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CASE FOCUS
Verveine Corp. v. Strathmore Insurance Company
By: William A. Schneider

LEGAL ANALYSIS
New Statutory Due Process Rights for Immigrant Victims in Massachusetts
By: David Emer

THE PROFESSION
The Business Litigation Session Orders the Return of an Inadvertently Disclosed Draft Letter
By: Marc C. Laredo and Matthew A. Kane

CASE FOCUS
Commonwealth v. Sweeting-Bailey
By: Rebecca Kiley

PRACTICE TIPS
If You Don't Ask, You Might Not Receive: Requests For Discovery Concerning The Existence Of Personal Jurisdiction
By: Philip A. O'Connell, Jr. and Tony K. Lu

CASE FOCUS
Tracer Lane II Realty, LLC v. City of Waltham: Massachusetts' Highest Court Grants Protection Over Solar Energy Systems
By: Courtney Simmons

POINT/COUNTER-POINT - Status of Nondisclosure Agreements (NDAs) in Massachusetts
Time's Up to End the Abuse of NDAs
By: Senator Diana DiZoglio

NDAs: Is There Anything Worth Keeping?
By: Ellen Zucker

Board of Editors

Case Focus

Verveine Corp. v. Strathmore Insurance Company

By William A. Schneider

On April 21, 2022, the Massachusetts Supreme Judicial Court ("SJC") became the first state court of last resort to weigh in on the question of whether economic losses arising from the COVID-19 pandemic are covered under standard commercial property insurance policies. In ***Verveine Corp v. Strathmore Ins. Co.*, 489 Mass. 534, 184 N.E. 2d 1266 (2022),** the SJC agreed with the insurer, and held that the plaintiffs' losses were not covered in the absence of "direct physical loss of or damage to" property, the provision under which the plaintiffs claimed losses. In doing so, the SJC joined a groundswell of rulings issued by federal courts around the country interpreting similar provisions which have found that neither the virus itself, nor the governmental orders restricting businesses, rose to the level of an insurable event absent some distinct, demonstrable, and physical alteration of the insured's property. Although the SJC denied the insureds recovery for their pandemic business losses, the decision provides helpful guidance for businesses making risk management decisions to address similar issues that may arise in the future.

The plaintiffs in *Verveine* were three Massachusetts companies that operated popular restaurants in Boston and Cambridge. Each restaurant maintained a policy of property insurance that covered, among other things, direct physical loss of or damage to covered property and business income loss. In Spring 2020, the novel coronavirus that causes the COVID-19 respiratory illness spread throughout the globe and eventually reached Massachusetts. In order to slow the spread of the virus, state and local authorities began issuing "stay at home" orders and other restrictions on businesses and public activities. On March 15, 2020, Governor Charlie Baker issued an emergency order prohibiting in-person dining at all restaurants and bars. Shortly afterwards on March 23, 2020, restaurants were deemed to provide essential services and made exempt from the order. The order exempting restaurants encouraged them to offer takeout and delivery services, so long as they complied with social distancing requirements. Many took advantage of the exemption. Others struggled financially and failed.

Based on the limitations imposed upon their businesses and the resulting economic loss, the plaintiff restaurants each filed claims for lost business income with Strathmore, their insurer. Strathmore denied the claims, citing to the lack of any "physical loss of or damage to the property", as well as to a virus exclusion in one restaurant's insurance policy. Unwilling to accept the denial of their claims, the restaurants commenced a declaratory judgment action to determine the scope of coverage under their policies, asserted claims for breach of contract, and claimed that the insurer engaged in unfair and deceptive business practices in violation of the Massachusetts Consumer Protection Act, G.L. c. 93A. Strathmore promptly moved to dismiss the plaintiffs' complaint. The trial court granted the insurer's motion, and the plaintiffs appealed.

The SJC construed the insurance policies based upon well-established principles of contract interpretation, including those that govern ambiguities which, the insureds argued, established coverage. *Id.* at 1272-73. With those principles in mind, the Court turned first to the language of the policies which used a selection of standardized forms. The Court found that the phrase "direct physical loss of or damage to covered property" applies to the impacts that the covered causes of loss must have on the property in order to trigger coverage, rather than the policies' definition of covered causes. *Id.* at 1274. It found the same interpretation applied to the recovery of business income loss. Recognizing that the questions of coverage turned on whether there was any direct physical loss of or damage to covered property, the Court concluded that no reasonable interpretation of the phrase supported the plaintiffs' claims. *Id.* This was in accordance with a survey of its precedent which revealed that the term "loss" in the context of a property policy must fairly be understood to require physical damage. *Id.* at 1276-77. In response to the insured restaurants' argument that the presence of the virus and resulting orders were in fact a physical loss, the Court concluded that, in accordance with its precedent, the phrase "direct physical loss of or damage to" property required some distinct, demonstrable, and physical alteration of the

property. *Id.* at 1275. It held that the mere presence of the virus would not amount to physical loss or damage because a virus is readily removable, returning the property to its uncontaminated state and allowing its particular use. *Id.* In addition to its own precedent, the SJC recognized that "[e]very appellate court that has been asked to review COVID-19 insurance claims has agreed with this definition for this language or its equivalent." *Id.* In the context of the business interruption coverage forms, the SJC found its interpretation supported by the policy definition of "period of restoration" which was measured by the time necessary to repair or replace the damaged property. *Id.*

In light of the Court's determination that coverage did not attach in the first place, it stated it need not reach the defendants' alternative arguments that other terms in the policy would exclude coverage. *Id*. at 1277. The Court did, however, address the "virus exclusion" in one policy "not for whether it would exclude coverage, but whether, as plaintiffs claim, it creates a clear negative implication that policies that do not contain the exclusion should cover claims arising from the COVID 19 virus." *Id*. at 1277. The Court emphasized the importance of not drawing negative implications and concluded that "no such negative implication can or should be drawn" here. *Id*. It relied on "basic insurance law principles that absence of an express exclusion does not operate to create coverage." *Id*. (internal quotations omitted). Applying these principles, it found in the first instance that the "virus exclusion" contained in one restaurant's policy which contains an exclusion for "loss or damage caused by or resulting from any virus … that induces or is capable of inducing physical distress or disease" cannot somehow "create coverage" in the policy of the other two restaurants that does not otherwise exist under that policy's plain language. *Id*. In short, it held that "the scope of that exclusion is irrelevant to the coverage" under the policy of the other two restaurants. *Id*. at 1277-78. Thus, the Court rejected outright the claim that simply because a policy did not have the virus exclusion in it that the policy should be deemed to cover the claim. Second, it found that this interpretation did not render the primary coverage meaningless or surplusage. *Id*. at 1278. Rather, it held that "most obviously" the exclusion "had independent significance where, for example, personal property, such as food, becomes physically contaminated or infected with a virus, requiring its destruction or some form of remediation." *Id*. It again noted that the COVID-19 virus is different from this circumstance in that the contamination is "readily removable" returning the property to its uncontaminated state and allowing its continued use. *Id*. The Court also acknowledged other appellate court decisions that found similar exclusions inapplicable where no physical loss or damage occurred to establish coverage.

The economic consequences of COVID-19 will likely have impact - anticipated and unanticipated - for years to come. Decisions such as *Verveine* make clear that not every loss is a covered loss. However, the decision offers important guidance that will assist in managing the expectations of policyholders and assist them in deploying alternate risk management strategies to deal with uninsured economic losses. Businesses now know, for example, that some distinct, demonstrable, and physical alteration of the property is necessary to establish coverage under most "all-risk" policies. In addition, businesses may seek out insurance products that provide limited coverage for virus-related losses, or develop alternate business models to sustain operations and generate revenue in the event of a future pandemic or event which may limit normal activities.

Bill Schneider is a Partner in the Boston office of Morrison Mahoney LLP, where he focuses his practice on civil litigation and first-party insurance, with an emphasis on trial and appellate work in the state and federal courts. Bill also represents insurers in arbitration, appraisal, reference, and other non-judicial proceedings required by the policy or applicable law. He received his Chartered Property Casualty Underwriter designation in 2001, and has extensive coverage experience, including policy drafting, policy interpretation, and the general representation of insurance companies in a variety of matters across several lines of insurance.

Legal Analysis

New Statutory Due Process Rights for Immigrant Victims in Massachusetts

By: David Emer

The Massachusetts Legislature added a new law – G.L. c. 258F, §§ 1-4 – to the General Laws on victim rights in 2021. **[1]** General Laws chapter 258F is the first victim rights' law enacted by the Legislature in over a decade.**[2]** The new statute stands at the intersection of federal and state law on immigration.

