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Helping to Create the “Practice Ready” Lawyer

by BBA President Lisa Arrowood

President’s Page

In late 2015, I had the honor of speaking at one of the several swearing in ceremonies for new lawyers in Faneuil Hall. It’s one of the things I enjoy most about being an officer of the Boston Bar Association. It was so nice to speak to a group of enthusiastic young lawyers, as well as their proud family members.

As I welcomed them to the profession – a profession which, I think, is one of the best in the world – I knew that many of them had not yet found jobs that required a J.D. degree and that some of them never would.

There are so many challenges affecting lawyers today that it’s hard to list them all, but I think for many of the people who recently graduated law school the most significant challenge is the reduction in the number of jobs available for new lawyers.

I have always had a great deal of sympathy for anybody who put themselves through the three years of rigorous study that law school requires – not to mention the cost – who then get out and don’t get jobs. As a hiring partner at two separate firms, I have received countless resumes from incredibly impressive recent graduates for whom we had no openings. It breaks my heart to see people work very hard to do well both in college and law school, and then be unable to find employment. This is such a contrast to the situation not so very long ago when there were well-paying jobs galore.

Compounding this issue is the fact that these recent graduates don’t yet know how to do much legal work. For those who will never get hired, they need to learn how to do the cases ordinary people will hire a solo practitioner to do handling a divorce case, drafting a will or handling an eviction.

And so a big part of what I’m focusing on as President of the BBA is finding ways to help those people. Can we get them all jobs? No. But what we can do is help them become “practice ready.” We can help them build practical skills so they can represent regular people with regular legal needs. These are the clients who aren’t eligible for legal aid, but who still can’t afford most lawyers out there.

To that end, I’m so pleased to announce that in January we launched “Friday Fundamentals,” which is a series of short, “how-to” trainings on specific legal issues. These
sessions are designed to give new attorneys the practical and technical skills required to represent clients, as well as add some additional knowledge and expertise to their resume.

The BBA is also working hard to ensure that new lawyers who want to go solo are getting top-notch guidance and support. Later this year, we will offer a comprehensive, hands-on workshop on how to launch a successful solo practice. This, in addition to our existing resources – from offering a place to meet with clients in our new member space rooms to discounts on professional liability insurance through USI Affinity – should help new graduates start their own practices and begin representing clients who now have no legal representation and who are part of the pro se litigant crisis troubling our courts.

With its well-established Professional Development program structure, the BBA is incredibly well suited to teach these skills. When I first learned about the BBA’s brown bag lunch lunches, I went to a few of them. In 90 minutes over lunch, a young lawyer can learn from the stars of the bar – for free!

Friday Fundamentals is building off this very successful model. From now until June, each of the BBA’s 24 sections – covering all areas of law – will offer CLEs or brown bag lunch programs designed for beginners. I’m thrilled and proud of the effort that these Section leaders have put in toward training the next generation of lawyers. To those of you with new associates in your ranks: encourage them to take advantage of this series. For those young lawyers out there: these programs are for you. Take advantage of them!

Are we going to fix this in a year? No. But it’s a wonderful place to start.

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.
The Federal Judicial Selection Process

by Judge Allison D. Burroughs

Voice of the Judiciary

As the most newly-minted judge in the Federal District of Massachusetts, I have been asked to reflect on my experience through the selection process while it is still relatively fresh in my mind. At least in this district, in my round (and as I learned at baby judge school, there is a wide variety between districts), the two Massachusetts senators formed a selection committee, headed by Judge Nancy Gertner (ret). The committee solicited applications. The application itself was long and detailed. It collected a lot of information which I am sure was helpful to the committee, but also required me to dig up long forgotten personal information (like addresses, phone numbers and jobs) going back to when I was 18 years old. Harder than it sounds. This likely served the dual purpose of providing information, but also sorting out who was truly committed to the process. The names of the approximately 12 committee members and the application itself were publicly available.

