can now bring as administrative cases essentially all the same cases it can bring in federal court. Assuming an enforcement action can be brought in either forum, the SEC can choose where it wants to litigate and the putative defendant/respondent has no voice in the matter. The SEC has numerous advantages when it brings a case in the administrative forum. This article will describe briefly some of the features that can make the SEC’s administrative forum an often challenging place to try a case. Nonetheless, armed with an understanding of these features, savvy counsel for respondents can often turn these features to their advantage.

Administrative Law Judges

There are no jury trials in SEC administrative proceedings (“APs”). All cases are tried to a single SEC administrative law judge (“ALJ”), who handles nothing but SEC matters. Once you know which ALJ has been drawn, you should review all the decisions issued by that ALJ. Particularly given the specialized nature of the forum, there are likely to be one or more decisions addressing issues in your case. These decisions may give you a sense of how the ALJ is likely to rule on particular issues and, of course, you will want to cite any favorable decisions in your briefs and distinguish the unfavorable ones. The ALJ’s

decisions will also give you a template for structuring your proposed conclusions of law, findings of fact, and briefs. You will also want to talk to counsel who have tried cases before the ALJ to learn the ALJ's preferences and pet peeves.

Prompt Hearings

APs are governed by the SEC's Rules of Practice (the "Rules"), which can be found on-line at <http://www.sec.gov/about/rulesprac2006.pdf>. The SEC commences an AP with an Order Instituting Proceedings ("OIP"), which contains the Division of Enforcement's (the "Division") allegations against the respondent(s) and serves as the charging document. A respondent has twenty days from service of the OIP to file an answer.

The ALJ will usually accommodate requests to have prehearing conferences conducted by telephone. The hearing itself will be conducted at a place designated by the ALJ with input from the parties "with due regard for the public interest and the convenience and necessity of the parties, other participants, or their representatives." Rule 200(c). The location chosen is usually that most convenient to the witnesses and respondents and may even be moved mid-hearing depending on what witnesses are scheduled to testify.

In the OIP, the SEC will state whether the ALJ has 120, 210, or 300 days from the OIP service date in which to render its decision (the "Initial Decision"). This determination is made based on the "nature, complexity, and urgency of the subject matter." Rule 360(a)(2). Most litigated APs are sufficiently complex to warrant the 300-day deadline. Assuming such a deadline, the ALJ will typically issue a scheduling order providing for only approximately four months from the service of the OIP to the hearing. The parties would then be given another approximately two months to obtain hearing transcripts and submit post-hearing briefs and proposed findings of fact and conclusions of law. The ALJ issues the Initial Decision approximately four months after briefing.

Given the expedited schedule and the head start that the Division will have by virtue of its investigation, respondent's counsel should start preparing for the hearing as soon as possible. You should be ready to receive the Division's investigative file shortly after service of the OIP, anticipate how the Division is likely to put on its case, prepare your cross-examination of the Division's witnesses and presentation of your own case, and think through (if not write up) your position on the various legal and evidentiary issues that are likely to arise. Indeed, the optimal approach would be to start as soon as is practical a rough draft of your post-hearing brief, as well as of the proposed conclusions of law and findings of fact, so that you have a good feel for the facts that you will need to elicit at the hearing and those you will likely have to challenge. Assuming you submitted a "Wells submission" to the SEC staff, setting forth the reasons no action should be brought, it should provide a good starting point for these documents. You should also remember that the Division, which typically does not have the resources to dedicate numerous attorneys to any one hearing, will have its own challenges preparing to try a case on such an expedited schedule.

Discovery

The Rules require the Division to turn over their investigative files, including any documents containing material exculpatory evidence (i.e., *Brady* material) within seven days after service of the OIP. Rule 230(d). The Division is permitted to withhold, among other items, privileged documents, work product, internal memoranda, notes and certain other writings prepared by SEC employees, as well as documents that would disclose the identity of a confidential source. See Rule 230(b). Clearly, respondent's counsel needs to review the Division's investigative files quickly and thoroughly. These files will reveal the facts and witnesses upon which the Division is relying. They may also show the facts and witnesses that undercut the Division's case and reveal gaps in its investigation.

In addition, the Rules provide for production of documents pursuant to subpoenas in advance of the hearing. Rule 232. A party may serve a subpoena for documents on anyone, including a third-party or the SEC itself. Subpoenas for documents or to provide testimony at the hearing may be served nationwide. See 15 U.S.C. § 78u(b). With limited exceptions (e.g., *Jencks* material/witness statements, depositions to preserve testimony of witnesses unlikely to be able to attend the hearing), there is no other discovery permitted in an AP.

Given the limitations on formal discovery (such as depositions), you should make use of the Rule 232 subpoenas as appropriate and consider what informal discovery you can undertake. For example, you may be able to speak informally with potential witnesses with an eye toward calling or cross-examining them at the hearing.

The Rules provide that a party tendering an expert provide only a brief summary of expected testimony, a statement of qualifications, a list of other proceedings in which the expert has testified, and a list of publications authored. However, ALJs will often also require production of an expert report.

