President’s Page
“Racing in the Right Drection:” Specialty Courts in Massachusetts
By BBA President Lisa Arrowood

Legal Analysis
Not So Fast on MARATHON MONDAY: Trademark Board Rejects Boston Athletic Association’s Bid to Prevent Clothier from Registering the Term
By John L. Welch and John Carl Zwisler

Voice of the Judiciary
Honest Answers: Learning How Best To Phrase Questions To Prospective Jurors In Voir Dire
By Superior Court Associate Justice Linda E. Giles

Heads Up
The 2016 Massachusetts Code of Judicial Conduct: Judicial Engagement with the Organized Bar
By Appeals Court Associate Justice Cynthia J. Cohen and SJC Senior Staff Attorney Barbara F. Berenson

Heads Up
The Impact of Recent Revisions to Fed. R. Civ. P. 37(e) -- Electronic Spoliation
By Elizabeth M. Bresnahan

Heads Up
Proportionality Emphasized In Amendments to the Federal Rules of Civil Procedure
By Immanuel R. Foster

Legal Analysis
Federal and Massachusetts Exemptions for Securities Crowdfunding
By John D. Hancock

Heads Up
Zoning for Medical Marijuana: Approaches & Considerations
By Lisa L. Mead and Adam J. Costa

Legal Analysis
The Tip of the Iceberg: Daily Fantasy Sports as a Harbinger of Future Regulatory Challenges
By Hon. James F. McHugh (Ret.) and Justin G. Stempeck

Practice Tips
Subpoenaing Third Parties in Proceedings before the Massachusetts Securities Division
By Thomas Sutcliffe

Case Focus
Maling v. Finnegan, Henderson, Farabow, Garrett & Dunner, LLP: The SJC Addresses the Ethics of Patent Subject Matter Conflicts
By Charles L. Solomont and Julie Silva Palmer
Board of Editors

Chair
Carol Head
Office of the Attorney General

Members
Peter E. Ball
Sally & Fitch LLP

Bruce Barnett
DLA Piper LLP

Hon. Amy Blake
Associate Justice, MA Appeals Court

Adam Bookbinder
U.S. Attorney's Office

Robert M. Buchanan
Choate Hall & Stewart LLP

David S. Clancy
Skadden, Arps, Slate, Meagher & Flom LLP

Hon. Judith Dein
United States District Court

Hon. Robert Foster
Associate Justice, MA Land Court

Alexandra Furth
Liberty Mutual Insurance

Hon. Linda Giles
Associate Justice, MA Superior Court

Hon. Mark V. Green
Associate Justice, MA Appeals Court

Alisa Hacker
Sugarman, Rogers, Barshak & Cohen, P.C.

Eric Haskell
Middlesex District Attorney's Office

Rachel Hershfang
U.S. Securities & Exchange Commission

Paul Holtzman
Krokidas & Bluestein LLP

Hon. Mitchell Kaplan
Associate Justice, MA Superior Court

Hon. Gary S. Katzmann
Associate Justice, MA Appeals Court

Sarah G. Kim
Office of the State Treasurer

David A. Kluft
Foley Hoag LLP

Hon. Peter Krupp
Associate Justice, MA Superior Court

Hon. Edward Leibensperger
Associate Justice, MA Superior Court

Andrew Lelling
U.S. Attorney's Office

Crystal Lyons
Middlesex District Attorney's Office

Alex Philipson
Staff Attorney, MA Superior Court

C. Dylan Sanders
Sugarman, Rogers, Barshak & Cohen, P.C.

Kathleen B. Shields
U.S. Securities and Exchange Commission

Lauren Song
Greater Boston Legal Services

E. Abim Thomas
Goodwin Procter LLP
“Racing In the Right Direction:” Specialty Courts in Massachusetts
By BBA President Lisa Arrowood
President’s Page

It was a graduation, but no one was wearing a cap or gown. Judge Serge Georges’ robes were the only ceremonial garb in the courtroom at the Dorchester Division of Boston Municipal Court on a recent Thursday, where a young woman was about to graduate from the Drug Court Program.

Judge Georges spoke of the “butterfly effect,” a scientific theory which says that even small occurrences can result in big changes. Each participant in the program, he said, is a butterfly. They create change in each other’s lives, and in the lives of their loved ones. The graduate echoed Georges’ sentiment; she spoke of finding the will to stay clean through acts of support, big and small, by the program’s staff and fellow participants.

The session was the first of four visits I would make to the Commonwealth’s specialty courts: Drug Court, Veterans Court, Homeless Court and Mental Health Court.

As a non-criminal lawyer, I had never had the occasion to see or take part in any of the specialty courts. I knew of them, of course; I knew they had a reputation for getting to the root cause of criminal behavior, and for taking a sensible approach towards treating that cause rather than sending the offenders off to prison. And while visiting these courts was something that I was looking forward to doing during my term as BBA President, I wasn’t prepared for how moved, impressed and inspired I would be by the time I had visited the fourth.

The very fact that entire teams of professionals – judges, probation officers, substance abuse and mental health clinicians, public defenders, and assistant district attorneys – are working collaboratively for the betterment of our most vulnerable citizens was a powerful thing to witness. So powerful, in fact, that when my visits had concluded, I knew that I had to find a way to recognize their invaluable contributions to our system of justice.

In that regard, I’m very pleased to announce that I will be awarding the four Specialty Courts with the BBA’s President’s Award at our Law Day Dinner on May 12th. I can’t think of a more fitting team of recipients to honor on a day that’s set aside to reflect on the role of law and its importance for society.

I think part of what makes these courts so effective is how each judge – in his or her own unique way – establishes an authentic connection with program participants. Judge Georges, for example, grew up in the Dorchester community where he currently serves. And he makes each graduation a community event, inviting other Drug Court participants to attend, and even recruiting his father to supply home cooked dishes for the post-ceremony celebration.

When I visited a Veterans Court graduation, I saw the same caring and supportive process played out in a different way. Judge Eleanor Sinnott – a veteran herself – spoke of courage, perseverance, and camaraderie as the things that carried one veteran successfully through the program at the Edward W. Brooke Courthouse in Boston.
“You’re a platoon,” she told the veterans in attendance. “And I’m your commanding officer.” It was this environment of support that helped the graduate – despite a temporary relapse – secure a job and complete the terms of his agreement with the court.

At Homeless Court – which is designed to resolve misdemeanor offenses, non-violent felonies, and outstanding warrants for homeless individuals with support and dignity – seven cases were considered. Judge Kathleen Coffey asked all defendants to share their stories of how they became homeless and what aspect of life on the streets was most challenging. Her genuine warmth and interest in each person’s circumstances empowered the defendants to describe the difficult, and varied, life circumstances that led to hitting rock-bottom. They also shared their motivations for self-improvement, which included the knowledge that they could do better, the need to escape the isolation and constant turmoil of homelessness, and in several instances, a strong desire to make their young children proud.

Judge Coffey encouraged positive progress, telling one defendant they were “racing in the right direction,” and District Attorney Christina Miller did the same, telling another defendant that she was “amazed and encouraged” by their progress.

For many of these people, it was the first time something good was happening to them in a courtroom. I looked around and thought that this is what they need – support, not incarceration.

In Judge Coffey’s words, Homeless Court “is based upon the premise that there is room for treatment, compassion and for recovery within the court system. It recognizes that homelessness presents a complicated challenge to the courts demanding alternative approaches in the administration of justice. The court seeks to make the justice system more accessible, accountable and responsive to the needs and challenges faced by this most vulnerable population.”

Judge Coffey also presides over Mental Health Court – or Recovery with Justice (RwJ) – which began in Massachusetts nearly a decade ago out of a recognition that an estimated 70 percent of men and women in the criminal justice system suffer from mental illness.

Working with a mental health clinician from the Boston Medical Center, the probation officer assigned to the Mental Health session identifies the particular mental health and social needs of each participant, and creates a service plan which includes referrals to mental health treatment, substance abuse treatment when appropriate, as well as housing, educational and employment opportunities. National studies place recidivism rates for mental health courts in the high teens (17-20%), less than half of the rate for traditional courts.

Like the other specialty courts, Mental Health sessions are largely focused on support and guidance. When one RwJ participant told of a recent relapse, Judge Coffey recognized the slip-up but told the individual she was proud of the progress made since then, explaining that the Court was interested in providing options for success without overburdening the participants. Her words hit home, prompting the individual to announce to the courtroom, “See all the people here who care about me? It’s great.”
Having experienced these courts at work firsthand, I am especially gratified to know that Specialty Courts are accessible nearly statewide and that the Trial Court is committed to their expansion and continued improvement. To help make that a reality, the BBA is advocating in the Legislature for more funding. Despite the Judiciary being a co-equal branch of government, funding for the Trial Court has grown only 7.9% from FY08 to FY16, while the overall state budget has increased 43.3% in that same time period. I urge lawmakers to decrease this gap.

I am grateful to Judges Kathleen Coffey, Serge Georges and Eleanor Sinnott for welcoming me to their courtrooms. After sitting in on the sessions, I am inspired not only by the profound impact the programs had on the lives of the graduates, but on its potential to meaningfully tackle complex issues underlying criminal behavior.

Having witnessed firsthand the dedication, excellence and impact that these amazing teams are having across Massachusetts; I am thrilled that our Law Day Dinner program is honoring them. I hope you’ll join me in celebrating their work.

You can read about the history of specialty courts, as well as more compelling stories from Drug Court and Homeless Court in earlier issues of the Boston Bar Journal.

Lisa is a founding partner of Arrowood Peters LLP, whose practice concentrates on business litigation, employment disputes, medical malpractice, personal injury, and legal malpractice. At the BBA, Lisa has served as the President-Elect, Vice President, and Secretary of the Council, the Co-Chair of the BBA Torts Committee, and a member of the Executive Committee, as well as various other committees. She is a Fellow of the American College of Trial Lawyers (ACTL), a Fellow of the International Academy of Trial Lawyers and immediate past Chair of the ACTL Massachusetts State Committee as well as a member of the Boston Bar Foundation’s Society of Fellows.
Not So Fast on MARATHON MONDAY: Trademark Board Rejects Boston Athletic Association’s Bid to Prevent Clothier from Registering the Term
By John L. Welch and John Carl Zwisler
Legal Analysis

New Englanders know what “Marathon Monday” signifies: the third Monday in April, the Red Sox in the morning, the Boston Marathon in the afternoon, Hopkinton, 26.2 miles, Heartbreak Hill, the crowd-lined streets. Many know that the race is overseen (or “run”) by the Boston Athletic Association (BAA). The BAA owns federal registrations for the mark BOSTON MARATHON (for entertainment services and for various goods including clothing). But what rights, if any, does the BAA have in the term “Marathon Monday?” An answer arrived recently in a ruling by the Trademark Trial and Appeal Board (TTAB or Board).

Velocity, LLC, based in Everett, Massachusetts applied to register the trademark MARATHON MONDAY for certain clothing items, namely, tops, bottoms, headwear, sweatshirts, sweat pants, jackets, pullovers, caps, hats, and socks. In November 2011, the BAA opposed Velocity’s application, basing its opposition on Section 2(a) of the Lanham Act, which bars registration of a mark that “falsely suggests a connection with persons, living or dead, institutions, beliefs or national symbols.” The BAA alleged that the mark MARATHON MONDAY would be recognized as its previously used name or identity because it “points uniquely and unmistakably” to the BAA.

Slow down there! What’s this Section 2(a) all about, you might ask?

The United States Court of Appeals for the Federal Circuit (CAFC) discussed the purpose of the “false connection” provision of Section 2(a) in a seminal decision involving a certain university’s unsuccessful attempt to block registration of the mark NOTRE DAME for cheese.