The front end of the process moved very quickly. Once the application deadline had passed (late January, 2014), I was asked to interview with the committee (approximately February). The interview questions were as wide ranging and diverse as the interests of the committee members and included topics such as temperament, role of a judge, reasons for wanting to be a judge, substantive legal questions, experience with various sorts of cases, views on discovery and professional and personal background. The next step was an interview with the two senators (approximately March). In my case, they interviewed me together, but I am not sure that is always the case. At some point thereafter (approximately April), I was notified that my name was being forwarded to the White House. This was the single most exciting moment of the process and one that I will always remember. I was in the lobby of a hotel, on vacation with my family, when my cell phone rang. I didn’t recognize the number and let it go to voice mail. It turned out to be Senator Warren herself, asking that I return the call. Needless to say, I returned the call very promptly. I have kept that voice mail – truly one of those calls you don’t really ever expect and certainly don’t forget.

After that, my primary contact with the process was through the Justice Department Office of Legal Policy rather than the Senators. My application, resume, background and professional qualifications were vetted by the FBI – which I know only because of the number of calls I got from people who had been contacted. There was an interview in the Old Executive Office Building that included White House Counsel staff and people from the Department of Justice, among others (but not the President). During this same time frame, I was also vetted by the ABA which traditionally has been given the opportunity to review candidates prior to their
nomination and to share with the White House its opinion of an applicant’s qualifications. The vetting process is an odd thing to experience, in part because it can be awkward to interact with people that you realize are likely being interviewed about you. It’s also disquieting to know that you are being judged by committees of people whom you have never met and who don’t know you. At various points, I had the chance to respond generally to things that were said about me and my qualifications. On the one hand, some people are very generous in their assessment of others. That being said, there were also comments that seemed unfounded, but that were, in some instances, hard to defend against. It was also humbling and somewhat surprising to realize that strong endorsements could come from unexpected constituencies, but that the opposite was also true.

In approximately May, I was informed by the Office of the Legal Policy that the President was going to nominate me. Surprisingly, this moment was much less climactic than learning that my name was going to be forwarded to the President – largely because it was the culmination of a process that I knew was going on, rather than a surprise call. I was formally nominated on July 31, 2014. On September 17, I had my confirmation hearing which involved the Senate Judiciary Committee questioning a panel that consisted of me and 3 other nominees from other districts (3 Article III judges and 1 Article II judge). The hearing was not attended by all of the committee members and was shorter than I anticipated. The questioning was done by one Senator from each party. The Senators who attended and the ones that did not then had the opportunity to follow up the hearing with written questions. These were quite substantive and covered topics such as the death penalty, my view of precedent, appropriate judicial temperament, gay marriage, equal protection and the reach of the Commerce Clause.

On November 20, I was voted out of committee (which I learned from the Senate Judiciary website). This meant that my nomination could proceed to the Senate floor for a vote. I was given very little information about when the floor vote might happen, if at all. In my case, the votes for the group of judicial and other presidential nominees in which I was included took place on December 16, 2014, right before the Senate recessed for the year, and in literally the last series of votes before the recess. This was fortuitous given the less hospitable make-up of the new Senate for presidential nominees; I was aware that it was at least possible that my nomination might never be brought forward for a vote if it did not occur before the recess. I did not know the vote was going to happen beforehand, but I did know it was likely the last night of the session. I was able to watch the vote only because I had the television set turned on to CSPAN. Hearing my name called for a Senate vote was one of the other very big thrills of the process.

Once a nomination is voted on by the Senate, the President has to sign your commission which generally takes no more than a couple of days. At that point you are IN! I took a few weeks to wind up my practice. I was officially sworn in January 2015 (almost exactly a year after I
submitted my application) and then had a more public ceremonially swearing in July—oddly enough a year to the day from my nomination.

Although that largely sums up my active participation in my nomination and confirmation, I am sure there were many machinations behind the scenes—not about me exactly, but more about the challenges of getting a large group of pending nominations (not just judicial) through the Senate as quickly and efficiently as possible. I appreciated and was repeatedly impressed throughout the process with how generously and selflessly various people worked to make sure that my nomination and confirmation continued to move forward, and I remain grateful for their encouragement and support.

Now that I am on the bench, I continue to feel very honored and lucky to have this job. I spend a lot of time thinking about how to do it right—in terms of correctly applying law to facts, but also in making sure that I treat litigants and their lawyers with respect and in trying to ensure that people, win or lose, feel like they were heard and their views fairly considered. A few other random thoughts:

I think about I Love Lucy, even if fleetingly, almost every day. This job is so much like the bon bons on the conveyor belt episode. The paper just keeps coming. For those of you (like my law clerk) too young to understand what I just said—find the episode. It’s a classic.