Admissibility of Evidence

In SEC administrative proceedings, ALJs are to admit all relevant evidence or, put another way, all evidence which "can conceivably throw any light upon the controversy." *Jesse Rosenblum*, 47 S.E.C. 1065, 1072 (1984). If there is any doubt as to admissibility, ALJs are expected to admit the evidence. See *City of Anaheim*, 54 S.E.C 452, 454 & n.7 (1999). Even hearsay is admissible. *Leslie A. Arouh*, 99 SEC Docket 32306, 32323 (Sept. 13, 2010). The low threshold for admissibility is based on the premise that the ALJ and the SEC are capable of assigning appropriate weight to marginally relevant evidence. However, this threshold is not without limits. ALJs are required to exclude all evidence that is "irrelevant, immaterial or unduly repetitious." Rule 320.

Notwithstanding the low threshold for admission of evidence, respondent's counsel should strive to develop the relevance of the evidence they present and, as appropriate, to undercut that evidence presented by the SEC. Even though all the evidence will likely be admitted, you will want to make sure

that the ALJ assigns appropriate weight to it. Also, despite the low threshold and assuming you do not do so too many times, you should not be hesitant to challenge any evidence that you believe to be “irrelevant, immaterial or unduly repetitious.”

Motion Practice

Unlike actions in federal court, there is very little motion practice permitted in administrative proceedings. Little discovery generates commensurately little discovery motion practice.

As a practical matter, there are also no dispositive motions prior to the hearing. The Rules provide that a motion for summary disposition be granted “if there is no genuine issue with regarding to any material fact and the party making the motion is entitled to a summary disposition as a matter of law.” Rule 250(b). However, summary disposition is usually reserved only for follow-on actions brought by the Division seeking relief on an underlying judgment in a related matter, (e.g., an industry bar following a guilty plea) or those seeking to revoke registration of securities. As the revision comments to the Rule indicate, “the circumstances when summary disposition prior to hearing could be appropriately sought or granted will be comparatively rare.” 59 SEC Docket 1546, 1576 (June 9, 1995). During the hearing, at the close of the Division’s case, a respondent may make a motion for summary disposition the same way one might make a motion for a directed verdict in a federal action.

Because most motions are disfavored or not even permitted, counsel for respondents should think carefully before filing such a motion about whether it is necessary and permitted under the Rules.

Appellate Process

Parties seeking to appeal the Initial Decision may make an appeal to the SEC itself, which will consider the record in the case, entertain briefing and argument, and render its opinion on a *de novobasis*, making credibility assessments as necessary from the written record. But because the SEC initially determined that there was a sufficient basis for bringing the action, a respondent has a difficult task in convincing the SEC upon appeal that there is no basis for liability.

A respondent may appeal any opinion by the SEC to the Court of Appeals for the District of Columbia or for the Circuit in which the respondent resides or has its principal place of business. See 15 U.S.C. § 78y(a)(1), 15 U.S.C. § 77i. Respondents who are concerned about a first appeal to the SEC should also appreciate that the D.C. Court of Appeals has not been a hospitable forum for the SEC.

Conclusion

The SEC has made clear that it will start trying more cases in its administrative forum. Defendants who had hoped to fight the SEC’s allegations in federal court may find that they are instead respondents in an AP and thus without many of the weapons they had hoped to use, such as the right to a jury, expansive discovery, dispositive motions, evidentiary challenges, or even much time to prepare for trial. The key to

succeeding in this forum notwithstanding the absence of these weapons is understanding the unique features of the forum and preparing accordingly. Indeed, a respondent who does so may find that there are advantages to litigating in the administrative forum. A respondent who sees and presses these advantages will get a prompt hearing and has a fair shot of getting a favorable result much more quickly and less expensively than one generally would in federal court.

Luke Cadigan is a partner in the Government Enforcement Group of K&L Gates LLP (Boston office). Prior to joining K&L Gates, Mr. Cadigan was an Assistant Director and a Senior Trial Counsel in the SEC's Enforcement Division. During his nine years at the SEC, he successfully tried several matters, both in federal court and the SEC's administrative forum.

Amendments to Mass. Rules of Civil Procedure Address E-Discovery

by Stephany Collamore

Heads Up



Litigants in state court cases have been obtaining discovery of Electronically Stored Information, or “ESI,” for quite some time. The broad scope of discovery permitted by **Mass.R.Civ.P. 26(b)(1)**, the expansive definition of “documents” found in the previous version of **Mass.R.Civ.P. 34(a)**, and the reference to “electronic storage locations” in **Superior Court Standing Order 1-09(c)(3)** all suggest that ESI should be discoverable. Until the enactment of certain amendments to the Mass. Rules of Civil Procedure (“Rules”) that took effect on January 1st of this year, however, litigants and the courts had little guidance as to how to proceed with this important form of discovery. Rules **16**, **26**, **34**, **37** and **45**, as amended, now provide some much-needed regulation. This article addresses some of the key provisions.