Reviewing the legislative history of Section 2(a), the CAFC concluded that the drafters of the proposed legislation were concerned with protecting the name of an individual or institution that was not a technical trademark – i.e., it was not used as a brand name for specific goods or services – upon which a Section 2(d) likelihood of confusion objection could be based. The court observed that the drafters intended to adopt concepts of the right of privacy and the related right of publicity, which protect one’s control over the use of an identity or persona. In order to establish a protectable right, a person or institution must show that the term at issue points uniquely and unmistakably to that person or institution. In contrast to Section 2(d), which is meant to prevent consumer confusion as to the source of goods or services, Section 2(a) is primarily intended to protect the person or institution from unauthorized use of its identity, independent of source confusion.

The TTAB applies a rather stringent test in determining whether a mark should be barred from registration under 2(a). It considers whether: (1) the mark is the same as, or a close approximation of, the name or identity previously used by another person or institution; (2) the mark would be recognized as pointing uniquely and unmistakably to that person or institution; (3) the person or institution named by the mark or using the mark is not involved with the activities performed by the applicant under the mark; and (4) the fame or reputation of the person

or institution is such that when the mark is used to identify the applicant’s goods or services, a
connection with that person or institution would be presumed.⁵

Under Section 2(a), a plaintiff need not prove that the mark or name at issue is used as a
trademark or service mark for goods or services (as required for Section 2(d) likelihood of
confusion). For example, the Board held that the petitioner for cancellation of a registration for
the mark TWIGGY for children’s clothing could succeed under Section 2(a) even though her
claim of likelihood of confusion under 2(d) failed because of abandonment of her trademark.⁶
Lesley Hornby, known personally and professionally as “Twiggy,” had used the mark TWIGGY
from 1967-1970 for various goods, including clothing, but by the time the respondent had filed
its application to register TWIGGY in 1977, Hornby’s mark had been abandoned for nonuse.
Nonetheless, Hornby, who came to prominence as a British teen model in the 1960s, established
the fame and reputation of her persona as “Twiggy” prior to and at the time of respondent’s
registration, and the evidence demonstrated that the mark TWIGGY pointed uniquely and
unmistakably to Hornby.

Even if a plaintiff never used the mark or name in question at all, Section 2(a) relief may be
available. For example, in a case involving the laid-back songster Jimmy Buffett, the Board
considered the viability of Buffett’s challenge to an application for the mark
MARGARITAVILLE for restaurant services. Buffett claimed that the mark falsely suggested a
connection with his public persona, even though he had not publicly exploited the term
“Margaritaville” other than as the title of his hit song.⁷ The TTAB observed that Section 2(a)
requires that the applicant’s mark must point uniquely and unmistakably to the opposer, not that
the opposer actually used the mark. Buffett relied on press clippings, licensing agreements
concerning the name of a future restaurant venture, J.B.’S Margaritaville, and affidavits from
members of the music industry to support his claim that the public associated the term
“Margaritaville” with his persona. The Board found that Buffett had stated a viable claim under
Section 2(a).

Although Twiggy and Jimmy Buffett cleared the Section 2(a) hurdle, the bar proved to be too
high for the BAA.

In its opposition to Velocity’s application to register MARATHON MONDAY, the BAA
adopted a two-step approach, contending that (1) the term “Boston Marathon” serves as the
BAA’s identity or persona for purposes of Section 2(a), and (2) “Marathon Monday” is a close
approximation of “Boston Marathon” because the phrases are “interchangeable.”⁸

The fact that neither “Boston Marathon” nor “Marathon Monday” is an official name of the BAA
was not dispositive. Even a name created by the public, such as a nickname or an informal
reference like “Margaritaville,” may qualify as an identity for purposes of Section 2(a) and thus
give rise to a protectable interest.⁹,¹⁰ There was no dispute that the term “Boston Marathon” is
well known to the public as a competitive marathon and a famous “runners’ race,” but it may not
be well known that the race is organized by a corporate entity named the Boston Athletic
Association.¹¹

The Board faced a similar issue in a case involving the mark SYDNEY 2000, ruling that the
mark falsely suggested a connection with the Olympic Games taking place that year in Sydney, Australia. Although it did not deem the Olympic Games to be an “institution” per se, the Board ruled that an event of “such magnitude, which occurs on a regular ongoing basis” and requires significant organizational structure, qualified as an “institution” for Section 2(a) purposes. Because of the widespread publicity for the Olympic Games, the Board concluded that the general public knew the 2000 Games would be held in Sydney. Consumers would thus presume a connection between the applicant’s publicity services under the mark SYDNEY 2000 and the Olympic Games.

Similarly, given the “magnitude and longevity of the event,” the Board found that “Boston Marathon” has become associated with its organizer, and although the general public may not know the organizer’s actual name, consumers will understand that the alternative name “Boston Marathon” represents or identifies the association. The Board therefore concluded that “Boston Marathon” is perceived as a name or identity of the BAA.

Although the BAA was successful in the first leg of its argument, it failed in the second: it did not prove that “Marathon Monday” is interchangeable with “Boston Marathon” and thus a close approximation of the BAA’s persona. The Board stated it was not enough that the two marks share the common word “marathon.” The term “Boston Marathon” is inextricably connected to the city of Boston because of the geographic reference, whereas “Marathon Monday” lacks that geographical connection. In short, the latter was not sufficiently similar to the former, and the second step of the BAA’s argument failed to reach the finish line.

The Board also considered whether “Marathon Monday” has itself become associated with the BAA. While there was evidence that the BAA has to some extent used the term “Marathon Monday” to identify the race itself, there was insufficient evidence to show that the public recognizes “Marathon Monday” as identifying not only the race, but also the entity that organizes the race. The BAA simply failed to show that “Marathon Monday” is so closely associated with the BAA that it qualifies as the BAA’s identity or persona.

In any event, Applicant Velocity’s evidence established that the term “Marathon Monday” is used by other entities across the country in connection with races in their respective geographical areas, and therefore the term could not point uniquely and unmistakably to the BAA. Most significantly, the record included numerous website excerpts and media articles using the term “Marathon Monday” to refer to the day after the New York City Marathon and the various events in which runners may participate.

And so the TTAB dismissed the BAA’s opposition to registration of MARATHON MONDAY, and the registration issued on March 15, 2016 to Velocity’s assignee. Nonetheless, there is nothing to stop the BAA or anyone else from referring to the day of the race, or even the race itself, as “Marathon Monday.” The owner of the registration owns a prima facie exclusive right to use “Marathon Monday” as a brand name for the clothing items identified in its registration. But given the highly descriptive nature of the term “Marathon Monday,” the registrant may have a difficult time proving likelihood of confusion as to source when “Marathon Monday” is used only in an informational sense in connection with goods or services related to the Boston Marathon. In short, Velocity may have won the race to federal registration, but it remains to be
seen whether its registration will have any real commercial significance come Marathon Monday.

John L. Welch is Counsel to Wolf, Greenfield & Sacks, P.C., in Boston, specializing in trademark, copyright, and patent counseling and litigation matters. He is a frequent speaker and author on trademark law issues, and is a member of the Editorial Board of, and a contributor to, The Trademark Reporter. He is the founder and publisher of the widely-read TTABlog, which focuses on the procedure and jurisprudence of the TTAB.

John Carl Zwisler is a Law Clerk at Wolf, Greenfield & Sacks, P.C. He is a J.D. candidate, 2016, at Northeastern University School of Law and a student member of the BBA.

---

\[ii\] Boston Athletic Association, 117 U.S.P.Q.2d at 1493.
\[iii\] University of Notre Dame Du Lac v. J.C. Gourmet Food Imports Co., Inc., 217 U.S.P.Q. 505 (Fed. Cir. 1983). (The CAFC found that “Notre Dame” is not a name solely associated with the University, and therefore the Section 2(a) claim was dismissed).
\[iv\] Section 2(d) of the Lanham Act, 15 U.S.C. §1052(d), in pertinent part, bars registration of a mark that “consists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive ….”
\[vii\] Buffett, 226 U.S.P.Q. at 429.
\[ix\] Id. at 1496.

See also In Re Nieves & Nieves LLC, 113 U.S.P.Q.2d 1639, 1644 (T.T.A.B. 2015) (Affirming a Section 2(a) refusal of ROYAL KATE for cosmetics and jewelry because the mark creates a commercial impression that references Catherine, Duchess of Cambridge, also known as Kate Middleton, although she has never used that identifier).

\[xi\] Id.
\[xiii\] Id. at 1779 (The Board noted that various international and national organizations participate in presenting the Olympic Games, and without evidence to the contrary it assumed there was a cooperative relationship between them).
\[xiv\] Boston Athletic Association, 117 U.S.P.Q.2d at 1496.
\[xv\] On December 1, 2015, the mark was assigned to Charles Tuite of Northboro, Massachusetts, manager of Velocity LLC.

Trial lawyers and I have not always seen eye-to-eye on the purposes or methods of juror voir dire. As a trial judge, I view the overarching objective of juror voir dire as the selection of an impartial jury, with a corollary need to make sure peremptory challenges are exercised constitutionally. Many trial attorneys admit freely that they are interested in as partial a jury as possible, with the subsidiary goal of learning as much as possible about the selected jurors so that they might later tailor arguments and present their case more persuasively.

With the advent last year of attorney-conducted voir dire in Massachusetts, we now have an array of mechanisms for conducting voir dire of prospective jurors: (1) traditional, judge-controlled questioning of prospective jurors; (2) attorney-conducted voir of individual jurors (each examined one at a time by the attorney or self-represented party at sidebar or in the absence of the rest of the venire); or (3) panel voir dire (the questioning by counsel or pro se litigant of jurors as a group). There has been much recent discussion within the Superior Court and the bar about which of these methods, alone or in combination, is more effective generally or in a particular case.

I am here to say that, whatever your goals in selecting a jury and whatever mechanism you select, if you want “to learn whether [a juror] . . . has . . . formed an opinion . . . or is sensible of any bias or prejudice,” G. L. c. 234, § 28, it is the phrasing of the voir dire questions themselves that matters most. The simple truth is that questions do more than solicit information; “[q]uestions put words in answerers’ mouths.” Kellerman, Kathy, “Persuasive Question-Asking: How Question Wording Influences Answers” (2007). The slightest differences in a question’s form, phrasing, terminology, and presumptions can alter the answer the prospective juror gives. Id. If a universal aim of jury selection is to elicit truly honest answers from prospective jurors, then we trial judges and lawyers alike should be mindful of and seek out training on the type of questions that could best accomplish this shared goal.