As a judge, I have repeatedly offered young associates in court the opportunity to make a brief argument on a motion once the lead attorneys have finished their presentations. Not once has anyone taken me up on this offer. I suspect that is because the young attorneys are wary of partner or client response. I will keep making the offer and hope that litigants will see it as an opportunity to make their points one more time, rather than as a potential pitfall for the young and unwary. Just as I would like to see more young lawyers with speaking roles, I have also been struck by the relative paucity of female litigators and would similarly like to see more women in court.

I am aware that the women on the bench, particularly the few of us with younger children, are, to some extent, role models for other women and that we may have a unique perspective on some of the challenges facing women in the legal profession. I have been experimenting with a 10-4 trial day instead of the more usual 9-1, thinking that this might benefit parents who do school drop off, as well as resulting in fewer trial days for the jurors. I am also finding that as a judge, rather than a partner in a law firm with client and practice development responsibilities, I have much better control of my schedule (except for those times when I have no control over it at all). As a result, I am more likely to make it home for dinner with my family. That being said, the volume of work is huge and unrelenting and I almost always work for several more hour later in the evening.
Finally, for those who have asked, yes, some people treat me differently. Most people treat me the same, which I appreciate. That being said, the job has required me to give significant thought to personal relationships. All of the other judges have been incredibly welcoming and generous with their time and advice, but there is the adjustment of thinking of them as peers and the resulting reordering of my prior relationships with many of them. Similarly, many legal conflicts are easily identified and resolved, but determinations about the appearance of unfairness based on personal and past professional interactions can be much more nuanced. I believe that a judge should remain a part of the legal community, but there are challenges in maintaining those connections without compromising confidence in the fairness of the process. I pay a great deal of attention to this obligation, and am becoming more comfortable with the balancing as time goes on.

Judge Burroughs was sworn in as a United States District Court Judge for the District of Massachusetts in January 2015. Prior to joining the bench, she was a partner in the Boston law firm of Nutter McClennen & Fish. Before entering private practice, she served for sixteen years as an Assistant United States Attorney in Boston and Philadelphia.

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The Impact of Recent Revisions of the Massachusetts Rules of Professional Conduct on Confidentiality

by Martin J. Newhouse and Jeffrey D. Woolf

Heads Up

The recent revisions by the Massachusetts Supreme Judicial Court (SJC) to the Massachusetts Rules of Professional Conduct effective July 1, 2015 included numerous changes to the rules governing confidentiality of client information, including substantial revisions of rule 1.6 (“Confidentiality of Information”). The changes, as addressed herein, generally clarify a lawyer’s obligations under the Rules and also offer more helpful guidance on several points than was previously provided.

Rule 1.6:

- The scope of information covered remains unchanged. The SJC maintained a major difference between the Massachusetts and the ABA Model Rules, namely by continuing to limit the information covered by rule 1.6 only to “confidential information relating to the representation.” (The ABA Model Rule covers all “information relating to the representation.”)
• **A clearer definition provided for “confidential information.”** In a very helpful step, the SJC also provided new comments, [3A] and [3B], clarifying what constitutes “confidential information.” Comment [3A] defines confidential information as information relating to the representation of a client, whatever its source, that is (a) privileged; (b) likely to be embarrassing or detrimental to the client if disclosed; or (c) is information the lawyer has agreed to keep confidential. Comment [3A] also provides a road map of what types of information would not be “confidential” under the rule. Comment [3B] further explains the limitation of the rule to “confidential information” and explains how this change has been carried out throughout the Massachusetts Rules of Professional Conduct.

• **Expanding protection of non-confidential information.** In an interesting addition, the SJC warns in comment [4] that the prohibition against disclosing confidential information also prohibits any disclosure of information, while not itself protected under rule 1.6, that “could reasonably lead to the discovery of [protected] information by a third person.” Included in this are hypotheticals that may lead others to “ascertain the identity of the client or the situation involved.”