Federal law permits immigrant victims of certain violent crime or severe forms of human trafficking to petition the United States Citizenship and Immigration Services ("USCIS"), for a "U" or "T" visa. The "U" visa grants lawful status to victims of specified violent crimes who have "suffered substantial physical or mental abuse as a result of having been a victim of criminal activity."**[3]** The "T" visa grants lawful status to victims of "a severe form of trafficking in persons."**[4]** [It is essential for] Immigrant victims who intend to petition for lawful status under the federal "U" and "T" visa programs must/can/should obtain certification that they have been helpful in the investigation or prosecution of serious crimes ("Certification") The federal "U" and "T" visa laws require designated, government officials to evaluate and authorize certifications that support immigrant victims' visa requests.**[5]** Certifying entities include the attorney general, district attorneys' offices, state and local police departments, and the Department of Children and Families, among other entities.**[6]**

The recently enacted state law – G.L. c. 258F – standardizes the role that Massachusetts state and local law enforcement agencies play in certifying that certain victims of violent crime or severe forms of human trafficking have been helpful in the investigation or prosecution of serious crimes.**[7]**

Before the Massachusetts Legislature enacted G.L. c. 258F, the federal law creating the certification requirement did not establish a standardized process for evaluating certification requests. Due to the absence of federal, statutory due process, some immigrant victims of crime experienced "delays and confusion" when requesting certification.**[8]** With the enactment of G.L. c. 258F, Massachusetts became the 17th state or territory to provide statutory due process for certification requests for victims who intend to petition for legal status under the federal "U" and "T" visa programs.**[9]**

The Federal "U" Visa

In 2000, Congress enacted the Victims of Trafficking and Violence Protection Act.**[10]** That Act created the "U" visa. Local or state certification is a prerequisite for an immigrant to petition for the "U" visa to the federal government.**[11]**

If the victim obtains certification and files a petition with the federal government, there is an estimated wait time of five to ten years for adjudication.**[12]** The long wait is due to the federal statutory annual cap of 10,000 "U" visas that may be granted.**[13]** In June 2021, however, the USCIS implemented a new policy to grant employment authorization and deferred action to those with pending applications meeting specified requirements.**[14]** Deferred action's "defining feature" is the decision to defer removal (i.e. deportation) and to notify the affected immigrant of that decision.**[15]** Before conferring these benefits, the USCIS conducts an initial review of the application to determine the "petitioner's compliance with initial evidence requirements and successful completion of background checks."**[16]** Significantly, the USCIS does not grant employment authorization or deferred action under this expedited review to a petitioner unless they have complied with the initial evidence requirements, which includes a "U" visa certification.**[17]** Thus, the expedited review makes the timeliness of state or local certification play an even more significant role in the process, as petitioners may be able to access benefits sooner.

After a victim obtains a "U" visa, the federal government may grant permanent residence to the victim if the victim's "continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest."**[18]**

"Congress created the visa to encourage crime victims to report crimes and assist law enforcement with investigation and prosecution."**[19]** Without "U" visas, more crimes committed against immigrants would be unreported because "[t]he fear of deportation for an undocumented person is realistic and too often determinative in a victim's decision to report a crime."**[20]** In cases of domestic violence, abusers "use the victim's immigration status as a sword, threatening to call immigration authorities if the victim reports" the criminal activity.**[21]** Thus, the "U" visa is critical to public safety.

The Federal "T" Visa

The same 2000 federal law that created the "U" visa also created the "T" visa. Local or state certification is not a prerequisite for an immigrant to petition for the "T" visa, but certification "shall be considered."**[22]** In some circumstances, the victim must also show that they have "complied with any reasonable request for assistance" from law enforcement investigations.**[23]** If a victim obtains a "T" visa, the USCIS may grant permanent residence to the victim. **[24]** The annual statutory cap on "T" visas is 5,000.**[25]** Unlike the "U" visa, however, "[i]n the years since its inception, the T visa program has been underutilized, leading to concern that it is not reaching its intended beneficiaries."**[26]** The enactment of G.L. c. 258F may cause district attorneys' and police to gain increased knowledge of "T" visas that can be shared with trafficking victims in Massachusetts.

G.L. c. 258F's Two Provisions on Statutory Due Process

Certification Policies

General Laws chapter 258F affords immigrants two statutory due process provisions when seeking certification for a "U" or "T" visa. The first provision requires certifying entities to "adopt a policy for completing and signing nonimmigrant status certification forms" for those who intend to seek "U" or "T" visas.**[27]** Those policies must be clear about how the agency assesses whether the victim "has been helpful, is being helpful, or is likely to be helpful" in the investigation or prosecution of qualifying crimes.**[28]**

Certifying Entity Timeliness Standard

The second statutory due process provision governs timeliness. The certifying entity must respond to a certification request within 90 days in one of the following ways:**[29]**

1. complete and sign the certification form**[30]**
2. deny the request without prejudice that explains "the reason that the request does not meet the requirements of the certifying entity's policy"**[31]**
3. provide a written explanation that the certifying entity is delayed in responding with a projected time frame for a response.**[32]**

If the certifying entity responds that there is a delay, the delay must be caused by "extenuating circumstances outside the control of the certifying entity."**[33]**

Court Enforcement of G.L. c. 258F's Statutory Due Process

G.L. c. 258F contains no express enforcement mechanism. Under Massachusetts law, the absence of an enforcement mechanism within a particular statute does not mean that the statute is unenforceable. G.L. c. 249, § 4 provides that a civil action in the nature of *certiorari* may be appropriate where a "proceeding [is] not otherwise reviewable by motion or by appeal."**[34]** Interpreting G.L. c. 249, § 4, the Supreme Judicial Court (the "SJC") has recognized that agencies sometimes make quasi-judicial decisions and sometimes make decisions involving the "exercise of administrative discretion."**[35]** The SJC has not had occasion to interpret G.L. c. 258F yet; however, the SJC following its interpretation of G.L. c. 249, § 4, may conclude that certifying entities are making quasi-judicial decisions because they relate to "whether the proceeding culminates in an individualized determination of a party's entitlement to some benefit."**[36]** Here, that benefit is the state or local entity's certification decision. A victim may bring a *certiorari* civil action in the superior court or the supreme judicial court.**[37]**

Conclusion

The statutory due process provided by G.L. c. 258F has the potential to alter the life trajectories of immigrants who are victims of violent crime or human trafficking. As a result, if certifying entities faithfully execute the newly-enacted G.L. c. 258F, Massachusetts immigrants may obtain employment authorization, deferred action and ultimately visas faster. This new law illustrates how statutory due process matters.

*David Emer is the legislative director and general counsel to the Senate Chair of the Legislature's Joint Committee on the Judiciary. In that role, David drafts, analyzes and makes recommendations on legislation pending before the Committee. The Committee helped craft the bill that the Legislature ultimately enacted as G.L. c. 258F. Before working for the Legislature, David was a litigation associate at Nutter for nearly a half decade. At Nutter, David successfully argued for stronger tenant rights for domestic violence survivors before the Supreme Judicial Court.***[38]**

[1] The Legislature added G.L. 258F through St. 2021, c. 24, § 65. The new law became effective July 1, 2021.
[2] In 2010, the Legislature added the preceding chapter in the General Laws on victim rights, G.L. c. 258E. G.L. c. 258E established harassment prevention order proceedings.
[3] *See* 8 U.S.C. § 1101(a)(15)(U)(i)(I) (providing for "physical or mental abuse" requirement); *see also* 8 U.S.C. § 1101(a)(15)(U)(iii) (listing qualifying criminal activity).
[4] *See* 8 U.S.C. § 1101 (a)(15)(T)(i)(I); *see also* 22 U.S.C. § 7102 (defining "severe form of trafficking in persons" with respect to sex trafficking and labor trafficking).
[5] 8 U.S.C. § 1184 (p)(1) ("The petition filed by an alien under section 1101(a)(15)(U)(i) of this title shall contain a certification from a Federal, State, or local law enforcement official, prosecutor, judge, or other Federal, State, or local authority investigating criminal activity described in section 1101(a)(15)(U)(iii) of this title").
[6] *Id.; see also* 8 C.F.R. § 214.14(a)(2) (including "child protective services, the Equal Employment Opportunity Commission, and the Department of Labor" in the definition of "certifying agency").
[7] *See* G.L. c. 258F, § 1 (defining "certifying entity" as "a law enforcement agency, prosecutor or other state or local entity that has the authority to detect, investigate or prosecute severe forms of trafficking in persons or criminal activity"). Federal law also permits federal or state judges to certify helpfulness. *See* 8 U.S.C. § 1101(a)(15)(U)(i)(III).
[8] Fact Sheet on S.D. 240/ H.D. 1160: An Act Promoting Safety for Victims of Violent Crime and Human Trafficking (on file with the author).
[9] Jurisdictions that have enacted similar legislation to Massachusetts's G.L. c. 258F are listed by

effective date: N.Y. Soc. Serv. Law § 483-dd (November 1, 2007); Vt. Stat. Ann. tit. 13, § 2663 (July 1, 2011); La. Stat. Ann. § 46:2162 (June 24, 2013); Wyo. Stat. Ann. § 6-2-709 (July 1, 2013); Del. Code Ann. tit. 11, § 787 (n) (June 30, 2014); Ind. Code Ann. § 35-42-3.5-4 (July 1, 2015); Mont. Code Ann. § 44-4-1503 (July 1, 2015); Ark. Code Ann. § 12-19-104 (July 22, 2015); N.D. Cent. Code Ann. § 12.1-41-18 (August 1, 2015); Cal. Penal Code § 679.10-11 (January 1, 2016); R.I. Gen. Laws Ann. § 11-67.1-22 (July 18, 2017); Wash. Rev. Code Ann. §§ 7.98.005-7.98.900 (June 7, 2018); VI ST tit. 14, § 151 (July 9, 2018); 5 Ill. Comp. Stat. Ann. 825/1 – 825/30 (January 1, 2019); Nev. Rev. Stat. Ann. §§ 217.550-217.590 (July 1, 2019); Md. Code Ann., Crim. Proc. §§ 11-930-11-931 (October 1, 2019); Conn. Gen. Stat. Ann. § 46b-38b (g) (5) (July 1, 2021).

[10] Victims of Trafficking and Violence Protection Act of 2000, P.L. 106-386, 114 St. 1464.