Questions shape answers in many ways. A “suggestive question,” for example, is one that implies that a certain answer should be given in response, Copeland, James M., “Cross Examination in Extemp,” National Forensic League (2010), or includes an assumption as accepted fact, Loftus, Elizabeth F., “Eyewitness Testimony,” Harvard University Press, Cambridge, MA (1996). Asking, “Don’t you think this was wrong?,” subtly influences the respondent into answering in the affirmative, whereas a one-word variant of that question, “Do you think this was wrong?,” does not. “Repeated questions” may make interviewees think that their first answer was wrong, leading them to change their answer. See Lyon, Thomas D., “Questioning Children: The Effects of Suggestive and Repeated Questioning,” Electronic Publishing, Inc. (1999). A “forced-choice question,” e.g., “Is this yellow or green?,” forces people to choose between two options when neither choice may be true or might need more explanation. See Peterson, Carole, & Grant, Melody, “Forced Choice: Are Forensic Interviewers Asking the Right Questions?,” Canadian Journal of Behavioural Science (2001).
“Confirmatory questioning” during voir dire can be particularly risky. Confirmatory questions are those posed to support a preexisting perception. For example, if a questioner assumes a hypothesis about a respondent, such as being extroverted, he/she may slant the questions to confirm that hypothesis, e.g., “What would you do if you wanted to liven up a party?” or, “In what situations are you most talkative?” Snyder, M., & Swann, W. B., “Hypothesis Testing Processes in Social Interaction,” Journal of Personality and Social Psychology (1978). Conversely, if the interviewer wanted to make the interviewee look introverted, he/she would ask questions like, “Have you ever been left out of a social group?” or, “In what situations do you wish you could be more outgoing?” Id. In both instances, the questioner simply finds what he/she expects to find. Such an intentional or unintentional strategy can produce non-representative answers that are shaped by the questions asked. See Swann, W. B., Guiliano, T., & Wegner, D. M., “Where Leading Questions Can Lead: The Power of Conjecture in Social Interaction,” Journal of Personality and Social Psychology (1982).

Moreover, many people have a tendency to say what they believe is acceptable or appropriate. This is the so-called “social desirability bias.” Fisher, R. J., “Social Desirability Bias and the Validity of Indirect Questioning,” Journal of Consumer Research: 20, 303-315 (1993). Whether questioning jurors individually or in a group, there is a great danger that venirepersons will tell the judge, attorney, or litigant what he/she wants to hear. In addition, prospective jurors who experience difficulty discerning “desired” answers may choose not to answer at all. Marshall, L. L., & Smith, A., “The Effects of Demand Characteristics, Evaluation Anxiety, and Expectancy on Juror Honesty During Voir Dire,” The Journal of Psychology (1986).

Several states, including Texas, North Carolina, and Maryland, have adopted rules prohibiting improper “commitment” (or “stake-out” or “precommitment”) questions in juror voir dire, see, e.g., Standefer v. State, 59 S.W.3d 177, 183 (Tex. Crim. App. 2001); Hyundai Motor Company v. Vasquez, 189 S.W.3d 743, 756 (Tex. 2006); State v. Parks, 324 N. C. 420, 423 (1989); Stewart v. State, 399 Md. 146, 162 (2007); some other federal and state jurisdictions have addressed the issue in the context of “death-qualifying” juror voir dire in capital cases, see Morgan v. Illinois, 504 U.S. 719, 735-736 (1992); U.S. v. Tsarnaev, U.S. District Court No. 13-CR-10200-GAO (Dist. Mass. 2014). A commitment question is one that “commit[s] a prospective juror to resolve, or to refrain from resolving, an issue a certain way after learning a particular fact.” Standefer, 59 S.W.3d at 179. “[A]n improper commitment question seeks to create a bias or prejudice in the panelists before they have heard the evidence.” Rodriguez-Flores v. State, 351 S.W.3d 612, 621 (Tex. App. 2012). An example of an improper commitment question (asked by the prosecutor in a drug case) would be the following: “If the evidence, in a hypothetical case, showed that a person was arrested and he/she had in his/her pocket a crack pipe with residue in it, is there anyone who could not convict a person based on that?” Standefer, 59 S.W.3d at 179. This question asks the jurors whether they would resolve a person’s guilt based on his/her possession of a residue amount of cocaine in a crack pipe. Id. By contrast, the question, “If the alleged victim is a nun, could you be fair and impartial?,” is not an improper commitment question because it does not ask the panelist to resolve any issue in the case based on the fact that the victim is a nun, only to commit to what the law requires, i.e., being fair and impartial. Id. at 180, 181.
Not all case-specific questions are inappropriate, of course. “[T]he proper tests for whether a question is a ‘stake-out’ question are the following: (1) Does the question ask a juror to speculate or precommit to how that juror might vote based on any particular facts? or (2) Does it seek to discover in advance what a prospective juror’s decision will be under a certain state of the evidence? or (3) Does it seek to cause prospective jurors to pledge themselves to a future course of action and indoctrinate them regarding potential issues before the evidence has been presented and they have been instructed on the law?” *U. S. v. Johnson*, 366 F. Supp.2d 822, 845 (N.D. Iowa 2005). The line between a proper and an improper commitment question is not always a bright one.

This discussion of framing voir dire questions only scratches the surface. I am concerned that trial judges and attorneys are not well informed about or skilled at asking questions during juror voir dire. I strongly urge the courts and the bar to develop training programs on the topic of questioning prospective jurors. By learning to keep our words out of the jurors’ mouths, we can achieve a more effective, trustworthy way of choosing a jury.

*Judge Linda Giles has served as an Associate Justice of the Superior Court since 1998. She is an adjunct professor of law at Suffolk University Law School and a member of the Board of Editors of the Boston Bar Journal. Judge Giles is a graduate of McGill University and New England School of Law.*
The 2016 Massachusetts Code of Judicial Conduct: Judicial Engagement with the Organized Bar
By Hon. Cynthia Cohen and Barbara F. Berenson
Heads Up

In October 2015, the Justices of the Supreme Judicial Court ("SJC") adopted a new Massachusetts Code of Judicial Conduct, effective January 1, 2016 ("new Code" or "2016 Code"). The new Code is the culmination of three years of study by a committee of judges, lawyers, and academics, who were appointed by the SJC to study the previous, 2003 Massachusetts Code of Judicial Conduct ("predecessor Code" or "2003 Code") and to recommend changes in light of the American Bar Association's 2007 Model Code ("2007 ABA Model Code"). The committee was fortunate to have among its members three prominent bar leaders: Attorney Lisa Goodheart and Professor Renee Landers, both past Presidents of the BBA, and Attorney Michael Greco, a past President of both the MBA and the ABA. Bar associations and individual members of the bar also provided invaluable feedback and suggestions during the public comment period.

The 2016 Code differs substantially from the predecessor Code in both form and substance. It closely resembles the 2007 ABA Model Code in structure and overall philosophy, but it also contains a significant number of nonconforming provisions, often because the departure is more suitable for a state that does not elect its judges. A summary of key new and revised provisions is available for review on the website of the Massachusetts Judicial Branch, as is the committee's Report.

An important difference between the 2016 Code and the predecessor Code pertains to judicial participation in outside activities. To a large extent, the 2003 Code shielded judges from interactions with the public, in the belief that judicial isolation would best ensure the independence, integrity, and impartiality of the judiciary. In contrast, the 2016 Code recognizes the value and importance of judicial outreach and affirmatively encourages judges to participate in community activities, so long as they are consistent with a judge's fundamental obligation to act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and that avoids impropriety and the appearance of impropriety.

This new philosophy is particularly evident in rules bearing on judicial engagement with the organized bar. Early on, in Canon 1, the new Code makes clear that judges are affirmatively encouraged to "participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession, and promote access to justice for all." Rule 1.2, Comment [4]. Later, in Canon 3, Rules 3.1 and 3.7 offer specific guidance concerning a judge's participation in extrajudicial activities, including those of bar associations. Rule 3.1 permits a judge to "engage in extrajudicial activities, except as prohibited by law or this Code," albeit with some general cautions. For example, the activities must not interfere with the proper performance of the judge's judicial duties or lead to recurrent disqualification. That said, as long as the concerns of Rule 3.1 are satisfied, Rule 3.7 encourages judges to participate in activities that "foster collegiality among the bar and communication and cooperation between the judiciary and the bar."
This encouragement specifically extends to speaking about the administration of justice at bar association events. Rule 3.7, Comment 1[B]. In a departure from the predecessor Code, a judge ordinarily may do so even when the event is held in space provided by a law firm or is financially supported by one or more for-profit entities, such as law firms or legal vendors, that do substantial business in the court on which the judge sits. Ibid. The rationale for this liberalization is that some bar associations, particularly affinity bar associations with smaller memberships, may not be in a financial position to hold events without the support of private sponsors or the use of law-firm space. The Code cautions, however, that the judge must avoid giving the impression that the sponsors of an event are in a special position to influence the judge. Rule 3.7, Comment [1A].

The 2016 Code also relaxes what had been an outright prohibition on a judge serving as a featured speaker or receiving an award or other comparable recognition at a fundraising event of a law-related organization. A judge is now permitted to speak or be honored if the event is sponsored by a law-related organization that promotes the general interests of the judicial branch of government or the legal profession, including enhancing the diversity and professionalism of the bar. Rule 3.7(A)(6A). As explained in Comment [4], general interest organizations include, for example, state bar associations, city or county bar associations, affinity bar associations, and bar associations that specialize in particular practice areas but whose members take positions on both sides of disputed issues.

The 2016 Code continues to prohibit a judge from serving as a featured speaker or receiving an award at other fundraising events, but more narrowly defines that term. Under the new Code, a fundraising event is one where the organizers' chief objectives include raising money to support the organization's activities beyond the event itself; unless that definition is met, an event is not considered to be a fundraising event, even if the revenues from the event ultimately exceed the costs. Rule 3.7, Comment [3].

The 2016 Code also modifies the rules governing a judge's acceptance of invitations to attend without charge a luncheon, dinner, reception, award ceremony, or similar event held by a law-related organization in Massachusetts. A judge may now accept such invitations without having to obtain a written determination from the Chief Justice of the court on which the judge sits that acceptance will serve a legitimate public purpose; instead, the Code presumes that a judge's attendance at such events will serve a public purpose. The intent of this provision is to make it less burdensome for judges and their Chief Justices to facilitate judicial attendance at local bar events. In other instances, judges remain required to obtain determinations from their Chiefs before accepting complimentary invitations. See Rule 3.14.

At the same time that the SJC adopted the new Code, it also revised SJC Rule 3:11, which governs the Committee on Judicial Ethics. Among other things, the revised rule provides that the Justices may from time to time issue an Ethics Advisory to elucidate the meaning or application of a provision of the Code and to expound upon provisions that are of broad interest and application. SJC Rule 3:11(4). Groups of judges and lawyers, including bar associations, may request an Ethics Advisory, but the court may decline to render one for any reasons it deems sufficient. Ibid. Although the Committee on Judicial Ethics will continue to render Informal
Opinions and Letter Opinions (formerly known as Advisory Opinions) only to judges, by offering bar associations the opportunity to seek clarification of Code provisions, the new rule recognizes that issues of judicial ethics are of great interest and importance to the bar as well as the judiciary.

Cynthia J. Cohen is an Associate Justice of the Appeals Court. She chaired the committee that drafted and recommended the adoption of the 2016 Massachusetts Code of Judicial Conduct, and currently chairs the Committee on Judicial Ethics.

Barbara F. Berenson is a senior attorney at the Supreme Judicial Court. She staffed the committee that drafted and recommended the adoption of the 2016 Massachusetts Code of Judicial Conduct, and is currently staff counsel to the Committee on Judicial Ethics.
The Impact of Recent Revisions to Fed. R. Civ. P. 37(e) -- Electronic Spoliation
By Elizabeth M. Bresnahan

Heads Up

The amendments to the Federal Rules of Civil Procedure, effective December 1, 2015, include significant changes to Rule 37(e) concerning spoliation of electronic evidence. See Fed. R. Civ. P. 37(e). With electronically stored information (“ESI”) becoming increasingly prevalent, the amendments are designed to clarify and streamline litigants’ preservation obligations, imposing a high bar on parties who seek to have sanctions imposed on their opponents. Litigants can now expect uniform standards for curative measures where the circuits had previously been split and sanctions inconsistently applied. For example, the amended Rule 37(e) represents a departure from the negligence standard which precipitated sanctions in a variety of circuits under the former Rule, and “forecloses reliance on inherent authority or state law to determine when” sanctions and remedial measures should be used. Fed. R. Civ. P. 37(e) advisory committee’s note to 2015 amendment, available at https://www.law.cornell.edu/rules/frcp/rule_37 (“Advisory Committee Notes”). Instead, under the current Rule 37(e), courts are instructed not to impose an adverse inference, or other harsh sanctions, absent a party’s intent to deprive the other party of the at-issue evidence, resulting in prejudice. Moreover, under the amended Rule, such corrective measures can only be imposed where electronic information that should have been preserved in anticipation of litigation is lost. The amended Rule offers some additional protection to litigants by permitting additional discovery to repair or replace such presumed “missing” evidence. And, even if the court eventually finds that sanctions are appropriate, they are limited to “measures no greater than necessary to cure the prejudice.” Fed. R. Civ. P. 37(e)(1). Thus, the result may be that, as litigants find additional protections under the amended Rule, and higher hurdles to imposing sanctions on their opponents, we may see a decrease in litigation concerning failure to preserve.