• **Enlarging the scope of permissible disclosures.** Most notably, the SJC has added two new exceptions to rule 1.6(b). Rule 1.6(b)(4) expressly permits disclosure “to secure legal advice about the lawyer’s compliance with these Rules.” Rule 1.8(b)(7) permits limited disclosure “to detect and resolve conflicts” when lawyers change employment or firm ownership changes. In addition, the new rule 1.6(b)(3), along with revisions to rule 1.6(b)(1) and (2), clarify prior existing exceptions. Significantly, rule 1.6(b)(1) continues to contain a provision, absent from the Model Rules, which authorizes the disclosure of confidential information “to prevent the wrongful execution or incarceration of another.” Rule 1.6(b)(2) also continues the prior Massachusetts provision that permits disclosure to “prevent the commission of a criminal or fraudulent act,” without limiting this exception to conduct committed by “the client,” as exists under Model Rule 1.6(b)(2). Thus the Massachusetts rule permits disclosure to prevent the commission of a crime or fraudulent conduct by a third person. Also unlike Model Rule 1.6(b)(2), the Massachusetts rule does not require that the lawyer’s services must have been used in furtherance of the crime or fraud in order for disclosure to be permitted. Permissive disclosure under rule 1.6(b)(2) is also not limited, as previously and under the Model Rules, to preventing conduct likely to cause substantial damage to property and financial interests of another; new rule 1.6(b)(2) additionally permits disclosure where substantial damage is likely to “other significant interests” of another.

• **Enhanced guidance with regard to disclosure exceptions.** Comments [5] et seq. have been revised or wholly rewritten to provide more detailed and much needed guidance for
lawyers seeking to understand whether disclosure is permitted or required. For example, comment [12] discusses disclosure that may be required by other law; comment [15] provides guidance on dealing with a court order requiring disclosure; comments [13] and [14] deal in detail with the disclosures when lawyers change employment or firms change ownership. Finally, comment [17] provides important guidance on how lawyers should exercise their discretion when an exception under rule 1.6(b) authorizes discretionary disclosure.

- **Addition of Rule 1.6(c):** This new subsection requires lawyers to make reasonable efforts to prevent inadvertent or unauthorized disclosure of, or access to, confidential information protected under the rule. New comments [18] and [19] provide, *inter alia*, that unauthorized access to or disclosure of confidential information “does not constitute a violation of paragraph [1.6](c) if the lawyer has made reasonable efforts to prevent the access or disclosure.” The comments discuss the factors to be considered as to whether reasonable efforts have been made. Comment [18] cross-references comments [3] and [4] to rule 5.3 with regard to the sharing of information with non-lawyers outside the lawyer’s firm (e.g., an outside document management company). Comments [18] and [19] confirm an attorney’s obligation to comply with all applicable state and federal privacy laws. (Practice tip: be aware of your obligations under Mass. G.L. c. 93H (the Massachusetts security breach notification law) and the corresponding regulations, 201 CMR § 17.00 et seq.).

**Rule 1.8(b) and 1.9(c)(1):**

Although in a number of respects, the SJC’s revisions to the Massachusetts Rules of Professional Conduct have brought our rules into closer conformity with the ABA Model Rules, they have also preserved important distinctions. As discussed above, the SJC retained our narrower definition of the scope of information covered by rule 1.6.

Similarly, while both rules 1.8(b) and 1.9(c)(1) parallel the ABA Model Rules in prohibiting the use of confidential information relating to the representation to the disadvantage of the client or, in the case of rule 1.9(c)(1), the former client, the SJC has retained in each rule the prohibition against using such information for the benefit of a third party or for the lawyer’s own benefit. Under rule 1.8(b) such information may be so used if the client gives informed consent or such use is permitted or required by the rules. Under rule 1.9(c)(1), such use is only allowed if permitted or required under rules 1.6, 3.3, or 4.1 with respect to the former client. Rule 1.9(c) applies not only to a lawyer who has formerly represented a client in a matter but also if the lawyer’s present or former firm has formerly represented the client in a matter.
**New Rule 1.18:**

On the other hand, the SJC has not hesitated to adopt aspects of the ABA Model Rules that fill gaps in or represent improvements to the Massachusetts ethics rules. One such example is the SJC’s adoption of Model Rule 1.18, which defines the duties owed to prospective clients. The new rule makes it an ethical violation for a lawyer to engage in conduct for which the lawyer would previously have been liable in tort for violating confidentiality obligations to a prospective client:

- Under rule 1.18(b), even when no client-lawyer relationship is formed with the prospective client, a lawyer may not use or disclose confidential information learned from the prospective client, except as rule 1.9 would permit in the case of a former client.