[11] *See* 8 C.F.R. § 214.14(c)(2); *see also* Danielle Kalil, *Certified Disaster: A Failure at the Intersection of the U Visa and the Child Welfare System*, 35 Geo. Immigr. L.J. 513, 524 (2021) ("The certification does not guarantee eligibility for a U visa but is required in order to apply for this status.")

[12] Deborah E. Anker, U and T visas, *Law of Asylum in the United States* § 1:15 (2021 ed.).

[13] 8 U.S.C. 1184(p)(2)(A).

[14] USCIS Policy Manual, Volume 3, Part C, Chapter 5, available at **https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-5.** (accessed March 13, 2022).

[15] *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1911 (2020).

[16] USCIS Policy Manual, *supra*.

[17] U Nonimmigrant Status Bona Fide Determination Process FAQs, Question and Answer # 17, available at **https://www.uscis.gov/records/electronic-reading-room/u-nonimmigrant-status-bona-fide-determination-process-faqs** (accessed March 13, 2022).

[18] 8 U.S.C. § 1255(m)(1)(B).

[19] *Meza Morales v. Barr*, 973 F.3d 656, 658 (7th Cir. 2020).

[20] Yvette Lopez-Cooper, *En Qué Te Puedo Ayudar? When Is A Crime Victim Helpful? Using California's Immigrant Victims of Crime Equity Act (Senate Bill 674) to Define the U Visa's Helpfulness Requirement*, 53 Cal. W. L. Rev. 149, 162 (2017).

[21] *Id.* at 173 (internal citation omitted).

[22] 8 U.S.C. § 1184(o)(6) ("In making a determination under section 1101(a)(15)(T)(i)(III)(aa) with respect to an alien, statements from State and local law enforcement officials that the alien has complied with any reasonable request for assistance in the investigation or prosecution of crimes such as kidnapping, rape, slavery, or other forced labor offenses, where severe forms of trafficking in persons (as defined in section 7102 of Title 22) appear to have been involved, **shall be considered**.") (emphasis added).

[23] 8 U.S.C. § 1101(a)(15)(T)(i)(III)(aa).

[24] 8 U.S.C. § 1255(l).

[25] 8 U.S.C. § 1184(o)(2).

[26] Anker, *supra*.

[27] G.L. c. 258F, § 2.

[28] 8 U.S.C. § 1184 (p)(1).

[29] G.L. c. 258F, § 3.

[30] G.L. c. 258F, § 3(i).

[31] G.L. c. 258F, § 3(ii).

[32] G.L. c. 258F, § 3(iii).

[33] *Id.*

[34] G.L. c. 249, § 4.

[35] *See City of Revere v. Massachusetts Gaming Comm'n*, 476 Mass. 591, 600, 605 (2017).

[36] *Id.* at 600.

[37] *See* G.L. c. 249, § 4.

[38] *See Beacon Residential Mgmt., LP v. R.P.*, 477 Mass. 749 (2017).

The Business Litigation Session Orders the Return of an Inadvertently Disclosed Draft Letter

By Marc C. Laredo and Matthew A. Kane

One of the things that can cause a lawyer, especially a litigator, to lose sleep (and there are lots of them!) is the fear of prejudicing their own client by inadvertently disclosing a privileged document to the opposing side. *See, e.g., Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 190 F.R.D. 287, 288 (D. Mass. 2000) (holding that inadvertent disclosure of privileged documents, "the misstep feared by all litigators," effected waiver of attorney-client privilege). A recent ruling by Superior Court Justice Kenneth W. Salinger may allow lawyers to rest a little easier.

In *Van Vuuren v. Lowenstein Sandler LLP*, 2184CV01663-BLS-2 (Mass. Super. Ct. May 24, 2022) ("*Van Vuuren*"), a case currently pending in the Business Litigation Session of the Superior Court, the defendants served a motion to dismiss on statute of limitations grounds, contending that the plaintiff's claims accrued when he received a letter from one of the defendant attorneys terminating his employment. "Counsel attached what they thought was an unsigned copy of that letter to the memorandum supporting the motion to dismiss." *Van Vuuren,* slip op. at 1. Alas, it was the wrong copy. Instead of being the unsigned copy of the final version of the letter, it was an unsigned copy of an earlier draft that "differed in potentially material ways from the final letter." *Id*. Defendants' counsel discovered their error after receiving the plaintiff's opposition to the motion to dismiss, at which point defendants' counsel promptly notified plaintiff's counsel that the disclosure had been inadvertent and requested the return of the draft letter. Plaintiff's counsel refused.

In a Memorandum and Order on the defendants' ensuing motion to compel the return of the draft letter, the Court addressed two important questions: (a) whether the attorney-client privilege protected the inadvertently disclosed draft; and (b) whether the plaintiff should return the draft to the defendants. *Id*. at 1-10. The Court answered both questions affirmatively.

First, the Court held that the draft was a privileged communication even though the final version of the letter had been sent to plaintiff's counsel prior to the commencement of litigation. Relying on a series of decisions of the Supreme Judicial Court ("SJC") and a law review article by the late Professor Paul R. Rice, the Court outlined the history and parameters of attorney-client privilege law in Massachusetts, including the following: *Attorney General v. Facebook, Inc.*, 487 Mass. 109, 121 (2021); *RFF Family Partnership, LP v. Burns & Levinson, LLP*, 465 Mass. 702, 707-08 (2013); *McCarthy v. Slade Assocs., Inc.*, 463 Mass. 181, 190 (2012); *Commissioner of Revenue v. Comcast Corp.*, 453 Mass. 293, 305 (2009); Paul R. Rice, *Attorney-Client Privilege: Continuing Confusion About Attorney Communications, Drafts, Pre-existing Documents, and the Source of the Facts Communicated*, 48 Am. Univ. L. Rev. 967, 1001 (June 1999) (Professor Rice's treatise, P.R. Rice, *Attorney-Client Privilege in the United States* (2d ed. 1999), was favorably quoted by the SJC in *McCarthy*, 463 Mass. at 190 n.20 and in *Comcast Corp.*, 453 Mass. at 305). The *Van Vuuren* court succinctly explained that the privilege applied to the *communications* between an attorney and client, emphasized that this was so even if the information contained in the communications was not itself confidential, and concluded that the privilege thus covered drafts of the final letter.

Second, the court ruled that counsel's inadvertent disclosure did not result in a waiver of the attorney-client privilege. Relying on the SJC's ruling in *In the Matter of Reorganization of Electric Mut. Liab. Ins. Co. Ltd*, 425 Mass. 419, 422-23 (1997), and the factors articulated in Mass. R. Civ. P. 26(b)(5), the Court held that "[a] party should be allowed to recover a privileged document if the 'disclosure was inadvertent,' 'the holder of the privilege … took reasonable steps to prevent disclosure,' and 'the holder promptly took reasonable steps to rectify the error.'" *Van Vuuren*, slip op. at 7. The court also found that the client seeking to enforce the privilege shared a "common legal interest" with the co-defendant's personal attorney with whom the draft had been shared, and thus that disclosure "did not waive the

privilege." *Id.* at 8-9.

In our view, the Court reached the right result on both issues. Many lawyers have no doubt assumed that earlier drafts shared with clients remain privileged even though the final draft is sent to an opposing party. And rightly so, because the fundamental purpose of the attorney-client privilege is to encourage the free, candid exchange of information between attorney and client for the purpose of providing legal advice. Involving clients in the drafting process is precisely that type of conduct. Likewise, *Van Vuuren* wisely recognized that safeguards are necessary to protect the attorney-client privilege when a draft of an otherwise privileged document is inadvertently revealed, because in such circumstances it would be patently unfair to penalize the client for the lawyer's mistake. Thus, concluded *Van Vuuren*, if the lawyer has taken reasonable steps to preserve the attorney-client privilege, the disclosure was the result of a mistake, and the lawyer took reasonable prompt steps to fix the error, then it is only fair that the attorney-client privilege should be preserved, and the inadvertently disclosed draft returned. Lesson for practitioners: Be diligent, but rest easier if you have been!

Matthew Kane, a partner at Laredo & Smith, LLP, is a business and commercial litigator representing small and mid-size businesses, banks and financial institutions, and individuals in an array of litigation matters, including commercial contracts, leasing, real estate, banking, employment, and business torts. He is an active member of the Boston Bar Association, a frequent speaker on business litigation topics, and looks forward to joining the BBA's Business and Commercial Litigation Committee this fall.

Marc C. Laredo, a founding partner of Laredo & Smith, LLP, is a business litigator and counselor. He represents businesses in an array of litigation matters, including shareholder disputes, commercial contracts, business torts, employment cases and government investigations. He also proactively advises closely-held businesses on entity formation, employment matters, contracts, crisis situations, and exit strategies. Marc is a member of the BBA's Law Firm Leadership Forum and the former co-chair of the Massachusetts Practice and Procedures Committee of the Litigation Section Council.

Case Focus

Commonwealth v. Sweeting-Bailey

By Rebecca Kiley

In *Commonwealth v. Sweeting-Bailey*, **488 Mass. 741 (2021)**, a fractured Supreme Judicial Court considered whether the patfrisk of a passenger of a car, following a "routine" traffic stop, could be justified not by his behavior, which by all accounts was perfectly compliant, but by the conduct of another passenger. In a total of five opinions, four justices concluded that it could; the chief justice and two others dissented. Criticism of the majority opinion was unusual and intense, with several retired judges—including two former SJC justices—calling the decision a retreat from the Court's commitment to combating racism in our criminal legal system.