Fed. R. Civ. P. 37(e), as amended.

The text of the amended Rule, marked to show changes from the prior version, follows:

(e) Failure to Preserve Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.[If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
(1) upon finding prejudice to another party from loss of information, may order measures no greater than necessary to cure the prejudice; or
(2) only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation may:
(A) presume that the lost information was unfavorable to the party;
(B) instruct the jury that it may or must presume the information was unfavorable to the party; or
(C) dismiss the action or enter a default judgment.

See Fed. R. Civ. P. 37(e), as amended.
Evidentiary Sanctions Under the Amended Rule.

Failure to take reasonable measures to preserve. Rule 37(e) does not create a new duty to preserve, and as such, does not apply if the ESI is lost before the duty to preserve arises. See Advisory Committee Notes. Indeed, a party’s preservation obligations remain triggered when litigation is pending or reasonably foreseeable, or where the party has independent preservation obligations, e.g., under a specific statute or internal company policy.

In determining whether a party has taken reasonable steps to preserve, the Rule allows courts to consider “routine, good-faith operation of an electronic information system,” as well as the “proportionality” of the efforts to the case and to a party’s resources. Id. The Advisory Committee directs that courts be “sensitive to the party’s sophistication with regard to litigation in evaluating preservation efforts…” Id. And, a party’s efforts need not be perfect. Id.

No sanctions or other remedial measures unless information is lost. Critical to whether remedial measures are permitted under the amended Rule is that the information at issue be lost; if it can be “restored or replaced through additional discovery,” Rule 37(e) does not permit remedial action. Fed. R. Civ. P. 37(e). The Advisory Committee reasons that “[b]ecause electronically stored information often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere.” Advisory Committee Notes. Moreover, “efforts to restore or replace lost information through discovery should be proportional to the apparent importance of the lost information…. [S]ubstantial measures should not be employed to restore or replace information that is marginally relevant or duplicative.” Id.

Measures “no greater than necessary” on finding of prejudice. Assuming the above prerequisites are met, a court may order certain proportional remedial measures under subsection (e)(1) of the amended Rule only “upon finding prejudice to another party from loss of information.” Fed. R. Civ. P. 37(e)(1). The measures must also be “no greater than necessary to cure the prejudice.” Id. How to assess prejudice is left to the discretion of the courts; the Rule does not address which party has the burden. Advisory Committee Notes.

Upon finding prejudice, courts may impose remedial measures that are proportional to the prejudice. Id. The Advisory Committee identifies these less severe, but serious measures, as “forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument, other than instructions to which subdivision (e)(2) applies.” Id.

Specified and severe measures only upon finding “intent to deprive.” Under the amended Rule, the most severe sanctions, such as adverse inference jury instructions, dismissal of claims, and entry of a default judgment, are now reserved for a “finding that the party acted with the intent to deprive another party of the information’s use in the litigation.” Fed. R. Civ. P. 37(e)(2). The Advisory Committee counsels the importance of a finding an “intent to deprive” in order to address and deter such failures. Advisory Committee Notes. Mere negligence -- or even gross negligence -- is no longer sufficient.
While the Rule sets forth four severe sanctions that may be imposed under the Rule upon a finding of intent, proportionality again directs the analysis. Likewise, the Advisory Committee cautions that “[t]he remedy should fit the wrong, and the severe measures authorized … should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss.” *Id.*

*Elizabeth Bresnahan is a litigation associate in the Boston office of Morgan, Lewis & Bockius LLP.*
Significant amendments to the Federal Rules of Civil Procedure became effective on December 1, 2015. The amendments modify Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, 55, and 84. The amendments seek to increase the efficiency and speediness of litigation while slowing the rising costs of discovery. Toward the latter goal, certain of the revisions establish an express guiding principle to limit the scope of discovery: proportionality.

The application of the proportionality requirement likely will have an immediate and lasting influence on how parties conduct discovery in federal courts and how the courts referee discovery disputes. Specifically, amended Rule 26(b)(1), which governs the scope of discovery, permits discovery into relevant, non-privileged information "proportional to the needs of the case." (Emphasis added.) Old Rule 26(b)(1) permitted discovery into relevant, non-privileged information "reasonably calculated to lead to the discovery of admissible evidence," a phrase that was often misconstrued and which is now removed. Old Rule 26(b)(1) also permitted such discovery into sources of additional discovery, "including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." Thus, the new rule: (i) establishes "proportionality" as a limiting principle (ii) potentially limits "discovery about discovery" and, consequently, (iii) will, it is hoped, add a needed control to the rising costs of discovery.

**Proportionality Is The New Standard**

The amended rule removes "reasonably calculated" – an ambiguous phrase that sometimes allowed for expansive discovery – and focuses on "proportional." And the amended rule specifies the considerations for determining whether discovery is proportional, including "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Parties now must consider these factors when making or responding to discovery requests.

To be sure, proportionality is not a wholly new concept in federal practice. For example, before the 2015 amendments, proportionality was implied by Rule 26(b)(2)(C)(iii), which required courts to limit discovery where "the burden or expense of the proposed discovery" would "outweigh[] its likely benefit," and Rule 26(g) required a party seeking discovery to certify that the discovery was "not . . . unduly burdensome or expensive," in light of the circumstances of the litigation. But while parties seeking protective orders pursuant to Rule 26(c) would frequently call the court's attention to these proportionality considerations, opposing parties would often invoke "reasonably calculated," which the Advisory Committee Notes on the new rule state "were used by some, incorrectly, to define the scope of discovery." The amendments change that. The Committee Notes also state that "[t]he present amendment restores the proportionality factors to their original place in defining the scope of discovery," empowering courts to enforce
tighter limits on disproportionate discovery.

**Proportionality May Restrict Discovery About Discovery**

The amendment to Rule 26 deletes language that permitted discovery into information about "the existence, description, nature, custody, condition, and location of any documents . . . and location of persons who know of any discoverable matter." However, the Committee Notes suggest that this change is more style than substance. It states that the long list of examples is so "deeply entrenched" that to include it would only maintain unnecessary "clutter" in an already lengthy rule, and that "[t]he discovery identified in these examples should still be permitted under the revised rule when relevant and proportional to the needs of the case."

Still, the revision suggests limitations to the scope of this discovery to the extent that it would be at cross purposes with proportionality. For example, in a recent case, a magistrate judge ruling on a motion for a protective order applied Rule 26(b)(1) and limited a proposed Rule 30(b)(6) deposition topic, noting that "[w]hile Plaintiffs have articulated credible reasons for seeking this information nationwide, its production is not proportional to the needs of the case." Cooper v. Charter Commc'ns, Inc., No. 3:12-cv-10530-MGM, 2016 WL 128099, at *2 (D. Mass. Jan. 12, 2016). One of the credible reasons that Plaintiffs had advanced was that they were entitled to test Defendant's assertion that they lacked certain relevant records for Massachusetts by inquiring about "how [Defendant] is able to track service losses in other states." Pl.'s Opp'n To Charter's Mot. at 7, Cooper, ECF No. 187. Thus, although the discovery request might have been permitted under the old rule, it was deemed not proportional under the new rule, and therefore exceeded the scope of discovery now permitted.

**Proportionality Considerations Will Likely Contain The Costs Of Discovery**

Proportionality figures to slow the ballooning costs of litigation caused by technological advances. Specifically, widespread use and adoption of electronically stored information (ESI), often over many platforms, has made once-mundane discovery requests exponentially more burdensome. In the past, responding to a discovery request might have meant collecting the data from a few computers from a few custodians, and each of those computers might have stored only a few gigabytes of data. Now, discovery sometimes requires searching and reviewing terabytes of data harvested from local computers, from networks, and from the cloud – all of which must be reviewed for relevance and privilege. This discovery can be similarly onerous for discovery recipients who must review and analyze large productions to determine how the information fits into or modifies their theory of the case or how the information might necessitate additional discovery.

The Committee Notes express the hope that parties and the courts will continue to embrace sophisticated ways to reduce the costs of producing ESI. For example, to the extent that a discovery request could call for a click-by-click review through thousands or millions of documents, courts should permit parties to use reasonably-tailored search terms to narrow the scope of review. Proportionality may now require it. Limiting the scope of e-discovery would certainly make discovery less expensive. Moreover, as discussed above, if courts become more reluctant to permit discovery into potential sources of additional discovery, that would further
contain costs.

Conclusion

At the very least, the amended Rule 26(b)(1) will require parties and federal courts to weigh the proportionality factors and determine, for example, whether the importance of certain discovery in resolving an issue is proportional to the burden or expense of providing that discovery. The Committee Notes suggest that parties should use Rule 26(f) and other scheduling and pretrial conferences to gain a "full appreciation of the factors that bear on proportionality" to inform their discovery requests and responses. In discovery motion practice, parties will no longer prevail by arguing that a discovery request is reasonably calculated to lead to admissible evidence; now they must demonstrate that the request is proportional.

Immanuel R. Foster is a litigation associate at Skadden, Arps, Slate, Meagher and Flom LLP, and a member of the Boston Bar Association.
Federal and Massachusetts Exemptions for Securities Crowdfunding
by John D. Hancock
Legal Analysis

Companies in Massachusetts have two new methods to conduct smaller securities offerings: crowdfunding under a federal regulation adopted in October 2015 and crowdfunding under a Massachusetts regulation adopted earlier in 2015. Both are designed to provide efficient and affordable means of raising capital through the sale of small amounts of securities to a large number of investors.2

The SEC’s new Regulation Crowdfunding,3 which takes effect on May 16, 2016, significantly changes how companies can conduct securities offerings exempt from registration under the Securities Act of 1933. Traditionally, requirements for exempt offerings have imposed significant restrictions on the offering process, such as limits on solicitation and advertising, the number or type of offerees, or the offering’s geographic scope. Under Regulation Crowdfunding, companies may offer and sell up to $1 million of securities to the public anywhere in the United States without registering the offering. The regulation allows companies to reach potential investors who are ordinarily excluded from exempt offerings and may enable companies unable to raise funds through traditional offerings to grow and thrive.

Unfortunately, the regulation imposes some requirements, such as the obligation to provide ongoing public disclosure, that may limit its utility.

The Massachusetts Crowdfunding Exemption4 was adopted after Regulation Crowdfunding was proposed but before it was adopted. The exemption relies on Section 3(a)(11) of the Securities Act and federal Rule 147, which historically have had limited utility.5 The state exemption is more flexible than Regulation Crowdfunding, including a higher maximum offering amount, fewer affirmative disclosure requirements and no ongoing reporting requirements.6

The new exemptions may be most attractive to newly organized startups with straightforward business plans whose capital needs can be satisfied entirely through crowdfunding. Companies considering crowdfunding should nonetheless anticipate the risks and costs associated with a large shareholder base.