- Under rule 1.18(c), a lawyer who has received confidential information from a prospective client may not take on a representation materially adverse to the prospective client in the same or substantially related matter if the confidential information received could be significantly harmful to the prospective client. If a lawyer is disqualified under this sub-section, no lawyer in the lawyer’s firm may knowingly undertake or continue the representation adverse to the prospective client.

- However, rule 1.18(d) provides that, even when the lawyer has received disqualifying information from the prospective client, representation in the adverse matter is permitted if (1) both the affected and the prospective client give written informed consent or the lawyer who received the information took reasonable precautions to limit the information from the prospective client and is timely screened, as defined in rule 1.10(e), and the prospective client is promptly given written notice.

**Rule 1.0 (former Rule 9.1):**

“Definitions” in the Massachusetts Rules of Professional Conduct used to be found in rule 9.1. Consistent with the ABA Model Rules, this has been renamed as “Terminology” and renumbered as rule 1.0. Three new definitions (and corresponding commentary) have been added: “informed consent”; “confirmed in writing”; and “writing” (or “written”). The new Massachusetts definitions are largely consistent with the ABA Model Rules.

**New Rule 4.4(b):**

The SJC also has added rule 4.4(b), which is identical to the corresponding ABA Model Rule, and for the first time addresses a lawyer’s obligation upon receipt of documents or electronic information that was inadvertently sent by opposing lawyers or parties. Rule 4.4(b) requires a lawyer receiving such documents or information to notify the sender promptly, in order that (as
stated in comment [2]) the sender may take protective measures. Comments [2] and [3] provide a good discussion of the problem the rule addresses. Importantly, comment [2] brings metadata in electronic documents within the purview of rule 4.4(b) “only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.” Comment [3] recognizes a lawyer’s professional discretion to return or delete such documents unread where the law does not require other action.

In conclusion, the reader is directed to the “Report of the Standing Advisory Committee on the Adoption of Revised Rules of Professional Conduct Effective July 1, 2015.” for a further discussion of these and other changes.

Martin J. Newhouse, President of the New England Legal Foundation, is a member of the SJC Clients’ Security Board and BBA Ethics Committee.

Jeffrey D. Woolf is an Assistant General Counsel to the Board of Bar Overseers and is a member of the BBA Ethics Committee.

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Seeking Justice for the Erroneously Convicted: Assessing the First Decade of Compensation Claims under Chapter 258D

by David Hartnagel

Legal Analysis

By the late 1990s and early 2000s, due to increased use of DNA and other scientific evidence, and further scrutiny of eyewitness identification, the number of criminal exonerations in both Massachusetts and the nation grew significantly. As of 2002, over 100 prisoners nationwide were found to be innocent and released after additional scientific testing of evidence; and between 1997 and 2002, six men in Massachusetts were exonerated after new DNA testing proved they were innocent of the crimes for which they had been convicted.[i] As attention on wrongful convictions increased, so did interest in providing exonerated individuals with a means to seek relief redress for time served, erroneously, in prison. As a result, in late 2004, Massachusetts enacted Chapter 258D. See St. 2004, c. 444; G.L. c. 258D.

This legislation was intended, in part, to meet the Commonwealth’s “moral obligation” to compensate those who had been erroneously convicted.[ii] Before Chapter 258D was enacted, Massachusetts had compensated only two exonerated men over the prior half-century, both by special legislative action. In 1958, Santos Rodriguez, who had spent over two years in prison for allegedly killing a woman, received $12,500 after the true killer confessed. Similarly, in 1992, Bobby Joe Leaster, who had served 15 years of a life sentence for murder, received a $500,000
annuity when new eyewitness testimony exonerated him. In contrast, since the enactment of Chapter 258D, approximately 50 people have sought relief, resulting in the Commonwealth paying over $9 million to nearly two dozen individuals whose convictions had been overturned.

This article examines Chapter 258D’s key provisions and looks back at its first decade, analyzing how well the Act has worked in compensating those who were erroneously convicted, and proposing changes to make the Act more effective.