Background

Zahkuan Bailey-Sweeting**[1]** was one of four people riding in a car stopped by New Bedford police for an improper lane change. Another passenger, Raekwan Paris got out and "angrily" confronted officers about the reason for the stop, suggesting it was harassment. Officers knew Paris from prior encounters, and testified that his demeanor was a departure from his previously calm and cordial conduct. After a ninety-second interaction during which Paris refused to get back in the car, police handcuffed and pat frisked him (finding no weapons), then ordered the remaining occupants out of the car and pat frisked them as well. A gun was found in Bailey-Sweeting's waistband. After a judge of the Bristol County Superior Court denied his motion to suppress, Bailey-Sweeting entered a conditional guilty plea on two firearms charges. His case reached the SJC on further appellate review, after an expanded panel of the Appeals Court affirmed the order denying the motion to suppress on a 3-2 vote.

The Opinion

Justice Cypher delivered the majority opinion of the Court. Acknowledging that the case was "close," the majority relied on four factors to conclude that there was a reasonable suspicion that Bailey-Sweeting was armed and dangerous.

First, and most critically, the majority agreed with the motion judge's conclusion that officers could reasonably infer, based on his "erratic, uncharacteristic behavior," that Paris was attempting to create a diversion to re-direct attention away from the car. *Id.* at 748-50, 755. The Court distinguished its recent conclusion in *Commonwealth v. Torres-Pagan*, 484 Mass. 34, 40 (2020) that "surprising behavior" does not supply reasonable suspicion that a person is armed and dangerous, on the basis that "Paris's behavior was not just surprising, it was aggressive." *Id.* at 750 n. 8.

Three other factors were given less weight but considered in the majority's calculus. First, the three male passengers in the car had "prior involvement with firearms." *Id.* at 755. The Court acknowledged that Bailey-Sweeting's three-year-old juvenile gun adjudication was "relatively remote in time" but concluded that it was relevant because "it involve[d] an offense close to the conduct at issue." *Id.* at 752.

Next, the Court considered testimony that the three men in the car were known to the police as members of three different gangs, though it cautioned that such evidence is less meaningful where, as here, there was no evidence of gang-related violence or other crime and no link between gang activity and Paris's purported efforts to distract the officers. *Id.* Finally, the Court relied on evidence "that the stop occurred in a high crime area"— which the Court did not detail, other than to note that Paris's prior gun arrest took place a half-mile away—but noted that this factor "contributes minimally." *Id.* at 752-53.

Concurrence by Justice Lowy

Justice Lowy concurred to record his agreement with the dissenters regarding the important issues of racial disparities in traffic stops and gang databases, and to emphasize that his disagreement with the dissents centered on "whether the inference that Raekwan Paris was attempting to divert attention from the car was reasonable." *Id.* at 756 (Lowy, J., concurring). His concurrence collects several federal cases supporting the idea that one passenger's behavior may reflect on another's, and that the officers "were entitled to rely on their training and familiarity with Paris in drawing" an adverse inference against Bailey-Sweeting based on Paris's behavior. *Id.* at 756-57.

Concurrence by Justice Wendlandt

Justice Wendlandt also began her concurrence with an acknowledgment of the "stark and unacceptable" racial disparities in "who is stopped, who is pat frisked, and who is incarcerated." *Id.* at 758 (Wendlandt, J., concurring). She asserted, however, that the Court's opinion "neither solves systemic racism nor contributes to it," emphasizing that "the defendant does not contend that the traffic stop at issue was motivated by racial profiling or discrimination." *Id.* at 758. She then summarized the evidence in the case, crediting the officers' belief that Paris was not "protesting continued harassment at the hands of police . . . [but] actively creating a distraction from the vehicle." *Id.*at 759. She concluded that, together, additional evidence of gang affiliation and "high-crime area"—"while seemingly innocuous in isolation"—warranted a reasonable suspicion that Bailey-Sweeting was armed and dangerous. *Id.* at 760-61.

Dissent by Chief Justice Budd

Chief Justice Budd dissented from the majority opinion, on two primary, interrelated grounds: (1) that no reasonable inference that Bailey-Sweeting was armed and dangerous could be drawn from Paris's conduct; and (2) that the Court's deference to police on that issue "provides the space into which seeps the damaging influence of racial bias." *Id.* at 770 (Budd, C.J., dissenting).

Focusing on the inferences left implicit in the majority opinion, Chief Justice Budd observed that police first inferred that Paris' conduct was an attempt to distract them, next that he sought to do so because there was contraband in the vehicle, then that the contraband was a weapon, and finally that the weapon might be on the defendant. *Id.* at 763. This chain of inferences, she concluded, was both "grounded in pure speculation," *id*, and "unlike any that we have previously accepted as objectively reasonable support for an officer's suspicion that a suspect is armed." *Id.* at 768. She emphasized that no officer testified to any training that informed the inference. *Id.* at 763. And she reasoned that past experience with Paris could not provide a basis for the inferences, as he had been cooperative and cordial even on the occasion on which police had recovered a firearm. *Id.* at 763-64.

Chief Justice Budd disagreed with the majority that common sense permitted an inference that Paris's conduct was a ruse, citing "the alternative, straightforward explanation that Paris contemporaneously provided for this behavior: his belief that the police were harassing him and that the stop was unfair." *Id.* at 764. That belief, in Chief Justice Budd's view, is "readily comprehensible" in view of well-documented racial disparities in traffic stops. *Id*. "To conclude that the commonsense judgment here was that Paris was feigning frustration at being stopped as a tactical maneuver to distract the officers from hidden contraband is to not only ignore the reality of race-based policing, but also perpetuate it." *Id.* at 764-65.

Chief Justice Budd concluded her dissent by "emphasiz[ing] the adverse implications of today's decision for communities of color." *Id.* at 769. She noted that people of color are disproportionately likely to be searched by police, primarily because of "neutral rules of deference that affirm the decision of racially biased actors." *Id.* at 770. She warned that by making it easier for police to act on "ungrounded intuitions that people are dangerous," the majority opinion "increases the risk that people of color will be subjected disproportionately to unjustified patfrisks." *Id.*

Dissent by J. Gaziano

Justice Gaziano also dissented, joined by Justice Georges. His primary criticism was that the majority opinion was contrary to the constitutional requirement of "particularized and individual" suspicion. *Id.* at 771 (Gaziano, J., dissenting). Like Chief Justice Budd, he regarded the inference that Paris was trying to distract police from the car as a mere hunch, and wrote that even if credited, "the court makes an unjustified leap from [that inference] to the belief that the defendant was armed and dangerous." *Id.* at 772-73. Given the requirement of "particularized and individual" suspicion, Justice Gaziano focused on Bailey-Sweeting's "own actions," none of which "gave rise to a reasonable suspicion that he was armed and dangerous." Like the driver and the other rear seat passenger, he obeyed instructions, was quiet and polite, and made no movement suggesting he was in possession of a firearm. *Id.* at 776.

Justice Gaziano regarded the gang evidence in this case as minimally relevant, considering the absence of evidence (a fact conceded by the majority) of recent gang violence, investigation of gang related crime, or any link between Paris' purported attempt to distract officers and gang activity. *Id.* at 777-78. Echoing the concern of Chief Justice Budd for the majority's "disregard[] [for] the adverse impact its decision will have on individuals and communities of color," he also highlighted the "unfortunate reality that gang membership may serve as a pretext for racial bias." *Id.* at 778. In Justice Gaziano's view, once Paris was handcuffed, the officers should have "return[ed] to the purpose of the traffic stop –the abrupt lane change – and proceed[ed] accordingly." *Id.*

Reaction

The majority opinion drew highly unusual criticism. A group of retired Black state court judges, including former SJC Justice Geraldine Hines, wrote publicly to decry the Court's decision as "stunningly oblivious to the necessary and proper role of our courts in mitigating the undue influence of race in our criminal jurisprudence." Dortch-Okara, *et al*., Massachusetts Lawyers Weekly (Jan. 24, 2022). A second retired SJC justice, Barbara Lenk, specifically quoted that language in her own public letter questioning whether the Court was living up to the commitment it made to racial justice in a landmark June 2020 letter to the bar and judiciary. Lenk, Massachusetts Lawyers Weekly (Feb. 7, 2022). Deborah Ramirez, wife of the late Chief Justice Ralph Gants and a law professor at Northeastern, published an opinion piece about the decision—coauthored by Harvard professor Sandra Susan Smith—under the headline "SJC takes big step backward on racial justice: Decision improperly expands police discretion in traffic stops." *Commonwealth Magazine* (Feb. 12, 2022). And the Boston Globe's editorial board cautioned the Court that "[o]ne hunch proven right should not open the floodgates for police encounters based on racial bias." Boston Globe (Jan. 3, 2022).

Implications/Takeaway

How broad the sweep of the *Sweeting-Bailey* case will be remains to be seen. The majority took pains to note that the opinion "does not stand for the proposition that every occupant of a vehicle may be pat frisked after a legal exit order based only on the conduct of a companion," and implied that the patfrisk of the driver, unknown to police, would not have survived constitutional scrutiny. *Sweeting-Bailey*, 488 Mass. at 755 & n.10. But Chief Justice Budd warned that the decision would "greatly . . . expand[] the circumstances in which officers may conduct a patfrisk." *Id.* at 769 (Budd, C.J., dissenting).

One thing is certain: the Court will see continued challenges to the use of gang database evidence to establish reasonable suspicion. In particular, the reliability of such evidence, paid relatively little attention in this case, is likely to be further litigated, especially in light of a First Circuit opinion issued just weeks after *Sweeting-Bailey* which held that the Boston Police "gang assessment database" is so flawed that it did not provide "reasonable, substantial, and probative evidence of gang membership or association" on which an immigration judge could properly rely to deny an asylum claim. *Diaz Ortiz v. Garland*, 23 F.4th 1, 22 (1st Cir. 2022) (citations omitted).