Form of Production

Rule 34 has been amended to include a specific reference to ESI and to provide the requesting party the opportunity to specify the form in which it would like ESI to be produced. **Mass.R.Civ.P. 34(b)(1)**. For example, a party may request that e-mails be produced in searchable native format rather than in less readily searchable PDF format or in paper. A party may also request production in the particular electronic form that works best with the computers of the requesting party or its ESI vendor. At the same time, amended **Rule 34** allows the responding party to object to a requested form of ESI production. **Mass.R.Civ.P. 34(b)(2)(B)**. This should help identify areas of disagreement before the production is actually made.

ESI Conferences

A party has a right to demand an ESI conference with the opposing party so long as the demanding party serves a written request for such a conference within 90 days after service of the first responsive pleading. **Mass.R.Civ.P. 26(f)(2)(A)**. Per **Rule 26(f)(2)(C)**, the topics to be addressed at an ESI conference include:

- any issues relating to preservation of discoverable information;
- the form in which each type of information will be produced;
- what metadata, if any, should be produced;
- the time within which the information will be produced;
- the methods for asserting or preserving (a) claims of privilege and/or work product protection and (b) the confidential and/or proprietary status of information;
- whether allocation among the parties of the expense of production is appropriate; and
- any other issue related to the discovery of ESI.

Once a request is served, the conference should be held as soon as possible, but no later than 30 days after the request is made. **Id.** This means that a party may be required to participate in an ESI conference within a month of the filing of a responsive pleading, making it imperative for attorneys to become knowledgeable about their clients' ESI as soon as possible.

Even when a party waives its right to an ESI conference by failing to timely request one, the parties may nevertheless hold such a conference by agreement or by order of the court upon motion. **Mass.R.Civ.P. 26(f)(2)(B)**. Regardless of how the ESI conference is initiated, the same topics identified above are to be addressed, and an ESI plan is to be filed with the court within 14 days after the conference. **Mass.R.Civ.P. 26(f)(2)(C)**.

ESI Plans and Orders

A court may enter an order governing the discovery of ESI *sua sponte* (after notice to the parties), or after conference, motion or stipulation. In addition to the topics set out in **Rule 26(f)(2)(C)**, an order governing the discovery of ESI may also address whether discovery of ESI is reasonably likely to be sought and the permissible scope of such discovery. **Mass.R.Civ.P. 26(f)(3)(A-J)**. Nonetheless, the general scope of discovery is unaffected. **Mass.R.Civ.P. 26(b)(1)**.

Cost-Shifting and Inaccessible ESI

Rule 26(f)(2)(C)(vii) directs the parties to discuss at their ESI conference "whether allocation among the parties of the expense of production is appropriate." The allocation of expense is often referred to as

“cost shifting.” One specifically identified area where cost shifting may be imposed is with regard to “inaccessible” ESI.

“Inaccessible” ESI is defined as ESI “from sources that the party identifies as not reasonably accessible because of undue burden or cost.” **Mass.R.Civ.P. 26(f)(1)**. For example, data archived on back-up tapes might be determined to be “inaccessible.” In the context of a motion to compel, a party objecting to the production of ESI pursuant to **Rule 26(f)(4)(A)** bears the burden of showing inaccessibility. **Mass.R.Civ.P. 26(f)(4)(B)**. Even where this showing is made, the requesting party may nonetheless obtain discovery of the inaccessible ESI if the requesting party is able to show that the likely benefit of its receipt outweighs the likely burden of its production. **Mass.R.Civ.P. 26(f)(4)(C)**. In making this determination, the court should consider the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues. **Id.** Further, where the production of inaccessible ESI is ordered, the court may set conditions for its discovery, including cost-shifting.

Court’s Power to Limit Discovery

The amended Rules also explicitly grant courts the power to limit discovery from *accessible* ESI sources “in the interests of justice” based on a consideration of several factors. See **Mass.R.Civ.P. 26(f)(4)(E)**. This is one area where the Massachusetts Rules differ from the Federal Rules of Civil Procedure (“Federal Rules”), although federal courts clearly possess the power to limit discovery generally. See **Fed.R.Civ.P. 26(b)**. In fact, there is significant overlap between the factors set out in **Federal Rule 26(b)(2)(C)** (identifying limitations to which all discovery is subject) and **Massachusetts Rule 26(f)(4)(E)**, including whether it is possible to obtain the information from some other source that is more convenient or less burdensome or expensive, whether the discovery sought is unreasonably cumulative or duplicative, and whether the likely burden or expense of the discovery outweighs the likely benefit.

ESI Lost as a Result of Routine, Good-Faith Operations

Rule 37 has been amended to include a “safe harbor” provision that protects parties from sanctions for failing to produce ESI that has been lost as a result of the routine, good-faith operation of an electronic information system. **Mass.R.Civ.P. 37(f)**. Note, however, that this amendment was not intended to alter any existing state law on the obligation to preserve evidence when litigation is reasonably anticipated or has commenced. **Mass.R.Civ.P. 37 (Reporter’s Notes 2014)**.