I. Key Provisions of the Erroneous Conviction Statute
A. To Seek Compensation, a Claimant Must First Be Eligible

Chapter 258D sets forth strict threshold criteria for an individual even to be considered eligible for compensation. A person must have been convicted of a felony and sentenced to not less than one year in a state prison – and served all or part of that sentence. G.L. c. 258D, § 1(C). In addition, the individual must have either received a pardon from the Governor or been granted judicial relief by a state court “on grounds which tend to establish the innocence of the individual.” G.L. c. 258D, § 1(B). The term “tend to establish” was offered by then-Governor Romney to “limit[] the class of claimants to those who received judicial relief on grounds that directly implicate innocence.” Guzman v. Commonwealth, 458 Mass. 354, 358-59 (2010). The phrase has been further interpreted to mean “grounds resting upon facts and circumstances probative of the proposition that the claimant did not commit the crime.” Id. at 362 (internal citations and quotations omitted). But such grounds must tend to do more than merely “assist the defendant’s chances of acquittal.” Id. at 360.

In the first appellate decisions interpreting the statute, Guzman and Drumgold v. Commonwealth, 458 Mass. 367 (2010), the claimants’ underlying convictions were overturned on grounds that undoubtedly tended to establish their innocence. In Guzman, the claimant’s defense attorney failed to call two eyewitnesses who would have testified that the claimant was not the person who committed the crime. 458 Mass. at 363-65. In Drumgold, the Commonwealth failed to disclose exculpatory evidence concerning promises and rewards made to a prosecution witness and newly discovered evidence relating to the credibility of a critical eyewitness. 458 Mass. at 372-76.

More recently, though, courts have considered factual scenarios that are less clear cut, such as where claimants’ convictions were reversed simply due to insufficient evidence. In the first instance, Renaud v. Commonwealth, 471 Mass. 315 (2015), the Court agreed with the Commonwealth that convictions reversed for insufficient evidence do not “categorically” equate to actual innocence, but the Court concluded that the absence of certain types of evidence may nonetheless tend to show actual innocence. Id. at 319. Courts must therefore “follow a case-specific, fact-based approach to determine whether judicial relief based on insufficient evidence
tends to establish actual innocence in any given case.” Santana v. Commonwealth, 88 Mass. App. Ct. 553, 555 (2015). As it turned out, the courts in Renaud, Santana, and Nguyen v. Commonwealth, 88 Mass. App. Ct. 1111, 2015 WL 6680985 (Nov. 2, 2015) (Rule 1:28 opinion) all held that the claimants were eligible under Chapter 258D. See Renaud, 471 Mass. at 317 (larceny convictions reversed where the evidence consisted largely of only an EBT card bearing the claimant’s name at the crime scene); Santana, 88 Mass. App. Ct. at 555 (drug conviction reversed because the only evidence of constructive possession was claimant’s presence as a passenger in the car where the drugs were discovered); Commonwealth v. Nguyen, 76 Mass. App. Ct. 1137, 2010 WL 2268933, at *3 (June 28, 2010) (Rule 1:28 opinion) (gun conviction reversed because of insufficient evidence that claimant had knowledge that the firearm was in the vehicle where it was found). As a result, the more recent appellate trend in these types of cases has been to hold in favor of claimants’ eligibility.

B. To Receive Compensation, a Claimant Has the Burden To Prove His Actual Innocence

If a claimant meets the eligibility requirements, he will face a trial at which he must, by clear and convincing evidence, prove that he did not commit the crime for which he was originally charged, or any other felony arising out of or reasonably connected to the facts supporting the indictment or complaint, or any lesser-included felony. G.L. c. 258D, § 1(C)(vi).

Chapter 258D, however, also recognizes that an erroneous conviction trial may take place years after the underlying crime occurred. Evidence and testimony may have been lost, forgotten, damaged, or destroyed, all through no fault of any party. Thus, Chapter 258D provides that a court “shall exercise” its discretion “when determining the admissibility and weight of evidence” by considering: “any difficulties of proof caused by the passage of time, the death or unavailability or witnesses, or other factors not caused by the claimant, or those acting on the claimant’s or the commonwealth’s behalf.” Id. § 1(F). Moreover, “[t]he court shall instruct the jury that it may consider the[se] same factors when it weighs the evidence presented at trial.” Id. Chapter 258D thus balances the need for the parties to provide the factfinder with as much evidence concerning the allegations and defenses, while acknowledging the limitations on the reliability of such evidence.