Rebecca Kiley is the Attorney-in-Charge of the Public Defender Division Appeals Unit of the Committee for Public Counsel Services. CPCS signed on to an amicus brief filed with the Supreme Judicial Court on behalf of Mr. Bailey-Sweeting.

[1] As is its custom, the SJC captioned the case in accordance with the way the defendant's name appears in the indictments against him. *Id.* at 741 n.1. This article uses his correct name, which is Zahkuan Bailey-Sweeting.

If You Don't Ask, You Might Not Receive: Requests For Discovery Concerning The Existence Of Personal Jurisdiction

By Philip A. O'Connell, Jr. and Tony K. Lu

Given the nature of the national and global economies, commercial litigators are ever more frequently confronted with disputes concerning the existence of personal jurisdiction. While an expansive body of case law addresses this issue, the question of when jurisdictional discovery is appropriate is not often addressed at sufficient length to be instructive. In this regard, the recent First Circuit decision in *Motus, LLC v. CarData Consultants, Inc.*, 23 F. 4th 115 (1st Cir. 2022) is illuminating.

Motus, LLC and CarData Consultants, Inc. are both in the business of providing "tools for managing businesses' reimbursement of employee expenses," including use of personal automobiles for business travel. *Id.* at 120. Motus is a Delaware limited liability company headquartered in Boston; CarData is a Toronto-based Canadian corporation. *Id.*

Motus claimed proprietary rights in the phrase "corporate reimbursement services." At one point in time, the meta-title of CarData's website incorporated that phrase. Although CarData had removed that phrase from the meta-title of its website at Motus's request, Motus still sued CarData in the United States District Court for the District of Massachusetts, citing the Lanham Act, 15 U.S.C. secs. 1051-1129, and seeking damages for trademark infringement, trademark dilution and unfair competition. Motus alleged that Cardata maintained a website, but failed to allege how or why operation of that website would result in personal jurisdiction over Cardata in Massachusetts. *Id*.

The district court dismissed Motus's suit against CarData based on lack of personal jurisdiction and denied Motus's request for jurisdictional discovery. *Motus, LLC v. CarData Consultants, Inc.*, 520 F. Supp. 3d 87, 94 (D. Mass. 2021). That "request for jurisdictional discovery comprised a single conclusory sentence, accompanied by a footnote, and contained no indication of what facts might be developed through discovery." 23 F. 4th at 128.

Motus appealed to the United States Court of Appeals for the First Circuit. After determining that Motus had failed to carry its burden of making out a *prima facie* case of personal jurisdiction over CarData, the court addressed what it called Motus's "last-ditch effort to snatch victory from the jaws of defeat"; namely, the contention that the district court had abused its discretion in refusing to allow Motus to conduct jurisdictional discovery. *Id.* at 127-28.

Relying upon Federal Rule of Civil Procedure 7(b) ("request for a court order must be made by motion"), the First Circuit made it clear that requests for jurisdictional discovery should be made by a separate, formal motion, not merely addressed in passing in an opposition brief. Citing the fact that Motus "merely mentioned the option of jurisdictional discovery in its opposition to CarData's motion to dismiss" (*id* at 127), the First Circuit noted that "the best way to ensure that a request for jurisdictional discovery is preserved for appeal if denied is to file a timely motion." *Id.*

The decision recognized that "district courts have a certain amount of leeway to treat informal requests for jurisdictional discovery made in opposition papers as if made by motion when there is no prejudice to the other party" (*id*.), but noted the peril associated with such a minimalist approach, concluding that "Motus did not act diligently to preserve its rights." *Id.* at 128.

The First Circuit emphasized that a party seeking jurisdictional discovery must (i) "explain why jurisdictional discovery [is] appropriate" and (ii) identify "what relevant information it hope[s] to glean through such discovery…" *Id.* It concluded that the "barebones nature of Motus's presentation" in its opposition brief had not done so. *Id.*

The lesson is clear: Although a district court may, in its discretion, elect to entertain an informal request

for jurisdictional discovery incorporated in a party's briefing, best practice dictates that a party should not make a request for such discovery in passing in an opposition. Rather:

- The party should file a separate, formal motion for jurisdictional discovery.
- The motion should explicitly request jurisdictional discovery and identify, with whatever degree of specificity is possible, exactly what the party seeks to discover. Indeed, if drafts of focused jurisdictional discovery can be attached to the motion for the court's consideration, all the better.
- The motion should explain why that discovery is necessary and appropriate. What is the non-frivolous factual dispute that the discovery addresses and how will the proposed discovery help resolve it?
- The separate formal motion and an opposition to the motion to dismiss should pointedly reference each other, so that they support each other and so the court does not lose track of the separate motion and fail to consider it in connection with the opposition.

The good news, as the First Circuit held in an earlier case, is that when a request for jurisdictional discovery is timely made and properly supported, it "merits solicitous attention." *United States v. Swiss American Bank, Ltd.*, 274 F. 3d 610, 626 (1st Cir. 2001).

Philip A. O'Connell, Jr. is the Managing Partner of the Boston office of Dentons US LLP. He is admitted to practice in Massachusetts, California, Illinois and Nevada. He represents clients primarily in insurance and commercial litigation.

Tony K. Lu is a Senior Managing Associate in the Boston office of Dentons. He is admitted in Massachusetts and Connecticut. He represents clients primarily in trade secret litigation, other commercial litigation and insurance litigation.

Both Phil and Tony were on brief for the appellee in Motus, LLC v. CarData Consultants, Inc., 23 F.4th 115 (1st Cir. 2022).

Tracer Lane II Realty, LLC v. City of Waltham: Massachusetts' Highest Court Grants Protection Over Solar Energy Systems

By Courtney Simmons

Introduction

On June 2, 2022, the Supreme Judicial Court ("SJC") issued an important decision interpreting the application of **G.L. c. 40A, § 3** (the "Dover Amendment") to solar energy systems. The Dover Amendment, enacted in 1950, prevents municipalities from implementing zoning regulations that prohibit or interfere with certain uses the Legislature has determined are valuable as a matter of public policy and deserve protection from local community prohibition, such as religious, educational and agricultural uses. In 1985, G.L. c. 40A, § 3 was amended to include solar energy systems as an additional protected use, providing in relevant part: "No zoning ordinance or by-law shall prohibit or unreasonably regulate the installation of solar energy systems or the building of structures that facilitate the collection of solar energy, except where necessary to protect the public health, safety or welfare." G.L. c. 40A, § 3, ninth par.

In *Tracer Lane II Realty, LLC v. City of Waltham*, **489 Mass. 775** (2022) ("*Tracer Lane*"), the SJC addressed for the first time the Dover Amendment's protection of solar energy facilities and their ancillary structures—here, an access road. In deciding that the proposed access road was part of the protected solar energy system, the SJC highlighted the road's significance to facilitating the system's construction, maintenance, and connection to the electrical grid. However, the SJC did not establish a clear standard for evaluating when a zoning ordinance or by-law has prohibited or unreasonably regulated the installation of solar energy systems when the protected use is otherwise permitted in certain areas of the municipality.

***Tracer Lane* Facts and Procedural History**

In *Tracer Lane*, a developer sought to build a road on its Waltham property to access its 9.5-acre property in neighboring Lexington, where it planned to install a ground-mounted solar array with approximately 4,000 solar panels. While its Lexington property is zoned for commercial use and allows ground-mounted solar arrays, its Waltham property is zoned only for residential uses. As a result, the Waltham building inspector informally advised the developer that the proposed access road would not be permitted, since it would constitute a commercial use in a residential zoning district. In response, the developer filed suit in Land Court seeking a declaratory judgment that an access road serving a solar energy facility is a protected use under the Dover Amendment and Waltham could not prohibit construction of the access road through its zoning code.

The parties cross-moved for summary judgment, disputing the extent to which Waltham's zoning code permits solar energy systems. Waltham contended solar facilities were not unreasonably restricted because they are allowed in the industrial zones which permit power generation establishments. Waltham also noted its code allows "accessory use" solar energy systems in residential and commercial zones. The developer argued that insofar as Waltham's zoning code specified any use "not expressly permitted . . . is hereby prohibited," and the zoning code does not specifically cover solar energy systems, such use is prohibited in all zoning districts. The developer further argued that even if such facilities were allowed in Waltham's industrial districts, the regulation was nevertheless unreasonable since industrial districts comprise less than two percent of the land in Waltham.

The Land Court's summary judgment decision found the proposed access road to be ancillary to the solar energy system and, thus, a protected use pursuant to the Dover Amendment. The Land Court judge did not determine whether solar energy systems are prohibited in Waltham but ruled that even if they are permitted in industrial districts, the exclusion of such use in more than ninety-eight percent of Waltham

was "unquestionably" an unreasonable regulation. The Land Court judge noted that as compared to religious and educational uses, which may be subject only to reasonable dimensional regulations, a municipality has more discretion to regulate solar facilities "where necessary to protect the public health, safety or welfare," but there was no such showing made here.

The Land Court ordered Waltham to allow construction of the access road, and Waltham appealed. The SJC, *sua sponte*, transferred the case for direct appellate review. Prior to *Tracer Lane*, no appellate decision had addressed the extent to which a municipality can regulate solar energy facilities without running afoul of the Dover Amendment.