Non-Parties and Unrepresented Parties

The impact of the ESI amendments to the Rules will not be limited to represented parties. For example, under amended **Rule 45(b)**, a subpoena may command a person to whom it is directed to produce ESI and, under amended **Rule 16**, a court may direct an unrepresented party to appear for a conference.

“Clawback” Provision

The production of ESI creates an increased risk that a party will inadvertently produce material that is protected by privilege and/or the work-product doctrine. Thus, it bears noting that the amended Rules include a “clawback” provision whereby a producing party may assert a claim of privilege or of protection under the work product doctrine with respect to information, including but not limited to ESI, that is inadvertently produced in discovery. **Mass.R.Civ.P. 26(b)(5)(B) & (C)**.

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Making the Most of a Reservation: Rights in Massachusetts When Insurer Reserves

by Richard J. Yurko

Legal Analysis



As lawyers, we often say that we are “reserving” our client’s rights and, in doing so, we hope to preserve some often unstated client rights, presumably neither expanding nor reducing those rights. However, when an insurance company “reserves” its rights to disclaim coverage while undertaking the defense of its insured, this step actually *creates* rights for the insured under Massachusetts law. Counsel for an insured needs, however, to be ready to assert those rights or they will evaporate like the summer’s dew.

To understand the setting and how new rights may arise from an insurer’s reservation, one need only appreciate several principles of insurance law and how they commonly apply to business and professional clients.

Basic Framework

First, the insurer’s duty to defend the insured is generally broader than its duty to indemnify (i.e., to pay any resultant judgment). ***Doe v. Liberty Mut. Ins. Co.***, 423 Mass. 366, 368 (1996); ***Boston Symphony Orchestra v. Commercial Union Ins. Co.***, 406 Mass. 7, 10 (1989). For instance, if a four-count complaint arising from common facts is filed against the insured and only one of the four counts is covered by the insurance policy, the insurance company typically has the duty to defend the entire complaint, including the non-insured claims. See, e.g., ***Aetna Cas. & Sur. Co. v. Cont’l Cas. Co.***, 413 Mass. 730, 732 n.1 (1992); ***Northern Sec. Ins. Co., Inc. v. R.H. Realty Trust***, 78 Mass. App. Ct. 691, 691 (2011) (only one of five counts covered).

Second, in general, if the insurer is aware that some claims are covered and other claims may not be covered, the insurer must apprise the insured of the possibility that some specific claims may not be

covered — or the insurer could later be deemed to have waived its right to disclaim coverage on those claims. E.g., *Salonen v. Paanenen*, 320 Mass. 568, 571 (1947).

As a result, in practice, within a reasonable time after receiving notice of a claim from its insured, in most cases, most insurers will accept the defense of the insured while also either disclaiming coverage on some claims or reserving the insurer's right to do so. Such reservation of rights letters permit the insurer to undertake the required defense of the insured while also cautioning the insured that (a) the insured rather than the insurance company may actually have to pay any judgment on some claims, (b) the defense may be short-lived if the covered claim(s) should be dismissed, and/or (c) the policy limits may well be insufficient to pay the entire judgment even for covered claims.

Although reservation of rights letters from an insurer have become commonplace, they put the insured in an odd position. Typically by contract, unless otherwise agreed, the insurer has the right to appoint counsel to represent the insured when a claim arises. Insurers typically have panel counsel to whom they refer large numbers of cases and, as a result, they receive reduced billing rates. Where the duty to defend and the duty to indemnify are co-extensive and the claim is within the policy limits, the insured has little economic incentive to complain of panel counsel selected by the insurer. But where the duty to indemnify is more narrow than the duty to defend, the reservation of rights letter effectively tells the insured that the insurer may walk away at any time, leaving the insured with counsel whom the insured might not otherwise have selected — and leaving the insured to pay that insurer-appointed counsel's fees out of the client's own pocket. And, if the appointed counsel commits malpractice, the insured may not be able to look to the insurer to pay damages. *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.*, 439 Mass. 387, 407-10 (2003).

For these reasons, among others, Massachusetts cases provide that when the insurer issues a reservation of rights letter, the insured can force the insurer either to give up the reservation of rights or to allow the insured to designate counsel:

When an insurer seeks to defend its insured under a reservation of rights, and the insured is unwilling that the insurer do so, the insured may require the insurer either to relinquish its reservation of rights or relinquish its defense of the insured and reimburse the insured for its defense costs.