---

2 These regulations apply when a crowdfunding campaign involves the offer or sale of securities; they do not apply to crowdfunding campaigns that offer participants, for example, early access to, or a discount on, a new product or service, such as an album, video game, or software.

3 17 C.F.R. Part 227, adopted under Sections 4(a)(6) and 4A of the Securities Act of 1933.


5 Under Section 3(a)(11) and Rule 147, a safe harbor thereunder, an issuer may conduct a crowdfunding offering, but only to investors in the state in which it is organized and operating. When the SEC adopted Regulation Crowdfunding, it proposed to amend Rule 147 to permit offers by out-of-state issuers. However, the amended rule would require that the offering be registered under state law or conducted under a state exemption that limits the offering size to $5 million and imposes an investment limitation on each purchaser. See Securities Act Rel. No. 33-9973, Exemptions to Facilitate Intrastate and Regional Securities Offerings, 80 F.R. 69786 et seq.

6 All offerings must comply with federal and applicable state securities laws. As explained below, Regulation Crowdfunding generally preempts state law. An offering under the new Massachusetts exemption must also comply with existing federal exemptions under Section 3(a)(11) and Rule 147.
Federal Crowdfunding

Under Regulation Crowdfunding, an issuer may conduct one or more offerings to raise up to $1 million in any twelve-month period. The dollar limit applies to offerings under the regulation by the issuer of the securities, its predecessors, if any, and companies controlled by it or under common control with it. The securities are generally non-transferable for one year.

Each investor can purchase only a limited dollar amount of crowd-funded securities in any twelve-month period, regardless of the number of issuers involved. If a person’s annual income or net worth is below $100,000, he or she can invest up to $2,000 or, if greater, 5% of the lesser of his or her annual income or net worth. If both a person’s annual income and net worth equal or exceed $100,000, he or she can invest up to 10% of the lesser of his or her annual income or net worth, up to $100,000.

Significantly, offerings under the regulation are eligible for federal preemption of state securities laws under Section 18(b)(4)(C) of the Securities Act, which should reduce compliance costs.

Some companies are ineligible to conduct offerings under Regulation Crowdfunding. The regulation provides an exemption only for the initial issuance of securities and does not expressly extend to a later conversion or exercise of those securities, which could occur months or years after the conclusion of the offering. Accordingly, there may be practical limits on the types of securities that can be included in a crowdfunding offering without introducing excessive complexity or cost.

Intermediary; Online-Only Offerings. Under the regulation, an issuer must engage an intermediary and conduct its offering “exclusively” through that intermediary’s online platform. The intermediary must be either a broker registered under Section 15(b) of the Securities Exchange Act of 1934 or a “funding portal” registered under Regulation Crowdfunding.

Neither an intermediary nor its directors, officers or partners may have or receive an interest in the issuer’s securities, except that an intermediary may receive, as compensation for its services, securities on the same terms and conditions as investors in the offering.

Limited Advertising; Promoters. The regulation prohibits advertising in connection with the offering and prohibits payment of compensation for promoting the offering outside the

---

7 The SEC made clear that its “integration” doctrine – under which multiple offerings may be treated as a single, integrated offering based on factors such as the timing of the offerings, the purpose of the offerings and the types of securities offered – will generally not apply to offerings under the regulation, as long as each offering independently satisfies the requirements of the exemption applicable to it. Nonetheless, an issuer may face difficulty satisfying these requirements simultaneously. For example, advertising permitted under Regulation Crowdfunding may constitute unlawful solicitation under Rule 506(b) of Regulation D, and a general solicitation permitted under Rule 506(c) of Regulation D may constitute illegal advertising under Regulation Crowdfunding.

8 For example, the regulation is generally unavailable to foreign issuers, public companies, investment companies, special purpose acquisition companies, companies without a specific business plan and issuers disqualified for prior illegal conduct.

9 A “funding portal” is a limited-purpose broker that acts as an intermediary in a crowdfunding offering but that does not offer investment advice or recommendations, solicit purchases, sales or offers to buy the securities displayed on its platform, compensate employees or others for solicitations or sales on the platform, or handle investor funds or securities.
intermediary’s platform. An issuer may, however, distribute notices that refer investors to the intermediary’s online platform if the notices contain only certain limited information. The issuer may communicate with potential investors through the online platform, but its founders, employees and promoters must disclose their relationship with the issuer and the receipt of any compensation from the issuer.

**Offering Structure.** Crowdfunding offerings must remain open for at least 21 days before the issuer may consummate any sale. The issuer must disclose the targeted offering amount, the deadline for reaching that amount and, if greater than the target, the maximum offering amount. Importantly, investors may cancel their offering commitments until 48 hours before the offering deadline.

If funding commitments fall short of the target at the offering deadline, investors’ funds must be returned to them. If the target is reached earlier than the offering deadline, the issuer may, in some circumstances, accelerate the closing.

**Offering Statement.** The most challenging aspect of an offering under the regulation is the requirement to prepare an offering statement. The SEC has estimated that, on average, preparation of the necessary disclosures will take approximately 100 hours, and experience suggests that the SEC’s estimates of paperwork burdens are often low. The regulation will likely be more attractive to very early-stage enterprises because the disclosure requirements will be less burdensome than for more mature companies.

The offering statement must disclose specific information, including, e.g., descriptions of the issuer’s business, business plan, financial condition (including material changes or trends since the most recent balance sheet), the terms of the offering, the anticipated use of proceeds and risk factors. The statement must also include information about directors, officers, beneficial owners and related parties. Issuers must provide financial statements prepared in accordance with U.S. generally accepted accounting principles for the two most recently completed fiscal years or, if shorter, the period since inception. For offerings up to $100,000, the issuer’s CEO must certify the financial statements. For offerings between $100,000 and $500,000, or for an issuer’s first offering under Regulation Crowdfunding, an independent accounting firm must “review” the financial statements. For subsequent offerings greater than $500,000, an independent accounting firm must audit the financial statements. These financial statement requirements may significantly increase the cost of a crowdfunding offering.

The offering statement is subject to the anti-fraud provisions of the Securities Act and must be updated to reflect material changes. Because the disclosure is directed at retail investors, SEC staff may expect a level of clarity closer to that found in a public offering prospectus than a

---

10 Permitted information includes the issuer’s name, address, telephone number and website, the terms of the offering and a brief description of the issuer’s business.

11 Liability is imposed on the issuer and its directors, key executives and others who “offer or sell” the securities, including intermediaries, and extends to any written or oral communication made to an investor in connection with the offering. These individuals should not overlook their exposure to personal liability, particularly for issuers that lack the resources to provide insurance coverage or meaningful indemnification.
private placement memorandum. Many issuers will benefit from the advice of experienced
disclosure counsel in satisfying this requirement.

**Progress Updates.** An issuer must notify investors within five business days after investment
commitments reach 50% and 100% of the targeted offering amount. If the issuer accepts funds
above the targeted offering amount, the issuer must also notify investors of the total amount sold.

**Filing Requirements.** Offering statements, amendments and progress updates must be filed with
the SEC, via EDGAR, on new Form C. This information will be publicly available.

**Ongoing Reporting.** One downside of a crowdfunding offering is that the issuer must file an
annual report with the SEC within 120 days after each subsequent fiscal year. The annual report
is substantially similar to the offering statement, excluding offering-related information. The
financial statements in the annual report must be certified by the issuer’s CEO and need not be
reviewed or audited; however, reviewed or audited financial statements must be included, if
available.

The obligation to file annual reports terminates if (a) the issuer becomes a public reporting
company, (b) after the completion of the offering, the issuer has filed an annual report and has
fewer than 300 shareholders or the issuer has filed annual reports for the three most recent years
and has assets of $10 million or less, (c) all of the securities issued under the crowdfunding
exemption are repurchased or (d) the issuer liquidates.

**Exemption from Exchange Act Registration.** Ordinarily, companies with more than $10 million
of assets and more than 500 shareholders of record that are not “accredited investors” must
register under the Exchange Act. However, shares issued in a crowdfunding offering are
excluded from this calculation if the issuer has filed all required annual reports, has assets of $25
million or less and has engaged the services of a registered transfer agent.

**Investor Management.** Given the potentially unlimited number of participants in a crowdfunding
offering, issuers should consider how they will manage a company with hundreds or thousands
of unfamiliar investors. Investors in early crowdfunding offerings will likely be inexperienced
with investing in non-public companies and may not anticipate how little information or access
to management they will receive. Issuers should consider how to respond to myriad requests for
information and progress reports or to unfavorable or inaccurate public comments by investors.
Issuers should anticipate that disappointed investors may assert claims or may file complaints
with government regulators. Issuers should consider adding contractual provisions to their
offering documents to reduce the costs of investor disputes, such as mandatory arbitration.

Lastly, issuers should consider the impact of a crowdfunding offering on potential exit
opportunities. Acquisitions of non-public companies usually involve indemnification by the
target’s securityholders, and a large number of unsophisticated securityholders may complicate
the target’s ability to consummate a transaction that is attractive to both a buyer and the target’s
own larger shareholders, who may be asked to bear a disproportionate share of potential liability.
Similarly, a large number of unaccredited investors may limit the buyer’s ability to pay with

---

12 The issuer need not provide any progress reports, however, if the intermediary provides “frequent” progress
updates to investors through its online platform.
Massachusetts Crowdfunding

In January 2015, Massachusetts adopted its own crowdfunding exemption from state registration requirements. Like Regulation Crowdfunding, the state exemption requires specific written disclosures to investors, imposes dollar limitations on investors’ purchases, is unavailable to disqualified issuers and certain types of issuers, and limits offerings to $1 million in any twelve-month period. Under the state exemption, however, issuers with audited financial statements can offer up to $2 million of securities. The exemption is limited to issuers organized under Massachusetts law with a principal place of business in Massachusetts, and securities may be offered and sold only to investors in Massachusetts. Moreover, the exemption requires issuers to comply with either Section 3(a)(11) or Rule 147.

Notably, the state exemption does not require that the offering be conducted exclusively online, nor does it require an intermediary. However, the exemption prohibits the issuer from remunerating anyone, other than registered broker-dealers, for soliciting prospective purchasers, which may limit the use of funding portals that are not registered broker-dealers.

The state exemption imposes certain requirements absent from the federal exemption. The minimum offering amount must be “sufficient” to implement the business plan described in the offering materials and must be at least 30% of the maximum offering amount. If the minimum offering amount is not met within one year, the issuer must return investors’ funds. The issuer must also file with the Secretary of the Commonwealth a notice of the offering, copies of offering materials and, after the offering, a sales report.

Although the express disclosure requirements of the state exemption are narrower than those of Regulation Crowdfunding, the state exemption requires disclosure of “any additional information material to the offering” and “full and fair disclosure to offerees and investors of all material facts relating to the issuer and the securities being offered, in accordance with Section 101” of the Massachusetts Uniform Securities Act, M.G.L. ch. 110A. Section 101 follows the traditional anti-fraud formulation of Rule 10b-5 under the Exchange Act that the issuer may not “make any untrue statement of a material fact or … omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading,” nor may the issuer otherwise commit fraud. The potentially open-ended nature of this disclosure requirement may discourage some issuers from using the state exemption.

---

13 Under the federal exemption, the dollar limits on each investor apply across all issuers whose securities are purchased under the crowdfunding exemption; under the state exemption, the dollar limits apply on an issuer-by-issuer basis.