Tracer Lane Reasoning and Holding

In deciding *Tracer Lane*, the SJC reviewed the history and intent behind the Dover Amendment's enactment. The SJC recognized that although originally passed to prevent municipalities from restricting educational and religious uses, the scope of the Dover Amendment's protection was expanded to "help promote solar energy generation throughout the Commonwealth." *Id*. at 779. The Court cited cases interpreting other protected uses under G.L. c. 40A, § 3 which were "considered ancillary structures to be a part of the protected use at issue" and "reach[ed] the same conclusion here" to hold: "Given the access road's importance to the primary solar energy collection system in Lexington . . . the access road is part of the solar energy system." *Id*. at 779-780. The SJC also found that Waltham's zoning code unduly restricted solar energy systems. Agreeing with the Land Court, the SJC concluded:

"An outright ban of large-scale solar energy systems in all but one to two percent of a municipality's land area… restricts rather than promotes the legislative goal of promoting solar energy. In the absence of a reasonable basis grounded in public health, safety or welfare, such a prohibition is impermissible under the provision." *Id*. at 782.

Notably, the SJC did not take the opportunity presented in *Tracer Lane* to determine whether G.L. c. 40A, § 3 limits a municipality from prohibiting the installation of solar energy systems or other protected uses in certain zoning districts, while allowing such uses in other districts (provided more than two percent of the land area in a municipality permits the protected use).

Implications to the Dover Amendment and Local Zoning Authority

Tracer Lane is consistent with prior SJC decisions extending the scope of protected uses under the Dover Amendment to ancillary components. However, the decision did not establish any standard or set of criteria for analyzing whether ancillary components should be recognized as part of a protected use and subject to treatment under the Dover Amendment.

Likewise, *Tracer Lane* did not establish any bright-line rule regarding the municipal regulation of protected uses under the Dover Amendment. In particular, the SJC could have determined the language of G.L. c. 40A, § 3, ninth par. meant solar energy systems must be allowed in every part of a municipality, regardless of zoning district limitations, unless it can be shown that a particular location was not suitable based on public health, safety or welfare grounds. Consequently, the decision leaves unanswered whether allowing Dover Amendment uses in a certain percentage of land in a municipality operates as a safe harbor against legal challenges, and, if it does, what percentage of land area would be reasonable. Ten percent? Twenty percent? The lack of a controlling standard on the limits of a municipality's discretion in restricting solar energy systems and other uses protected by the Dover Amendment perpetuates uncertainty and invites more litigation.

For now, *Tracer Lane* sends a clear message that municipalities must be more cautious in regulating uses specifically protected under G.L. c. 40A, § 3. Further, as applied to solar facilities, municipalities must be prepared to make a showing that any restriction is "necessary to protect the public health, safety or welfare" for the ordinance or by-law to survive judicial review. The municipal response to *Tracer Lane*

and how courts apply its reasoning will impact the development of solar energy facilities in Massachusetts and whether the Commonwealth can reach its climate goals.

Courtney Simmons is a litigator at the Boston law firm of Davis Malm, assisting clients in commercial litigation and real estate disputes. She counsels clients involved in business, land use, zoning and permitting issues and often addresses environmental issues affecting developers, landlords and tenants. Prior to joining Davis Malm, Courtney served as Law Clerk to the Honorable Mark V. Green, Chief Justice of the Massachusetts Appeals Court, and the Honorable Robert B. Foster and Honorable Howard P. Speicher, both of the Massachusetts Land Court.

Time's Up to End the Abuse of NDAs

By Senator Diana DiZoglio

Nondisclosure provisions or agreements (NDAs) have historically served and continue to guard businesses against the dissemination by employees and former employees to third parties of proprietary information discovered during the course of employment. Trade secrets, for example, are expressly protected under both Massachusetts and Federal law**[1]**. However, the use of NDAs has expanded and normalized over time, with confidentiality provisions now typically included in the resolution of legal disputes, barring parties from disclosing settlement terms or, at times, even the existence of the wrongdoing originating the dispute.

Massachusetts has of late taken legislative steps to curtail the use of NDAs between particular parties. During the 2019-2020 legislative session, the General Court enacted a law prohibiting the inclusion of nondisclosure provisions in agreements settling professional misconduct complaints against law enforcement officers**[2]**. The Massachusetts Senate also took action to prohibit nondisclosure provisions in agreements between the chamber and its members, officers and employees**[3]**. Notwithstanding the foregoing and other limited statutory examples, the enforceability of NDAs in Massachusetts, including NDAs entered into in the context of settling sex discrimination and sexual harassment claims, remains governed by general principles of contract law and the courts' interpretation thereof.

NDAs in Sex Discrimination and Sexual Harassment Disputes as Against Public Policy

Sexual harassment and other forms of sex discrimination in the employment context are prohibited under Massachusetts law**[4]**. As recently spotlighted by the "#MeToo" movement, during which high-profile figures were driven to speak out, NDAs are a frequent tool utilized in the settlement of such claims. The floodgates have since opened, with hundreds of survivor stories evidencing a widespread perpetuation of discriminatory workplace environments facilitated by the use of NDAs to suppress and silence.

In certain circumstances, an NDA will be unenforceable due to conflict with federal labor or civil rights laws. One federal District Court in Massachusetts held that Title VII of the Civil Rights Act prevents employers from interfering with the ability of the Equal Employment Opportunity Commission (EEOC) to investigate charges of discrimination, and that any agreement that prohibits or interferes with the EEOC's ability to communicate with the employee is void as a matter of public policy. (*EEOC v. Astra USA, Inc.*, 929 F. Supp. 512 (D. Mass. 1996).) However, the limited scope of the case is insufficient to protect employees and potential employees from unlawful actions and workplace environments that can be physically and mentally debilitating or outright dangerous. Almost by definition, employees are in positions of inferior bargaining power as compared to their employers. A critical component of an enforceable contract is the concept of "mutual assent". For an NDA to be enforceable, negotiation must therefore be free of duress. By its nature, sexual harassment seeks to disempower and disadvantage its victims, creating or furthering an environment conducive to pressure and coercion, whether or not intentional.

Following the emergence of the #MeToo movement, the National Women's Law Center in 2020 released a **fact sheet** detailing the importance of limiting NDAs that silence workers. The document included policy recommendations and urged lawmakers to "stop the abusive use of NDAs and restore victims' voices." The document noted that, since the movement started in 2018, multiple jurisdictions have taken the initiative to do just that and restrict the use of NDAs. States have taken various approaches, distinguishing between pre- and post-dispute NDAs. Eliminating the use of pre-dispute NDAs fosters a more open and inclusive workplace culture, and prevents employers from misleading employees about their rights and duties to disclose. Massachusetts should follow the lead of California**[5]**, New York**[6]**,

Washington**[7]** and other states in eliminating pre-dispute NDAs as a condition of employment. To allow employers the ability to *preemptively* silence employees and prospective employees regarding practices that, by Massachusetts' own statutes, are *unlawful* is insupportable.

Regarding post-dispute NDAs, no state has completely eliminated their use, in part to protect the rights of the victim. Protecting victim anonymity has often been cited in Massachusetts as a reason to reject proposed legislation seeking to eliminate the use of post-dispute NDAs. The argument, however, is misleading, as many states have successfully passed carefully crafted legislation designed to help protect the confidentiality of victims while simultaneously holding perpetrators accountable**[8]**. A victim's identity can always be redacted from settlement agreements. When NDAs prohibit victims from disclosing violations, employers have little incentive to penalize perpetrators or prevent these, again, unlawful practices from recurring. The function of the Legislature is to pass laws that protect and benefit the public good. To statutorily recognize actions as unlawful but forestall legislation to reduce the incidence of those unlawful actions is a dereliction of duty.

At a minimum, those who serve the public should be held to account. The use of taxpayer-funded NDAs by public officials and entities, meant to silence victims regarding any type of abuse, should be prohibited. It is a gross abuse of taxpayer dollars and the antithesis of public service for those elected or appointed to office to be able to draw on the funds of the very taxpayers who have entrusted them to serve. Those who make and execute the laws are not above the laws. A recently enacted **Arizona law (12-720)** prohibits the use of public funds to secure an NDA relating to a sexual harassment claim.

In Massachusetts, I have sponsored a number of bills in the Legislature's 192nd General Court pertaining to sexual harassment and discrimination policies and the use of NDAs. These include **S. 1019**, which expands and clarifies the definition of sexual harassment and related actions as a form of discrimination; **S. 1020**, which prohibits the use of NDAs in cases involving sexual assault, harassment, and discrimination in both the public and private sectors; and **S. 2047**, which protects the taxpayers by prohibiting the use of NDAs by governmental entities.

A wide variety of laws acknowledging the broader awareness of the public health threat posed by sexual harassment and sex discrimination have been successfully enacted in other jurisdictions. These laws demonstrate that it *is* possible to carefully craft legislation which balances transparency and accountability, victim and survivor rights, and protection of taxpayer funds. These are not competing interests, but all interests necessary to effect the common good.

Senator Diana DiZoglio serves as State Senator for Massachusetts' First Essex District, which includes the Cities of Amesbury, Haverhill, Methuen and Newburyport, the Towns of Merrimac and Salisbury and portions of the Town of North Andover. She serves as the Chair of the Joint Committee on Export Development and Vice Chair of the Joint Committee on Municipalities and Regional Government.