Sullivan, 439 Mass. at 406-07 (collecting cases). See also *Three Sons, Inc. v. The Phoenix Ins. Co.*, 357 Mass. 271, 276 (1970); *Magoun v. Liberty Mut. Ins. Co.*, 346 Mass. 677, 684 (1964); *Salonen v. Paanenen*, 320 Mass. at 574. The insurer will then have to pay the reasonable fees of the counsel selected by the insured. The billing rates of the insured-selected counsel may often be substantially higher — but nevertheless reasonable — than the charges of an insurer's panel counsel. E.g., *Northern Security*, 78 Mass. App. Ct. at 697 (panel counsel generally paid \$150 per hour; in absence of

agreement, \$350 was reasonable for reservation of rights counsel). In the alternative, the insurer could agree to pay for both its panel counsel and for the insured's selected counsel who may ride alongside the case as co-counsel. E.g., *San Diego Navy Federal Credit Union v. Cumis Ins. Soc., Inc.*, 162 Cal. App. 3d 358 (1984), thereafter codified at Cal. Civ. Code § 2860 (2013).

Asserting the Right

As a practical matter, it may not be as simple as the cases imply for the insured to assert the rights that Massachusetts case law provide. The insured has just been sued. The people involved are feeling attacked and vulnerable. The insured sends the complaint to the insurer, with a sigh of relief ("that's what we have insurance for"), and then sometime later, often around when an answer or motion to dismiss may be due, the insured gets a letter saying that the insurer is willing to defend only after reserving its right to disappear in the future. Cold comfort. In many such situations, the insured's initial inclination is not to challenge the insurer on anything, including on the reservation of rights.

But if the insured does not challenge the appointment of counsel and seek to have its own counsel appointed, or alternatively seek to have the reservation of rights withdrawn, those rights can be lost, as the insured will be deemed to have acquiesced in the choices made by the insurer. E.g., *Sullivan*, 439 Mass. at 407 ("There is no indication in the record that [the insured] either insisted on having the reservation of rights removed or, in the alternative, insisted on assuming control of its own defense. As such, we conclude that [the insured] acquiesced..."). The insured should think of itself as present at a shotgun wedding between its defense and insurer-appointed counsel: You must speak now or forever hold your peace.

Simply calling the insurer and requesting in that phone call the ability to appoint counsel is not enough, legally or practically. As a legal matter, making a single phone call is not "insisting." E.g., *Sullivan*, 439 Mass. at 407. Also, as a practical matter, most insurers are not based in Massachusetts and most of their personnel may not be familiar with the case law here, which differs from that in other states in this area. See, e.g., *Cumis*, 162 Cal. App. 3d at 375 ("insurer must pay reasonable costs for hiring independent counsel by the insured" where insurer has issued a reservation of rights); Cal. Civ. Code § 2860; *Swanson v. State Farm Gen. Ins. Co.*, 219 Cal. App. 4th 1153 (2013) (withdrawal of reservation of rights eliminates insurer's duty to pay for independent co-counsel). The insured should send a letter, citing the case law and insisting that the insurance company must choose between the reservation of rights and the appointment of counsel.

Negotiating the Resolution

Following the assertion of the insured's rights arising from the insurer's reservation of rights, the insured and the insurer each hold some cards, but none invariably trump the others. As a result, in the best cases, a three-way process of negotiation among insured, insurer, and counsel often ensues.

Assume, for the moment, that the insurer is unwilling to relinquish its reservation of rights. Under the case law, it must then accede to the insured's selection of counsel. As noted, very often, the insured's selected counsel will be charging hourly rates that, while reasonable for the market, are substantially higher than insurer's panel counsel. E.g., **Northern Security**, 78 Mass. App. Ct. at 697. This is a situation the insurer wants to avoid or minimize.

At the same time, there is nothing in the case law that says the insurer has to pay insured's selected counsel on a monthly, quarterly, or any other particular periodic basis. Absent a separate declaratory judgment action, the insurer may only have the obligation to pay fees at the end of the representation, e.g., **Magoun**, 346 Mass. at 685; **Three Sons**, 357 Mass. at 276-77; but see **Northern Security**, 78 Mass. App. Ct. at 698 (delaying payment of fees for 14 months gives rise, with other factors, to c. 93A liability), leaving it to the insured to advance legal fees on an ongoing basis until then or leaving the insured's selected counsel to remain largely unpaid until then. The insured wants to avoid the former and its selected counsel certainly wants to avoid the latter. So, the assertion of these rights figuratively leaves the parties playing poker with each other, each trying to avoid a particular permissible, but less than optimal, outcome.

In this situation, the parties can negotiate various resolutions that avoid the least desirable outcomes, such as the following:

1. The insurer can decide to withdraw its reservation of rights and preserve its selection of counsel. This generally will happen in a case where the insurer re-assesses its reservation of rights and determines that the rights being reserved are more theoretical than real.
2. The insurer and insured can agree that the day-to-day work in the defense of the insured will be undertaken by insurer's panel counsel, but that the insurer will also pay for co-counsel appointed by the insured who acts either like a spare tire or a security blanket, depending on the nature of the case and the parties. This is the common solution in some states, like California, where the case law leans this way. See, e.g., **Cumis**, 162 Cal. App. 3d at 375. To date, it is not a solution much seen in Massachusetts, but it could be the preferred solution where the parties believe, for instance, that a dismissal of the sole insured claim is possible or likely.
3. The insurer and insured can negotiate a three-way agreement with insured-selected counsel on the rate at which that specially-appointed counsel will be paid and the periodic payment of such counsel. Typically, the insured-selected counsel will charge more than insurer's panel counsel because the specially-appointed counsel does not have the expectation of volume that panel counsel have, cf. **Northern Security**, 78 Mass. App. Ct. at 697, but such counsel is willing nonetheless to discount its rates somewhat to benefit the insured (so that the insured does not have to advance payment) and to engender a good working relationship with the insurer. This is perhaps the most common resolution in Massachusetts.