14 Interestingly, the dollar limits do not apply to securities offered and sold to the issuer’s directors, officers, partners, trustees and 10% shareholders.

15 Through incorporation of Section 3(a)(11) and Rule 147, the state exemption effectively prohibits out-of-state offers. In order to comply with this prohibition, an issuer would need to take steps to ensure that information about its offering is available only to investors in Massachusetts.
Conclusion

Both the federal and Massachusetts crowdfunding exemptions offer novel but untested means to raise funds from a broad section of the public. As companies and investors gain experience with the exemptions, regulators should augment their usefulness by eliminating requirements that prove to be burdensome, costly or impractical.

John D. Hancock is a partner at Foley Hoag LLP. He practices in the areas of corporate finance, securities, and mergers and acquisitions. He can be reached at jhancock@foleyhoag.com. The views expressed in this article are his alone and do not necessarily express the views of Foley Hoag.
Zoning for Medical Marijuana: Approaches & Considerations
By Lisa L. Mead and Adam J. Costa
Heads Up

On November 6, 2012, Massachusetts voters overwhelmingly approved a ballot initiative legalizing the use of marijuana by qualifying patients who have been diagnosed with a debilitating medical condition. Effective January 1, 2013, the “Act for the Humanitarian Medical Use of Marijuana” presents a number of issues for cities and towns concerning the exercise of their zoning powers. The Act established a process whereby medical marijuana treatment centers, defined as not-for-profit entities that acquire, cultivate, possess, process, transfer, transport, sell, distribute, dispense, or administer marijuana or products containing marijuana for medical use, may apply to the Department of Public Health (DPH) for registration. The Act provides for the registration of up to 35 medical marijuana treatment centers initially, with at least one but not more than five centers per county.

Although no reference is made in the Act to municipal zoning control or its applicability to medical marijuana treatment facilities, the DPH regulations promulgated thereunder in mid-2013, see 105 CMR 725.000, address zoning for these facilities, referred to as registered marijuana dispensaries (RMDs): “The Department does not mandate any involvement by municipalities or local boards of health in the regulation of RMDs, qualifying patients with hardship cultivation requirements or any other aspects of marijuana for medical use. However, nothing in 105 CMR 725.000 shall be construed so as to prohibit lawful local oversight and regulation. . . that does not conflict or interfere with the operation of 105 CMR 725.000.” 105 CMR 725.600. Accordingly, per the Home Rule Amendment, Mass. Const., amend. LXXXIX, Massachusetts cities and towns may in their discretion adopt zoning ordinances and bylaws relative to the siting, development, and operation of medical marijuana treatment centers, as long as their provisions are not at odds with the Act or the DPH regulations.

To Zone or Not to Zone

A municipality is under no obligation to zone for RMDs, and many cities and towns either have yet to adopt such zoning or have elected not to do so. The DPH regulations mandate a buffer zone around certain facilities for children. Absent a more stringent local requirement, “a RMD shall not be sited within a radius of five hundred feet of a school, daycare center, or any facility in which children commonly congregate. The 500 foot distance. . . is measured in a straight line from the nearest point of the facility in question to the nearest point of the proposed RMD.” Municipalities may establish their own buffer zones from these or other facilities, provided they are mindful that, collectively, these zones may not effectively prohibit RMDs city- or town-wide.

The Office of the Attorney General has opined that an outright ban on medical marijuana treatment centers in a municipality frustrates the purposes of the Act and, consequently, is invalid. “The Act’s legislative purpose could not be served if a municipality could prohibit treatment centers within its borders, for if one municipality could do so, presumably all could do so.” Letter from the Att’y Gen. to the Town of Wakefield, Mar. 13, 2013, available at http://www.mlu.ago.state.ma.us/.
The Attorney General’s Office has also rejected bylaws prohibiting home cultivation as an accessory use, restricting home cultivation to a particular area of the community, imposing buffer zones around home cultivation sites, and requiring a special permit for home cultivation. Home cultivation of medical marijuana is authorized by the Act and the DPH regulations for qualifying patients whose access to a RMD is limited by verified financial hardship, a physical incapacity to access reasonable transportation, or the lack of a medical marijuana treatment center within a reasonable distance from the patient’s residence.

For municipalities that choose to zone for medical marijuana by adopting reasonable regulations, the choice is between incorporating RMDs into the zoning already in effect and establishing an overlay district within which RMDs may be sited.

**Incorporation into Existing Zoning**

Using a more traditional approach to zoning, a municipality may amend its existing zoning ordinance or bylaw to identify and define RMDs and to specify the zoning district or districts where they are permitted. In doing so, it subjects a RMD to the same dimensional and density requirements and performance standards applicable to other uses in the same district. Dimensional and density requirements might include area, frontage, and setback constraints, among others. Performance standards might regulate noise, traffic, or other aspects of a use for compatibility with its surroundings. If a city or town so chooses, it may zone cultivation and processing operations separately from retail facilities. Although both qualify as RMDs per the DPH regulations, these uses need not be co-located.

A city or town may elect to allow RMDs only by special permit, in some or all of the zoning districts in which they are an available use. The Attorney General has cautioned municipalities, however, that an ordinance or bylaw must provide adequate standards to guide a board in deciding whether to grant or deny the special permit. It may not be enough for a municipality to rely on the general requirement of the Zoning Act, at G.L. c. 40A, § 9, that the use be “in harmony with the general purpose and intent of the ordinance or by-law,” nor are a municipality’s special permit criteria for other uses always appropriate for application to RMDs. Municipalities have been advised “to list specific criteria for . . . consider[ation] when reviewing [an] application.” Letter from the Att’y Gen. to the Town of Westborough, July 11, 2013, available at http://www.mlu.ago.state.ma.us/.

In its regulation of medical marijuana treatment centers, a municipality must also be cautious not to run afoul of the zoning exemption available to agricultural uses, under G.L. c. 40A, § 3. To the extent that an RMD’s operations qualify as commercial agriculture thereunder, a municipality cannot require a special permit for, or unreasonably regulate or prohibit, the use.

**Creation of an Overlay District**

An alternative to incorporating RMDs into an existing zoning ordinance or bylaw is to create an overlay district for medical marijuana treatment centers. An overlay zone is a district superimposed on one or more established zoning districts which may apply supplemental restrictions on uses in these districts or permit uses otherwise disallowed. By adopting an
overlay district, a municipality gains greater control over where RMDs may be sited. The limits of acceptable locations need not coincide with the boundaries of the municipality’s existing zoning districts, but may be determined by the city or town in its discretion upon consideration of existing and anticipated land uses and the compatibility of RMDs with these uses. A municipality may incorporate dimensional requirements and performance standards specific to the overlay district, and may even pair these regulations with buffer zones surrounding schools, daycare centers, or other uses potentially impacted by a RMD. A special permit may be required for the development and operation of a RMD within the overlay district; or the municipality may choose to permit these facilities as-of-right or subject only to site plan review.

Host Community Agreements

Several Massachusetts municipalities have opted to negotiate host community agreements with potential RMDs to eliminate or mitigate any possible adverse effects of RMDs. Neither the Act nor the DPH regulations prohibit these agreements. And while a municipality may not require a RMD to enter into a host community agreement, such an agreement may expedite a RMD’s receipt of a letter of support or non-opposition from the municipality, now a requirement of the DPH licensing process as updated in mid-2015. A municipality might otherwise choose to issue its letter of support or non-opposition only upon a RMD’s completion of the permitting process, once the city or town is satisfied that the project has been adequately vetted.

Among the most common subjects of host community agreements are financial compensation due the municipality, taxes, and charitable contributions. Financial assistance to a city or town may help offset community impacts, fund public health and safety initiatives, or otherwise aid the municipality. The payment of real estate taxes or the making of payments in-lieu-of taxes is also worthy of negotiation; otherwise, because RMDs are required by the Act to be not-for-profit entities, they may qualify as tax-exempt. Entering into a tax agreement helps to alleviate any questions about the payment of taxes to the municipality. Finally, a number of Massachusetts municipalities have negotiated charitable contributions by RMDs in exchange for the community’s support of, or non-opposition to, the development of a medical marijuana treatment center.

In summary, Massachusetts cities and towns have a choice about whether to zone for medical marijuana treatment centers and, if they do, of how to approach the rezoning process. Some municipalities have utilized traditional zoning practices, allowing RMDs in one or more existing zoning districts and often requiring a special permit. Other municipalities have developed overlay districts, within which RMDs may be sited subject to dimensional requirements, performance standards, and other regulations specific to the use. Regardless of which approach is chosen, a municipality would be wise to explore negotiation of a host community agreement with a potential RMD and avail itself of the financial incentives that may be offered in exchange for the municipality’s cooperation with the application process.

Lisa L. Mead and Adam J. Costa are partners at Blatman, Bobrowski, Mead & Talerman, LLC. They concentrate their practice in the areas of general municipal, land use and environmental law, representing both municipal and private clients throughout Massachusetts.
In the fall of 2015, as professional football fans drew up their chairs, turned on their television sets and began another season with their favorite sport, they witnessed a sustained barrage of advertisements promising them the opportunity to win enormous cash prizes for playing daily fantasy football. The advertisers were two Internet companies, DraftKings, based in Boston, and FanDuel, headquartered in New York, its chief competitor. Both were young companies, but by that fall they had captured about 85% of the national daily fantasy sports (DFS) market.

In one form or another, fantasy sports have been with us for decades. In the original model, groups of baseball fans formed a fantasy baseball league, paid an agreed entry fee and then created fantasy teams composed of active major league baseball players. The success of the fantasy teams depended on the performance of the real players in real games played throughout the season. The success of those players – the number of hits they made, the number of strikeouts they threw, the number of runs they drove in, etc. – translated into points earned by the fantasy team on which they also "played." At the end of the season, the owner of the fantasy team that had the most points collected a cash reward composed of the entry fees all team owners paid when the league was formed.

Available only through the Internet, DFS is built on the same concept but the entry fees are paid to DraftKings or FanDuel and the winners are determined on the basis of player performance on a single day. The concept has spread far beyond baseball and now includes football, hockey, basketball and a variety of other sports. Indeed, major league sports have embraced the idea and major league baseball has created fantasy programs of its own.

Until the fall of 2015, DraftKings and FanDuel offered their products in a relatively quiet fashion to a relatively small market. The explosion of advertising in which they began to engage at the opening of the 2015 football season was a dramatic departure from their previous business model and it provoked an immediate reaction that continues today. That reaction was amplified by published reports that an employee of one of the companies had won over $300,000 using insider information to form and enter a fantasy team on the other company’s website. Though the reports were vigorously denied, they added to the intensity of the reaction the advertising had provoked.

The reaction produced probing questions about the nature of DFS contests, their legality, fairness and similarity to other forms of regulated gambling. Previously the industry had relied on certain provisions of the federal Unlawful Internet Gambling and Enforcement Act (UIGEA) to assert that DFS was “100% legal.” A careful reading of UIGEA demonstrated that, while it did include a carve-out for fantasy sports, it ultimately deferred questions of legality to state law. As a result, numerous attorneys general began examinations of DFS and concluded that it constitutes illegal gambling under their respective state’s law. Additional state attorneys general are still reviewing the industry and have yet to render formal opinions on its legality.
The attention on the DFS industry also spurred myriad legislative efforts to legalize the activity although no uniform approach to legalization has yet crystallized. Proposed legislation is extremely varied in both scope and depth, ranging from simply decriminalizing the activity in a state’s criminal code to creating a detailed licensing scheme for the industry. A number of gaming commissions also have investigated the topic through hearings and public discussions. Nevertheless, the main focus of inquiries over the past eight months has been on the legality of the contests as viewed by attorneys general pursuant to state law.