[1] Mass. Gen. Laws ch. 93, §§ 42-42G; and 18 U.S.C. §§ 1831-1839 (2011).
[2] Mass. Gen. Laws ch. 41, § 98H.
[3] Mass. Sen. Rule 11G, 192nd Congress (2019).
[4] Mass. Gen. Laws ch. 151B; Mass. Gen. Laws ch. 214 § 1C.
[5] Cal. Civ. Proc. Code § 1001 (2022).
[6] N.Y. Gen. Oblig. Law § 5-336 (2018).
[7] Wash. Rev. Code § 49.44.210 (2018).
[8] *id.* at 5-7.

NDAs: Is There Anything Worth Keeping?

By Ellen J. Zucker

It is a simple – and perhaps profound – political truth: when individuals tell their stories, they can bring about change. Women speaking of terrifying back-alley abortions, same-sex couples describing their families' daily joys and struggles, black men talking about being pulled over and abused by authorities for no good reason: in each case, it is the personal narrative that has the power to reshape social discourse and provide an impetus for change.

In 2017, in the wake of media reports about serial sexual harassment and assault allegations against famed producer Harvey Weinstein, an actor took to social media. She invited others to step forward and tell their stories with the hashtag #MeToo. While this term had been coined by an activist combating rape culture over a decade earlier, it was in 2017 that the moniker, and its underlying message, went viral. Women began telling their stories in unprecedented numbers; and the nature and scale of the problem, too often ignored or buried in the quiet confines of a lawyer's settlement file, came to light. Attention began being paid and, for the first time, powerful men were called to account. As this happened, women who had years earlier resolved sexual misconduct complaints with an agreement not to disclose what had happened began to chafe under the weight of their own silence. And we, as a society, began to challenge the private contractual impediments to public accountability.

The potentially pernicious impact of what we commonly call non-disclosure agreements ("NDAs") came into focus.**[1]** Critics noted that NDAs between parties where sexual misconduct is alleged give predators license to continue their misdeeds with impunity. NDAs provide corporations with an easy out, allowing them to purchase silence and then move on, retaining talent – even predatory talent – without any internal dislocation, without accountability and without damage to their brand. NDAs, critics observed, can also have another costly side-effect: they leave victims with feelings of isolation and self-doubt, as many believe – incorrectly – that what they experienced happened to them alone.

With the social costs of NDAs persuasively identified, advocates called for legislative action.**[2]** Several states took up the challenge and enacted legislation that limits the use of NDAs.**[3]** The federal government likewise responded, enacting legislation designed to limit confidentiality in sexual harassment cases by, among other things, altering the deductibility of settlements paid in sexual harassment and abuse cases[4] and prohibiting the enforcement of pre-dispute agreements to arbitrate such claims.**[5]** In some states, bills have been proposed or enacted that would effect a wholesale ban of NDAs where sexual harassment is alleged. Recently, the Washington State Legislature passed a broad ban on NDAs, explaining the need for the law as follows: "there exists a strong public policy in favor of the disclosure of illegal discrimination, illegal harassment, illegal retaliation, wage and hour violations, and sexual assault …. Nondisclosure and nondisparagement provisions in agreements between employers and … employees, and independent contractors have become routine and perpetuate illegal conduct by silencing those who are victims or who have knowledge of illegal [conduct] …. It is the intent of the legislature to prohibit nondisclosure and nondisparagement provisions in agreements, which defeat the strong public policy in favor of disclosure."**[6]**

While the flurry of legislative proposals and actions in recent years represents a well-intended effort to address the social costs of victim silence, there are unintended but terribly harmful consequences that will likely flow from some of what has been proposed, particularly from any broad prohibition against the use of NDAs. In fact, in the name of equity, some of the legislation will predictably create circumstances where individuals who suffer harassment, discrimination or retaliation on the job or in the course of their education will feel *more* concerned – not less – about the potential consequences of stepping forward to report what they have experienced.

As counsel to individuals who have faced sexual harassment on the job or in the course of their education, I have been humbled by how hard it is for these victims even to seek legal advice. Most struggle mightily before they ever pick up the phone or come to a lawyer's office. They have usually suffered alone for months, if not years, as they try to brush off, redirect, avoid or just plain tolerate the offensive behavior. Where harassment occurs in highly specialized work settings, individuals fear that complaining will not only degrade their current work situation but equally their ability to move on to a new position in their field. Where the harassment involves low-wage workers, in job environments where the disparity in power between employee and employer is particularly extreme, employees' fears can be even more overwhelming.

Victims thus very often feel trapped. They are terrified about complaining, but also know the consequences of acquiescence: isolation, feelings of shame, anger, and ever-increasing disengagement from the workplace – circumstances which themselves can result in flagging job performance and diminished opportunities. In this context, the promise that individuals can come forward to describe what has happened to them in confidence, and at the same time resolve the matter expeditiously and quietly, is often reassuring rather than repressive.

There are many reasons why individuals who are harassed, abused or assaulted may opt for silence. Victims of sexual assault – already physically and emotionally harmed, uneasy and taxed at work or school – too often face further harsh treatment if they speak out about what happened to them. Colleagues turn away, the next job is harder to find if they are known to have complained, and the perpetrators (and their allies) all too often decide that it is in their interest to turn the tables, invoking tired tropes and damaging sexual stereotypes to try to destroy the reputation of their victims.[7]

Indeed, while our anti-discrimination laws, by their very architecture, dignify individuals who bring charges of discrimination or harassment as "private attorney[s] generals" who come forward to vindicate not only their own but also society's interests,**[8]** the reality can be quite different and far less dignifying. In the practical world, privacy, peace and job security may seem preferable to public vindication. Settlements exchanged for a promise not to disclose the fact of an agreement or the complaint that resulted in it offer a mechanism *for individuals* to address sexual harassment and assault concerns without risking as much personal, financial, and professional damage to their lives and futures.

In this context, when individuals victimized by sexual harassment and assault find their way to an attorney willing to assist them, their goals are often at once urgent and unremarkable: they want a solution to help them move forward and put the traumatic and damaging experience behind them, but without suffering further financial, personal or professional harm. Faced with a choice between a quiet settlement and public litigation, most choose the former. This practical reality itself militates against any broad-based ban on NDAs.**[9]**

There are other factors that likewise counsel against such a prohibition. First, abolishing NDAs only in cases of sexual harassment, as many of the current bills propose, would eliminate critical bargaining power and leverage for victims of sexual harassment while leaving such leverage in place where claimants have raised concerns about other forms of misconduct. However well-meaning, this would leave victims of sexual harassment with fewer tools to resolve disputes, thereby cementing the very power imbalance that lies at the core of sexual harassment itself.

Second, an overbroad ban on NDAs will deny victims protection from their harasser's public attacks in the future. For the ban will extend not merely to alleged victims, but to the alleged perpetrators as well, the latter of whom will be free to speak about past events without contractual limitation.

Finally, there is another reality that those of us who fight for individual rights in the workplace must acknowledge: those accused rarely confess their misconduct, the truth of what occurred may be difficult to establish, and employers of the accused may – in earnest – believe a complainant's assertions are

overstated in terms of legal liability. In these situations, the promise of confidentiality becomes a central – if not the *essential* – element of any settlement. Without the business justification of an NDA, employers are more likely to conclude that they are better served by not settling at all and instead litigating the allegations vigorously. If they are in all events going to be exposed to the public relations harm to their brand that results when an individual speaks out about alleged workplace harassment, many employers will opt to litigate the claims. They will make this choice either because they truly believe they will be vindicated, or because they believe they can dirty up the image of the complainant or simply outlast that person, ultimately resolving the case on more favorable terms. This is not a desirable outcome for the victim, and just as surely not in the public interest.

These practical – and important – considerations counsel against the strict limitation on NDAs reflected in the proposals put forward in Massachusetts by Senator DiZoglio and others. We must work, instead, to make sure that any legislative impairment of the ability of parties to enter into settlement agreements that contain non-disclosure provisions does not (in the name of a public good) further burden and disempower the very victims of sexual harassment whose stories animate such proposals. We must look to ensure that, in any efforts to address workplace misconduct and protect future victims, it is employers and perpetrators – and *not* their victims – who bear the burden of accountability and compliance.

There are a number of legislative fixes that would address the operation of NDAs to effect positive social change for both victims and the workplace as a whole. Non-disclosure agreements, for example, could be required:

- to establish a sunset on confidentiality and non-disclosure of substantive allegations;
- to meet established standards assuring that any settlement agreement's non-disclosure, non-disparagement or confidentiality provisions be reasonably mutual, and providing a mechanism for individuals to address disclosures made or disparagement voiced by corporate actors not bound by such provisions, and to exempt from any such provisions the discussion of substantive allegations with an individual's family members and/or medical/mental health providers;
- to provide that *all complaints* or expressed concerns about harassment, discrimination or retaliation be maintained in an alleged perpetrator's personnel file and, in the event that civil litigation is initiated by another claimant or a government investigation related to the conduct of the alleged perpetrator is commenced and such information is requested, disclosure of all such prior complaints must occur without objection based upon privacy or confidentiality;
- to affirm that *all agreements* containing confidentiality and/or non-disparagement clauses that apply to allegations of harassment, discrimination or retaliation under state or federal anti-discrimination or whistleblower laws do not limit an individual's ability to bring their concerns to law enforcement or governmental agencies charged with enforcing such laws, and that testimony in response to lawful process or requests from any governmental agency may likewise not be inhibited by such clauses;**[10]**
- to bar *pre-dispute* confidentiality and non-disclosure provisions or agreements to arbitrate such claims which effectively provide fewer benefits incident to employment (relative to other workers) to those who suffer discrimination, harassment or retaliation; and,
- to allocate what percentage of proceeds in a settlement is paid *for* non-disclosure (as opposed to emotional distress, past wages and the like), and that that amount could be considered severable from the rest and clawed back by the employer (trued up for tax consequences) in the event that a claimant in the future wishes to speak out.**[11]**

In sum, while banning all non-disclosure agreements where sexual harassment, discrimination or retaliation is alleged unfairly disempowers and burdens victims and should be rejected, this should not end the discussion. There are other ways to even the playing field and reduce the deleterious social costs of silence. Advocates should continue to explore creative solutions that address the ramifications at play – solutions which enhance rather than narrow the options individuals have when trying to navigate deeply troubling circumstances and move forward with their lives.