In addition to these options, there are as many possible variations and permutations as there are insurers, insureds, and potential counsel. Whatever gets agreed upon, however, usually needs to be hashed out and documented in the compressed time between issuance of the reservation of rights letter and the first major event in the defense of the case. A court will then have no trouble enforcing that agreement, ordinarily. Cf. **Northern Security**, 78 Mass. App. Ct. at 697-98 (agreement on fees trumps reasonable rate). The situation will not reach the optimal result by itself, but adroit lawyering can help substantially. Counsel for the insured should be ready to assert the insured's rights and also to broker a quick resolution of these rights.

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Predicting the Complex Future of Retroactivity in Massachusetts: Commonwealth v. Sylvain

by Professor Daniel Kanstroom

Case Focus



“[We] cannot escape the demands of judging or of making the difficult appraisals inherent in determining whether constitutional rights have been violated.”

Goldberg, J., *Haynes v. Washington*, 373 U.S. 503, 515 (1963)

In ***Commonwealth v. Sylvain*, 466 Mass. 422 (2013)**, the SJC held that the requirements placed on criminal defense lawyers to properly advise defendants about certain immigration consequences enunciated in ***Padilla v. Kentucky*, 559 U.S. 356 (2010)** are retroactive to 1997. The SJC, relying both on the Sixth Amendment and on art. 12 of the Massachusetts Declaration of Rights, diverged from the U.S. Supreme Court on the retroactivity question. This very important—but rather esoteric—immigration law case may have profound implications regarding the retroactivity of recent holdings in such areas as public trial rights during jury selection and juvenile sentencing.

The SJC achieved a just outcome while reminding the legal community why retroactivity is an extraordinarily difficult jurisprudential concept and why immigration law has long been known as a subject that could **“cross the eyes of a Talmudic Scholar.”** The daunting complexities presented by the case derived in part from certain anachronistic late nineteenth century legal doctrines establishing **“plenary power”** over noncitizens seeking to enter the United States as well as those facing deportation. The Court has held that certain noncitizens seeking to enter the United States have no enforceable constitutional rights and that **deportation exercised under that power was not criminal punishment**. Therefore, the specific constitutional norms attendant to the criminal justice system are largely inapplicable to deportees. See ***Fong Yue Ting v. United States*, 149 U.S. 698 (1893)**.

For more than a century, the constitutional implications of these doctrines and their progeny frequently (but not always) defeated claims of ineffective assistance of counsel by deportees who were badly advised (or not advised at all) by their criminal lawyers. Noncitizens have the right to appointed counsel in the *criminal* justice system, but they do not have such a right in deportation proceedings. Deportation has often been deemed a civil “collateral” consequence of criminal conviction. Among other implications of this categorization, criminal defense lawyers have sometimes been found to have no professional duty to advise defendants about such consequences.

In 2010, however, the Supreme Court decided **Padilla v. Kentucky, 559 U.S. 356 (2010)**, a case in which the question of ineffective assistance was squarely presented. Mr. Padilla, a long-term lawful permanent resident of the United States, had apparently been advised to plead guilty to a drug-related charge in criminal court, which—unbeknownst to him—virtually guaranteed his deportation and lifetime banishment from the United States and his family. The Court upheld his claim that his criminal defense counsel was ineffective due to this incorrect advice concerning the risk of deportation. This was in many respects a path-breaking, virtually unprecedented constitutional decision, with powerful Fifth and Sixth Amendment implications. *See generally*, Daniel Kanstroom, **The Right To Deportation Counsel in Padilla v. Kentucky: The Challenging Construction of the Fifth-And-A-Half Amendment**, 58 **UCLA L. REV.** 1461 (2011); *see also*, Daniel Kanstroom **Padilla v. Kentucky and the Evolving Right to Deportation Counsel: Watershed or Work-in-Progress?** 45 **NEW ENGLAND L. REV.** 305 (2011).

The Court, most significantly, recognized that deportation as a consequence of a criminal conviction now has such a close connection to the criminal process that it is uniquely difficult to classify it as either a “direct or a collateral consequence.” *Padilla* at 364. The two systems, in short, have become inextricably linked. Further, the Court recognized that “the landscape of federal immigration law has changed dramatically.” In the past there were only a “narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation.” But now, the regime contains a much-expanded class of deportable offenses and it has limited the authority of judges “to alleviate the harsh consequences of deportation.” *Id.* at 357. As a result of these changes, the “drastic measure” of deportation or removal, . . . is now *virtually inevitable* for a vast number of noncitizens convicted of crimes. Deportation has become “*an integral part*—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.” *Id.* at 362 (emphasis added). From this logic, one can easily see why substantial due process protections, and also some of the more specific protections normally tied to the criminal justice system, are warranted. *See generally* **Daniel Kanstroom, Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases**, 113 **HARVARD LAW REVIEW** 1890-1935 (June, 2000).