Just as significant as the attorney general opinions has been the reaction of online payment processors. Because DFS is available exclusively on the Internet, both DraftKings and FanDuel rely on those processors to direct payments made by DFS players to the issuers of the credit cards on which the payments were charged. Thus, the processors are the foundation for the DFS platforms. One of the largest processors is a company called Vantiv. After the New York Attorney General concluded that DFS was illegal under New York law and issued a cease and desist letter to both companies, Vantiv, undoubtedly concerned about the UIGEA’s penalties for processing illegal gambling debts and charges, told its DFS clients that it could not accept payments from players in New York. In December, the New York State Supreme Court granted the Attorney General’s request for a preliminary injunction stopping DFS operators from doing business in the state; however, later that same day, an appellate judge stayed the decision, allowing the businesses to continue their operations while the appeal was considered. Concurrently, DraftKings obtained an order from a Massachusetts Superior Court judge obligating Vantiv to continue to process New York player payments. Vantiv has since initiated its own lawsuit in New York State Supreme Court challenging the conflicting rulings in New York and Massachusetts on its ability to process DFS payments.

The reaction in Massachusetts has been significantly different. Massachusetts has a long history with gambling, legal and illegal. On the legal side, from the lottery, now in its fifth decade, to the more recent passage of the 2011 Expanded Gaming Act, M.G.L. c. 23K, Massachusetts has recognized and benefited from regulated gambling. Despite a familiarity with gambling, Massachusetts, like the nation, was caught flatfooted by the meteoric rise of DFS and its associated legal questions. During the initial flurry of official responses to DFS, Attorney General Maura Healey opined that the games did not run afoul of any state or federal laws but did constitute gambling. Her office has since promulgated first-of-their-kind consumer protection regulations specifically applicable to DFS. The regulations address age and deposit limits, segregation of experienced and novice players and contain a ban on automated computer “scripts,” amongst other topics.

In parallel to General Healey’s development of regulations, the Massachusetts Gaming Commission, at the behest of state legislators, researched and drafted a white paper on DFS. This white paper addressed the history of DFS, the questions surrounding its legality (both state and federal), the universe of consumer protection issues involved and concluded by positing a regulatory framework flexible enough to address not only the challenges of DFS but also future challenges posed by other online/mobile gaming products. xviii

General Healey’s approach to DFS and the white paper both highlighted gaps in Massachusetts law that produce difficulties when one attempts to determine whether a novel gambling-like
activity is legal or illegal. While Massachusetts does have a statutory definition of “illegal gaming,” the statute, M.G.L. c. 4, § 7(tenth), is definitional only, lacking provisions for criminal or civil consequences. Instead, those consequences are primarily found in statutes and judicial decisions concerning lotteries and betting pools.

Lotteries, as defined in numerous judicial decisions, encompass a wide range of activities sharing three common elements: “(1) the payment of a price for (2) the possibility of winning a prize, depending upon (3) hazard or chance.” See Com. v. Stewart-Johnson, 78 Mass. App. Ct. 592, 594 (2011), quoting, Com. v. Lake, 317 Mass. 264, 267 (1944). Numerous activities have been found to constitute lotteries, including: operation of a toy crane to win prizes, the playing of a version of “Beano” that included a combination of darts and bingo, video poker and the operation of a slot machine that solely awarded free plays. Further complicating matters is the fact that merely because an activity includes these three elements does not immediately make it an illegal lottery. Instead the balance of chance versus skill must be weighed by a fact-finder prior to determining whether the activity is legal or illegal.

While nearly every competitive activity includes some element of chance, the issue is highlighted in DFS contests where the DFS players cannot control the performance of the athletes that they “draft.” DFS has never been evaluated under the skill-versus-chance test but even if it passed such an analysis it still could become entangled in the Massachusetts lottery or betting pool statutes.

A pool has been defined as “a combination of stakes the money derived from which was to go to the winner. . . . This does not mean, however, that all the money derived from the combination of stakes must go to the winner. Commonly the man who runs the pool makes something out of the transaction.” Com. v. Sullivan, 218 Mass. 281, 283 (1914) (citing the definition articulated by Oliver Wendell Holmes in Com. v. Ferry, 146 Mass. 203, 208 (1888)). Sullivan further defines a “bet” as “the hazard of money or property upon an incident by which one or both parties stand to lose or win by chance.” Id. “For one to have placed a ‘bet,’ he must have taken a risk on the uncertain outcome of a particular event and, depending on the outcome, he must be entitled to receive payment from another.” Com. v. Sousa, 33 Mass. App. Ct. 433, 437 (1992). M.G.L. c. 271, § 17 provides that it is a felony for one to possess an “apparatus, books or any device . . . for buying or selling pools, upon the result of a trial or contest of skill, speed or endurance of man, beast, bird or machine, or upon the result of a game. . . .” Section 16A of the same chapter makes it similarly illegal for one who “organizes, supervises, manages or finances . . . the illegal buying or selling of [such] pools.”

The typical DFS contest involves numerous participants paying their entry fees to a company, the company taking a percentage of the total entry fees and the winner being paid from the company’s coffers. Such contests bear more than passing resemblance to the betting pools found to be illegal in Sullivan and thus have potential application to DFS operators. But that conclusion is not certain nor is it certain that either the lottery or pool statutes that originated in the 18th and 19th centuries apply.

The complexities, gaps and uneasy fits just described are largely the product of a regulatory scheme created for a different era and never updated. In that era, bookmakers kept books, or at
least paper records, on which accounts, wagers and payoffs were recorded by hand. Lotteries were mainly paper affairs in which the winner was determined by drawing a paper ticket out of some sort of container. Pools typically were tangible collections of cash and chits kept in some identifiable place within the Commonwealth’s borders.

The Internet has changed much of that, just as it has changed so much else. Now horseracing fans in the United States can place real-time bets on races that occur throughout the nation and the world. Outside the United States, legalized sports betting over the Internet is a huge business. It is a huge business inside the United States, too, though most of it is illegal and therefore clandestine. This year, sports fans will be able to watch live eSports events on ESPN, in the process joining the estimated 100 million international monthly viewers who now watch, and often bet on, Internet broadcasts of those video game contests that are complete with play-by-play announcers and color commentators. Social gaming, i.e., gambling and other Internet games in which the prizes theoretically cannot be redeemed for tangible benefits, is an industry that now produces annual revenues in the vicinity of $30 billion. It is likely that those revenues will continue to grow as new games and game concepts are added. It is also likely that questions about whether the games do or do not produce tangible benefits for the players will become increasingly complex. Prediction markets, increasingly popular as the election season proceeds, essentially allow participants to bet on the outcome of future events. Those events are mainly, though not exclusively political in nature, but there is no reason why their reach cannot expand.

Any list of gambling-like activities available on the Internet is likely to require quick revisions, for the Internet environment is highly dynamic. The rewards for successful innovation can be enormous and launching a new concept requires only a laptop and a new idea. The low barriers to entry and the speed with which new activities can and will be launched pose significant challenges. Indeed, under the current regulatory framework, it is entirely possible that gambling or gambling-like activities can be deployed and operating for substantial periods before they attract any regulatory attention. Moreover, as the current national examination of DFS reveals, many such activities will inevitably raise one or more of a series of questions. Among them is whether the activity amounts to “gambling” and, if so, whether the activity is illegal. If it is illegal, why should it be, particularly in Massachusetts, where residents annually spend $700 per capita gambling on the state-sponsored Lottery? If the activity is not gambling or if it is but it is not illegal, is some form of regulation nevertheless necessary or is the activity so transparent or low risk that no regulation is required? If regulation is required, what form should the regulation take?

Perhaps the most important question, though, concerns who should answer those questions. The Legislature is the obvious candidate but the Legislature typically is engaged in deliberative policy-making that by its very nature takes time. There is a real question whether a legislative determination, particularly on an activity-by-activity basis, can keep pace with the issues that will likely require exploration. State and local law-enforcement agencies could answer at least some of the questions through application of the criminal law, though that approach uses a blunt instrument to deal with what are likely to be nuanced issues. Moreover, inaction by law enforcement presents at best an ambiguous answer to questions about whether an activity is or should be legal. The Attorney General and other existing agencies with responsibility for consumer protection could deal with consumer safety through issuance of regulations, as General
Healey has done in the case of DFS in Massachusetts, but that process is reactive and may be insufficiently nimble to keep up with the pace of change. The Massachusetts Gaming Commission has observed that the dynamic nature of the Internet, the desirability of a comprehensive approach to Internet gaming-like activity and the need for right-sized regulations that protect the public without stifling creativity suggest the desirability of a single regulatory body charged with oversight of all such activity.

However those questions are answered, one thing is certain: The issues recently raised by the advent of DFS are going to recur, perhaps at an increasing pace, as we move forward in the Internet age. With that certainty in mind, now is an opportune time to create a framework for rapid and thoughtful exploration of the questions each new type of activity will inevitably raise. To be successful, that framework must provide for prompt decisions about whether the activity is legal. It must also provide for prompt decisions about whether specific regulations are needed to deal with unique issues the activity presents or whether existing regulations of general applicability will suffice. If specific regulations are needed, the scheme must also provide for prompt deployment of right-sized regulations to deal with unique issues of concern while not unduly discouraging the creative entrepreneurial spirit the Internet demonstrably produces.

James F. McHugh is a retired Massachusetts judge and a retired member of the Massachusetts Gaming Commission.

Justin G. Stempeck is a former civil litigator and current staff attorney with the Massachusetts Gaming Commission.

---

xvii To date attorneys general in Georgia, Alabama, Tennessee, Michigan, Mississippi, New York, Hawaii, Texas, Vermont, Illinois and South Dakota have all opined that DFS is illegal under their respective state’s law. Nevada’s attorney general also opined that DFS was gambling under state law, but, like any other gambling, would be legal with the appropriate gaming license. In contrast, the attorneys general in Rhode Island and Massachusetts have opined that DFS is legal under the law of their respective states.

The Massachusetts Securities Division (“Division”) is the state agency entrusted with protecting investors. And the scope of its power is considerable, ranging from the authority to order the disgorgement of profits to its ability to issue cease and desist demands. But parties defending against the Division’s Registration Inspections, Compliance and Examinations (“RICE”) Section are often disadvantaged by a very limited right to discovery.

Respondents in Division proceedings can, however, request to subpoena third parties, which can be valuable considering the paucity of other discovery tools. But getting the Division to issue a subpoena is not easy or intuitive. This article, therefore, provides an overview of the subpoena process in adjudicatory proceedings before the Division.

Discovery in Division Proceedings

Under the Division’s rules, respondents have no right to propound interrogatories or requests for documents. 950 C.M.R. § 10.01 et seq. Instead, the Division has held that RICE is only required to produce documents it identifies as exhibits in its pre-trial memorandum. Conversely, RICE may issue subpoenas even before an adjudicatory proceeding has begun. M.G.L. c. 110A, § 407(b).

Subpoenas can mitigate this imbalance, as there are many scenarios in which third parties will hold key information. For example, in insider trading cases, establishing whether information is material or obtained in violation of a fiduciary duty could depend upon information held by the third-party company whose shares were traded. With third-party subpoenas, respondents can gain advance notice of the evidence upon which RICE may rely at trial while also potentially obtaining exculpatory evidence which RICE would otherwise not be obligated to produce.