Ellen Zucker is a partner at Burns & Levinson LLP. Her practices focuses on employment litigation and counseling. She served as lead counsel for Dennis Burke, M.D, in a whistleblower lawsuit relating to the practice of double booking surgical cases and Carol Warfield, M.D., in a gender discrimination and retaliation case against a Boston area teaching hospital.

[1] Brushed into this category are both sweeping pre-dispute confidentiality and non-disparagement clauses contained in boilerplate agreements signed incident to employment on-boarding, as well as narrower post-dispute agreements not to engage in disparagement or to keep a particular set of terms**,** conditions *and* the substantive allegations underlying same in confidence. According to the Harvard Business Review, in 2018, over one third of the U.S. workforce is bound by some form of non-disclosure agreement. Orly Lobel, *NDAs Are Out of Control. Here's What Needs to Change*, Harv. Bus. Rev., Jan. 30, 2018.

[2] *See, e.g*., Nat'l Women's Law Ctr., *Limiting Nondisclosure and Nondisparagement Agreements That Silence Workers: Policy Recommendations* (Fact Sheet, Apr. 2020). *See also, e.g.*, Vasundhara Prasad, *If Anyone Is Listening, #MeToo: Breaking the Culture of Silence Around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements*, 59 B.C. L. Rev. 2507 (2018) (Note); Emily Otte, *Toxic Secrecy: Non-Disclosure Agreements and #MeToo,* 69 U. Kan. L. Rev. 545 (2021).

[3] From 2018 into 2020**,** more than a dozen states – with legislative leadership across a broad political spectrum – passed new laws limiting the use of NDAs. *See, e.g.*, La. Rev. Stat. § 13:5109.1 (2019); A.B. 248, 80th Leg. (Nev. 2019); S.B. 479, 80th Leg. Assemb., Reg. Sess. (Or. 2019); S.B. 726, 80th Leg. Assemb., Reg. Sess. (Or. 2019); H.B. 594, 111th Gen. Assemb., Reg. Sess. (Tenn. 2019); VA. CODE ANN. § 40.1-28.01 (2019); *see also* A. Johnson, R. Sekarian & S. Gombar, *Nat'l Women's L. Ctr.*, Progress Update(s): MeToo Workplace Reforms, https://nwlc.org/resource (Oct. 2021), https://nwlc.org/resource/2021-progress-update-metoo-workplace-reforms-in-the-states/#. In 2020, Hawaii enacted a law prohibiting employers from requiring employees to execute pre-employment non-disclosure agreements that would prevent discussion of workplace harassment. H.B. 2054 HD1 SD1, 30th Leg., Reg. Sess. (Haw. 2020). New Mexico passed into law a bill prohibiting private employers from requiring NDAs relating to the underlying circumstances resulting in the agreement, where sexual harassment is involved, unless such an agreement is at the employee's request in order to protect confidentiality. H.B. 21, 2020 Reg. Sess. (N.M. 2020). Illinois enacted legislation that seeks to limit the use of NDAs where they are imposed unilaterally. S.B. 0075, 101st Gen. Assemb. (Ill. 2019). In 2021, California passed the Silenced No More Act, S.B. 331 (Cal. 2021), which prohibits employers from using non-disparagement or non-disclosure agreements to prevent employees from discussing factual information related to a claim for workplace harassment or discrimination, whether or not it is gender-based. New Jersey has enacted a law broadly invalidating NDAs, with exceptions for non-competition and trade secret agreements. N.J. STAT. ANN. § 10:5 – 12.8 (2019). Notably, the New York, California, and Illinois laws prohibit nondisclosure provisions related to unlawful discrimination in settlement agreements *unless* an employee wants such confidentiality, and in New York, nondisclosure clauses in pre-employment and severance agreements are still permissible. Other state efforts, such as those in Massachusetts, have made only limited progress; but legislation remains under consideration, as Senator DiZoglio describes in her article.

[4] The Tax Cuts and Jobs Act that took effect in January of 2018 amended Section 162 of the Internal Revenue Code, eliminating tax deductions for settlements, payouts and attorneys' fees "related to sexual harassment or sexual abuse if such payments are subject to a *nondisclosure agreement*" (emphasis added). The amendment applies to all employers, no matter what their size or revenue.

[5] On March 3, 2022, President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, which amends the Federal Arbitration Act ("FAA") and limits the use of *pre-dispute* arbitration agreements and class action waivers covering sexual assault and sexual harassment claims. The law provides: "at the election of the person alleging conduct constituting a sexual harassment dispute or a sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law and relates to the sexual assault dispute or the sexual harassment dispute." *Id.* On June 29, 2022, a bi-partisan group

of House lawmakers introduced the *Speak Out Act* which seeks to prohibit pre-dispute nondisclosure agreements (NDAs) in instances in which sexual harassment or sexual assault has been alleged. *See* Press Releases, Reps. Frankel, Buck Introduce Bipartisan Legislation to Empower Employees, Consumers to Speak Out Against Sexual Harassment, Congresswoman Louis Frankel (Jun. 29, 2022), https://frankel.house.gov/news/documentsingle.aspx?DocumentID=3497.

[6] *See* H.B. 1795, 67th Leg., Reg. Sess. (Wash. 2022). On March 24, 2022, Washington State's Engrossed Substitute House Bill 1795, the *Silenced No More Act,* was signed into law , and took effect on June 9, 2022. The law prohibits employers from requiring or even requesting that workers sign agreements containing non-disclosure and non-disparagement provisions which would restrict their right to discuss factual information regarding discrimination, harassment, sexual assault, retaliation, wage and hour violations, or any other conduct "that is recognized as against a clear mandate of public policy." *Id*. The new section, inserted as Section 49.44.211 of the Revised Code of Washington, provides that "a provision in an agreement between an employer and employee not to disclose or discuss conduct, or the existence of a settlement involving conduct, that the employee reasonably believed to be illegal discrimination, illegal harassment, illegal retaliation, a wage and hour violation, sexual assault, or against a clear mandate of public policy is void and unenforceable." The Act broadly defines "employee" to include current, former, and prospective employees, as well as independent contractors; and encompasses all work-related conduct, whether occurring in the workplace or off-site. There is a narrow exception to the scope of this new law: employers may keep the *amount paid in a settlement* confidential and the law expressly does not apply to agreements not to disclose trade secrets or proprietary information. While other states, *see supra*, have enacted laws that limit NDAs, Washington State's law appears to be the most restrictive, as it bars confidentiality clauses even if they are requested by an employee.

[7] The phenomenon has its own acronym: DARVO (**"deny, attack, and reverse victim and offender"). While the term was first coined by** psychologist Jennifer Freyd in 1997, *see* Jennifer Freyd, *Violations of power, adaptive blindness, and betrayal trauma theory*, 7 Feminism & Psych. 22, 22–32 (1997), in recent years it has been applied to the conduct of those accused of sexual harassment in high profile cases and cases involving highly specialized workplaces. *E.g.*, Louise F. Fitzgerald & Jennifer J. Freyd, *Trump's DARVO defense of harassment accusations,* Boston Globe (Dec. 20, 2017), https://www.bostonglobe.com/opinion/2017/12/20/trump-darvo-defense-harassment-accusations/bTCR8QDrjLaYAwsQHCtpsM/story.html; Resa Lewiss, M.D. et al, *Who's Really the Victim Here? It's time to end DARVO behavior in the healthcare workplace,* MedPageToday (Jun. 2, 2022), https://www.medpagetoday.com/opinion/second-opinions/99015.

[8] Individuals who step forward to raise these concerns, after all, engage in an activity essential to the functioning of our civil rights laws. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418–19 (1978) (citing *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968) (individuals serve as "private attorney[s] general," vindicating not only their rights but society's as well)).

[9] As made clear below, the critique offered here does not address *pre-dispute* NDAs that are the focus of some state legislative efforts – and the current *Speak Out Act* introduced in the House in June of 2022. These efforts are righteous**,** and correctly rebalance the respective power of the parties when an individual comes forward with concerns about sexual harassment, discrimination and/or sexual assault. The only quarrel this author has with the legislation proposed is that it should not parse the forms of discrimination suffered so finely, and *all* statutory civil rights or whistleblower claims should be deemed beyond the reach of any pre-dispute NDA.

[10] This does little more than what the law already requires; but clarity as to this limitation would be useful. Indeed, such limits on agreements have been set by courts, and it is now well established that private agreements to remain quiet or talk positively yield to the requirement that one speak candidly when under oath. *E.g.*, *EEOC v. Astra USA, Inc.*, 94 F.3d 732, 738 (1st Cir. 1996) (declining to enforce private confidentiality and non-disclosure agreements when testimony is provided under subpoena).

[11] A legislative enactment that so provides would work a benefit for employers and claimants alike, particularly in light of changes in tax law which affect the deductibility of payments made in exchange for a non-disclosure agreement. *Supra* at n.4.