The question quickly arose whether the *Padilla* model would be retroactive. Unfortunately, *Padilla* itself did not address this question. In **Commonwealth v. Clarke, 460 Mass. 30 (2011)**, the SJC held

that *Padilla* was retroactive, at least as to convictions that became final after April 1, 1997 (the effective date of relevant changes to deportation law). The SJC followed a long-standing framework derived from **Teague v. Lane, 489 U.S. 288 (1989)**. See also, **Commonwealth v. Bray, 407 Mass. 296, 300-301 (1990)** (adopting *Teague* model). The essential question from *Teague* and progeny was whether the Supreme Court in *Padilla* had announced a “new” rule. A “new” rule, very simply put, “breaks new ground or imposes a new obligation” on the government. If so, the *Padilla* norms would *not* be retroactive. In *Clarke*, the SJC concluded that *Padilla* was *not* a new rule because it was merely an application of well-recognized Sixth Amendment ineffective assistance of counsel standards. See **Strickland v. Washington, 466 U.S. 668 (1984)**; *Clarke* at 34-46.

So far, so good; and so far, at least moderately clear. However, things soon got murkier. In **Chaidez v. U.S., 133 S. Ct. 1103 (2013)**, the Supreme Court held that *Padilla* had in fact announced a “new” rule and therefore its holding should *not* be applied retroactively by federal courts. *Chaidez*, however, did not necessarily bind state courts. Indeed, the Supreme Court had recognized the propriety of such divergence in **Danforth v. Minnesota, 552 U.S. 264 (2008)** in which the Court held that *Teague* does not constrain the authority of state courts to give broader effect to “new” rules of criminal procedure.

In *Sylvain*, the SJC continued to view retroactivity differently from the Supreme Court. The SJC concluded that *Padilla* did not announce a “new” rule for the “simple reason that it applied a general standard—designed to change according to the evolution of existing professional norms—to a specific factual situation.” *Sylvain* at 435 (citing *Clarke, supra* at 36, 38-39, 43; *Chaidez, supra* at 1114-1116 (Sotomayor, J., dissenting)). Importantly, the SJC based its ruling both on the Sixth Amendment and on art. 12 of the Massachusetts Declaration of Rights. As one excellent Practice Advisory notes, art. 12 may prove to be a broader source of rights for noncitizens than the Sixth Amendment. See CPCS, Immigration Impact Unit, *Practice Advisory on the Retroactivity of Padilla in Massachusetts: Commonwealth v. Sylvain, 466 Mass. 422 (2013)*, October 2013.

The SJC also correctly noted that professional standards in Massachusetts have long required criminal defense lawyers to advise noncitizen clients about immigration consequences. Practitioners thus now face a certain dissonance in that criminal defendants prosecuted in federal courts who face or have faced deportation may only cite *Padilla* prospectively, while state court defendants in Massachusetts may use the *Padilla* ruling to seek to vacate convictions dating back to 1997. The practical difficulties involved in bringing such claims on behalf of deportees are still significant, however. See, e.g., **Perez Santana v. Holder, No. 12-2270 (1st Cir. Sept. 27, 2013)** (invalidating regulation barring such claims), and **Bolieiro v. Holder, No. 12-1807 (1st Cir. Sept. 27, 2013)** (same).

Sylvain may also portend greater assertiveness by the SJC in certain other arenas where retroactive application of constitutional holdings is at issue. The SJC has now made clear that it considers a “new” rule to be such only if the result is *contrary* to precedent. *Sylvain*, at 434. This is rather narrower than the

approach taken by the Supreme Court, which has used the formulation of that which was not “apparent to all reasonable jurists.” The SJC formulation could thus expand state court remedies for other violations of constitutional rights. Indeed, the Court highlighted that retroactivity in *Sylvain* was required by “tenets of fundamental fairness.” *Sylvain* at 437, citing **Commonwealth v. Amirault, 424 Mass. 618, 639 (1997)**. It therefore seems quite possible that *Sylvain* could influence such pending questions as the retroactivity of rulings about mandatory life without parole sentences for juveniles—See **Diatchenko v. D.A. for the Suffolk District, SJC-11453**—and public trial rights during jury selection. See **Commonwealth v. Alebord, SJC-11354**. Retroactivity analysis will thus have to consider, in addition to precedent, such factors as the evolution of practice, reliance, and deeper normative questions of justice and fairness.