Right to Issue of Subpoenas

How do respondents obtain subpoenas in Division proceedings? At first, the answer may seem straightforward. Under M.G.L. c. 30A, § 12(3):

Any party to an adjudicatory proceeding shall be entitled as of right to the issue of subpoenas in the name of the agency conducting the proceeding. The party may have such subpoenas issued by a notary public or justice of the peace, or he may make written application to the agency, which shall forthwith issue the subpoenas requested.

That is, respondents appear entitled to subpoenas “as of right.”

The Division’s position, however, is that Section 12(3) does not apply to its adjudicatory proceedings because M.G.L. c. 110A, § 407(b) supplants it. See, e.g., In the Matter of Blinder, Robinson, & Co., Docket No. E-85-27, 1986 Mass. Sec. LEXIS 63 (Mass Sec. Div. April 30, 1986). As the reasoning goes, under Section 407(b), the Division “may” issue subpoenas, but is not required to, and therefore, there is a conflict between Section 12(3) and Section 407(b). And
where Section 407(b) deals specifically with the Division but Section 12(3) is merely a default rule applicable to all agencies, Section 407(b) prevails. Accordingly, respondents in Division proceedings are subject to 950 C.M.R. § 10.09(l), which requires a respondent to make a “written application” for a subpoena to the Presiding Officer, who “may” grant the application.

No court has yet weighed in on the Division’s interpretation, however, and its position is open to challenge. First, nothing in Section 407(b), which was enacted after Section 12(3), states that it overrides Section 12(3), and there is “a very strong presumption against [the] implied repeal” of a statute, Commonwealth v. Hudson, 404 Mass. 282, 286 (1989) (internal quotation marks omitted), particularly where the statute unequivocally confers a procedural “right.” Nor is it clear there is a conflict between Section 12(3) and Section 407(b); the former deals with a respondent’s ability to issue subpoenas whereas Section 407(b) refers to the Division’s prerogative to do so. Moreover, the Division, in a slightly different context, has itself stated that “[a] party to an adjudicatory proceeding before the Division is entitled as a matter of right to the issuance of [a] subpoena.” In the Matter of Cohmad Sec. Corp., Docket No. E-2009-0015 (Mass Sec. Div. Nov. 17, 2009). There are, therefore, ample grounds upon which to invoke subpoena rights under Section 12(3).

What should a respondent do if it wishes to issue a subpoena under Section 12(3)? It could simply ignore Division precedent and serve a notarized subpoena pursuant Section 12(3). But RICE will almost certainly respond with a motion to quash, which in turn may result in an order to withdraw the subpoena from the Presiding Officer.

The prudent approach would be to file a motion before the Division under both Section 12(3) and 950 C.M.R. § 10.09(l). This approach affords two advantages. First, the Division may simply grant the subpoena, in which case the applicability of Section 12(3) is moot. Second, if the Division denies the subpoena, then the respondent will have preserved the issue for appeal under M.G.L. c. 30A, should the Division ultimately decide unfavorably. If the respondent believes that it cannot wait until after a final decision, it might also consider interlocutory relief by way of a mandamus action in the Superior Court pursuant to M.G.L. c. 249, § 5. Mandamus relief will likely be an uphill battle, however, as it is only available where a M.G.L. 30A appeal is an inadequate remedy. Because a court can always reverse the Division’s judgment and order more discovery, there is usually an adequate remedy. If there is an immediate need for the subpoena, however, a mandamus action may be an important option to preserve by moving for a subpoena under both Section 12(3) and Section 10.09(l).

**Requesting a Subpoena**

To request a subpoena from the Presiding Officer under 950 C.M.R. § 10.09(l)(1), the respondent must make a “written application,” which should consist of a copy of the proposed subpoena and a short motion. The Presiding Officer may deny a request if she determines that the subpoena would be “unreasonable, oppressive, excessive in scope, or unduly burdensome.” Id.

Both the Division’s rules and M.G.L. c. 30A, § 12(3) allow the subpoenaed party, but no one else, to move to quash the subpoena. Accordingly, the Division has held that only “a party to
whom the subpoena is directed may move to vacate or modify the subpoena.” In the Matter of Cohmad Sec. Corp. RICE, however, has argued that applications for subpoenas are “motions” under 950 CMR § 10.07(a), entitling it to file an opposition. Thus far, the Division appears to have rejected RICE’s position, and a respondent should promptly move to strike any opposition RICE files.

RICE has also argued that any subpoena served prior to the exchange of pre-trial memoranda under 950 C.M.R. § 10.09(b) is per se unreasonable because it is inherently inefficient to serve subpoenas that may overlap with the documents that RICE may produce with its memorandum. RICE’s argument is difficult to square with the language of Section 10.09(l), which imposes no time limitation on requesting subpoenas, and Section 10.09(b), which deals solely with the exchange of documents between parties, not third-party subpoenas. At least one Presiding Officer has rejected RICE’s position that subpoenas must be filed after the exchange of pre-trial memoranda. In the Matter of Risk Reward Capital Management Corp., Docket No. E-2010-0057 (Sept. 23, 2014). Nevertheless, respondents seeking to obtain subpoenas should be ready to field similar objections.

Subpoenas are a valuable tool in proceedings before the Division. But respondents should anticipate resistance and RICE’s likely objections. By preparing to do so, respondents can maximize their chances of success, either before the Division or (if necessary) on appeal.

Thomas Sutcliffe is an associate at Prince Lobel Tye LLP. His practice focuses on complex commercial and administrative litigation.
In *Maling v. Finnegan, Henderson, Farabow, Garrett & Dunner, LLP*, 473 Mass. 336 (2015), the Supreme Judicial Court (“SJC”) ruled that a law firm does not violate the Rules of Professional Conduct *per se* when it simultaneously represents business competitors. The SJC warned, however, that a conflict of interest could arise where the representation of one competitor impairs the law firm’s ability to fully represent the interests of another. The opinion provides nuanced guidance for all lawyers in Massachusetts, and all patent attorneys throughout the United States.

**The Rules of Professional Conduct**

Mass. R. Prof. C. 1.7 prohibits a lawyer (with limited exceptions) from representing a client where there exists a “concurrent conflict of interest.” A conflict occurs where either (1) “the representation of one client will be directly adverse to another client;” or (2) “there is a significant risk that the representation of one or more clients will be materially limited” by a lawyer’s other responsibilities. In *Maling*, the SJC considered both prongs in the context of “subject matter” conflicts, a special category of conflict that may arise in the patent arena because of “the simultaneous representation of clients competing for patents in the same technology area.” *Id.* at 337. The SJC addressed whether such situations render the competing interests of two clients “directly adverse” to each other, and whether they “materially limit” a lawyer’s ability to represent either client.

**Maling v. Finnegan**

The plaintiff, Maling, engaged the defendant law firm (“Finnegan”) to prosecute patents in the screwless eyeglass market. Finnegan accepted this representation without disclosing to Maling that it also prosecuted patents for Masunaga Optical Manufacturing Co., Ltd. (“Masunaga”), a company in the same market. During the period that Finnegan’s Boston office successfully obtained four patents for Maling, Finnegan’s Washington D.C. office prosecuted patents on behalf of Masunaga. When Maling learned that Finnegan represented Masunaga, he brought suit.

Maling claimed that Finnegan’s simultaneous representation of Maling and Masunaga was a conflict of interest that Finnegan had a duty to disclose. Maling alleged that he would not have invested millions of dollars to develop his product if Finnegan had disclosed the alleged conflict. Maling also claimed that he lost critical financing when Finnegan refused to provide him an opinion letter concerning similarities between the Maling patents and the Masunaga patents. The trial court granted Finnegan’s motion to dismiss. The SJC, on its own motion, transferred the case and affirmed.

**Were the Representations Directly Adverse?**

In ruling on whether Finnegan’s simultaneous representation of Maling and Masunaga was directly adverse to Maling’s interests, the SJC relied in part on *Curtis v. Radio Representatives.*
Inc., 696 F. Supp. 729 (D.D.C. 1998), in which the D.C. District Court held that a law firm’s simultaneous, successful representation of two radio stations applying for broadcast licenses posed no conflict. That Court further held that “the fact that an attorney is simultaneously representing two companies that are competitors in the same industry does not itself establish an actionable breach of an attorney’s fiduciary duty.” Id. at 736. Rather, a breach of the duty would require an actual conflict of interest, such as both clients seeking broadcast licenses where “objectionable electrical interference existed between two stations.” Id.

Analogizing Curtis to the case at bar, the SJC noted that Finnegan successfully obtained patents for both Maling and Masunaga, and held that, on the facts presented, there was no directly adverse representation. Quoting the American Bar Association Standing Committee on Ethics and Professional Responsibility (ABA Op. 05-434), the SJC confirmed that “direct adverseness requires a conflict as to the legal rights and duties of the clients, not merely conflicting economic interests.” Maling, 473 Mass. at 341. For example, the SJC opined, a conflict likely would have occurred had Finnegan provided the opinion letter Maling requested, because such a letter would have involved “the legal rights and duties of the two clients vis-à-vis one another.” Id. at 344. But in the absence of an allegation that Finnegan agreed in advance to provide opinion letters, Maling’s complaint for a breach of duty failed to allege an actionable conflict.

Was the Representation Materially Limited?

With respect to whether the simultaneous representation “materially limited” Finnegan’s ability to perform its duties, the SJC reaffirmed its holding in Matter of Driscoll, 447 Mass 676, 686 (2006): The “critical inquiry” is “whether the lawyer has a competing interest or responsibility that will materially interfere with the lawyer’s independent judgment in considering alternatives or forecloses courses of action that reasonably should be pursued on behalf of the client.” Maling, 473 Mass. at 345. The SJC also distinguished Maling from Sentinel Prods. Corp. v. Platt, 2002 WL 1613713 (D. Mass. July 22, 2002), in which a conflict of interest was found to exist when a law firm narrowed the claims in one client’s patent application so as to avoid overlap with the claims in a second client’s patent application. Maling failed to allege an analogous, actionable conflict because the complaint did not allege “that Finnegan’s judgment was impaired,” that it pursued “a less robust patent,” or that either client gained any advantage because Finnegan’s dual representation “materially limited” its ability to discharge its responsibilities to both clients. Maling, 473 Mass. at 346.

SJC Commentary on the Rules of Professional Conduct

While the holding of Maling v. Finnegan is arguably limited to the specific context of subject matter conflicts arising from patent prosecutions, the SJC’s decision provides some important insights into its interpretation of the Rules of Professional Conduct. The SJC explained that the “purpose of rule 1.7 is twofold. It serves as a prophylactic measure to protect confidences that a client may have shared with his or her attorney and safeguards loyalty as a feature of the lawyer-client relationship.” Maling, 473 Mass. at 340.

The SJC also commented on Mass. R. Prof. C. 1.10, which prohibits a firm from representing a client when any one of its lawyers alone would be prohibited from doing so (except in limited circumstances). The SJC reiterated that this rule obligates firms to “implement procedures to
identify and remedy actual and potential conflicts of interest.” *Maling*, 473 Mass. at 348. While the SJC declined to define a minimum protocol for conflicts checks, it noted that firms must “avail themselves of a robust conflict system adequate to the nature of their practice.” *Id.*

Finally, the SJC also emphasized what most attorneys likely view as obvious: “[b]efore engaging a client, a lawyer must determine whether the potential for conflict counsels against undertaking representation.” The SJC cited Comment 8 to Rule 1.7 for elaboration. That Comment instructs that “[t]he mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment . . .”

*Charles L. Solomont is a partner at Morgan, Lewis & Bockius LLP. He has handled complex litigation, class action, and regulatory matters for 20 years.*

*Julie Silva Palmer is a senior associate at Morgan, Lewis & Bockius LLP. Her practice focuses on complex business litigation matters.*