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Aftermath: The Legal Community's Response to the Boston Marathon Bombings

by Robert A. Whitney*

Viewpoint



**Please note that the opinions expressed in this Viewpoint are solely those of the author and do not necessarily reflect or represent the position of the Massachusetts Division of Insurance.*

On Patriots' Day, Monday, April 15, 2013, the 117th annual Boston Marathon began in much the same way as the previous 116 Boston Marathons had begun, with runners crowding the starting line in Hopkinton awaiting the gun, and thousands of spectators lining the race course to see the racers go by. At the finish line, crowds had gathered to await the winning runners and cheer on the thousands of non-professionals who completed the 26.2 miles from Hopkinton to Boston.

I was one of those people, standing on the right side of Boylston Street facing the finish line, watching for a friend. As my friend ran past me toward the finish line, I cheered and then left the area, heading back to my office at the Division of Insurance. About 20 minutes later, at 2:49 pm, the first of two bombs exploded outside Marathon Sports on Boylston Street. A second blast came 13 seconds later, just before the finish line near Copley Square.

The explosions killed three spectators and injured over two hundred and fifty others. The area around the two explosions—nearly a mile long and three blocks across—was immediately closed off. The Copley Square area did not reopen until April 24, 2013, more than a week after the Boston Marathon bombings.

The Boston legal community immediately stepped up to help the victims and their families. For example, as noted in the **Boston Business Journal**, the Boston Bar Association ("BBA") was among the first to provide assistance by recruiting volunteer attorneys. Within ten days of the bombings, some 125 attorneys, five law firms and law students had already signed up to help individuals and small

businesses. The Massachusetts Bar Association (“MBA”) also reached out to its membership, asking them to provide free services to affected persons and property owners, including helping victims of the bombings with applications to the “One Fund Boston,” a compensation fund that raised more than \$60 million for the victims and their families.

The MBA proposed that victims be permitted to submit personal statements about their injuries and the effect that the bombings have had on their lives, in addition to merely submitting just medical records. BBA volunteer attorneys also helped marathon bombing victims fill out One Fund Boston claims. One volunteer attorney helped 14 victims complete One Fund Boston claims, including making three home visits to meet with those who are unable to leave home because they were still recovering from physical injuries.

Many local businesses also faced an immediate, major issue after the bombing: whether the damage from the explosions themselves and from the resulting lost revenue, would be covered by their respective insurance policies. The issue turned in part on an important matter of insurance law, namely, whether the bombings at the Boston Marathon could be viewed as an “act of terror.” To much of the general public, there was little doubt that the Boston Marathon bombings were an “act of terror;” even President Barack Obama, in statement on April 16, 2013, said that, although the perpetrators were still unknown, the bombing was an “act of terror,” and that “[a]ny time bombs are used to target innocent civilians, it is an act of terror.”

But from an insurance perspective, the situation was less clear. After the terrorist attacks on “9/11” in 2001, the insurance industry began to write exclusions into business insurance policies, that would preclude coverage relating to business interruption and lost income resulting from “acts of terror.” Many of the insurance policies held by businesses affected by the Boston Marathon bombings contained these so-called “terrorism exclusions.” Of course, determining exactly what is considered to be a “terrorist act” for insurance exclusion purposes is not clear cut. If the Boston Marathon bombings were to be considered “acts of terror,” that potentially would trigger the exclusions contained in local businesses policies, then there might be no coverage available to those businesses for any physical damage and loss income resulting from the explosions.

The Boston legal community responded to these insurance-related issues by offering *pro bono* legal services to local, affected businesses to help them determine whether they could make insurance claims for losses including business interruption, property damage and relocation expenses, despite any “terrorism exclusions.” As reported in the **Boston Globe**, one priority for the BBA’s volunteer lawyers was to make sure that business owners were able to file their claims with their insurance carriers in a timely fashion, and to make the best arguments in favor of finding insurance coverage available for any damage.

In the immediate aftermath of the bombings, the Massachusetts Division of Insurance (“Division”) issued a **bulletin** detailing appropriate procedures for insurers to use in reviewing claims made as a result of the bombings. The Division was concerned that all insurers “promptly investigate all claims for all lines of coverage including, without limitation, business interruption insurance, home insurance, property insurance and health insurance.” The Division also sought to make sure that any insurer’s investigation of any claimed loss was done strictly on a “claim-by-claim basis.”

In the weeks and months following the Boston Marathon bombings, insurers paid the vast majority of the insurance claims made with respect to damages from the explosions, and the Division is unaware of any claims for damages being denied by any carrier because of any “terrorism exclusion.” Insurers may have had difficulty determining exactly what constituted “terrorism” for purposes of excluding insurance coverage, particularly where the definition of “act of terror” might be different in each affected insurance policy, and where the burden would be on the insurer to affirmatively demonstrate the applicability of each policy’s exclusion.

The volunteer work of the MBA, BBA, law firms, individual attorneys and law students in the aftermath of the bombings enabled victims to make claims for compensation for their injuries that they otherwise may not have been able to make. Moreover, affected businesses were likely back up and running faster due to the assistance of the volunteers.

There can be no doubt that the immediate and strong *pro bono* efforts of these lawyers and law students during this terrible time made a bad situation much better for many individuals and businesses that suffered from the effects of the Boston Marathon bombings.

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