C. Types of Relief Available Under Chapter 258D

A successful claimant can receive four potential types of relief: (1) $500,000[vi]; (2) 50 percent tuition reduction from any public university or college in Massachusetts; (3) services to address physical and emotional deficiencies related to one’s conviction and incarceration; and (4) expungement or sealing of records. G.L. c. 258D, §§ 5, 7. However, one who settles with the Commonwealth, where no judgment is entered in his favor, is ineligible to seek expungement or sealing. See Memo. of Decision and Order, Commonwealth v. Baran, Civil Action No.
SUCV2010-00034 (Mass. Super. Dec. 12, 2013). In addition, a claimant is barred from recovering punitive damages, interest, costs, or attorney’s fees. See G.L. c. 258D, § 5(A).

II. Actions Under the Erroneous Conviction Statute

Approximately 50 actions have been filed under Chapter 258D and the vast majority have proceeded along one of two paths: settlement or dismissal due to ineligibility. The initial cases largely concerned convictions that had been reversed well before 2004 because of scientific testing, perjured or manufactured evidence, or faulty eyewitness testimony. Due to the uncontroverted evidence of innocence, those cases often ended in settlements at or near the maximum amount of monetary relief. The Commonwealth has settled approximately half of all Chapter 258D cases for over $9 million, which cases (except for one) were filed in the statute’s first five years. After 2010, the Commonwealth has settled few cases and none recently. Many of the remaining closed cases were often dismissed as the claimants were ineligible, i.e. their convictions were reversed on grounds that did not tend to establish their innocence, their claims were untimely, or they did not otherwise satisfy the statute’s requirements.

Just three cases have gone to trial, and only one – brought by Ulysses Charles – ended with a verdict for the claimant. But this figure will likely increase in the near future: as of this article’s publication, around a half dozen cases are pending before the Superior Court and at least two others are pending appeal (with respect to claimants’ eligibility). Also, a number of these actions, such as Renaud, Santana, and Nguyen, are unlikely to settle. These cases are largely based on convictions that were reversed due to insufficient evidence, as opposed to newly discovered affirmative evidence of innocence such as DNA evidence, recanted testimony, or police misconduct. Similar circumstances existed in the two other Chapter 258D actions that went to trial, which ended with verdicts in favor of the Commonwealth. Ultimately, with the presently pending Chapter 258D cases, the Commonwealth will likely be more inclined to take its chances at trial (with the attendant cap on damages and unavailability of interest and fees) than settle beforehand, in light of the claimants’ high burden at trial and the lack of clear exonerating evidence.

III. Challenges to Fulfilling Chapter 258D’s Goals, and Potential Solutions

With just over a decade’s worth of experience with Chapter 258D, some challenges to its efficacy have come to light. Certain changes, some small in nature, could greatly improve its workability and help achieve its purpose more fully.

A. Chapter 258D Actions Proceed Slowly, Preventing an Erroneously Convicted Individual From Receiving Timely, Effective Compensation

1. Chapter 258D Actions Are Assigned to the Slowest Schedule in the Superior Court
Because of the pace at which Chapter 258D actions proceed, they place an unnecessary burden on claimants. This is particularly so when one considers that claimants’ cases typically involve considerable investigation and discovery well before any Chapter 258D action is even contemplated. One reason for the slow pace is that Chapter 258D actions, as actions against the Commonwealth, are assigned to the most deliberate schedule, Track A, under current Superior Court Standing Orders. Track A provides for two years of discovery, and targeted resolution in three years. See Superior Court Standing Order 1-88.

As one example, Bernard Baran served approximately 20 years in prison before his conviction was reversed. Commonwealth v. Baran, 74 Mass. App. Ct. 256 (2009). By the time Baran filed his Chapter 258D action in 2010, at least a half dozen substantive and evidentiary proceedings had occurred over the prior two decades. Yet, Baran was forced to proceed via Track A. Ultimately, Baran settled for less than the statutory cap in 2012, instead of waiting – possibly even years longer – for greater compensation and a potential judgment of innocence.

Even where claimants had claims that would otherwise exceed $500,000 in damages, if not for the Chapter 258D cap, due to lengthy incarcerations, and presented uncontroverted evidence of innocence, they have at times faced long delays before receiving compensation. Stephan Cowans, Angel Hernandez, Dennis Maher, Neil Miller, Marvin Mitchell, Anthony Powell, and Eric Sarsfield all had convictions reversed as a result of scientific evidence, yet each waited from seven months to almost two years after filing their Chapter 258D complaints before settling for the maximum amount of compensation under the statute.

These delays are contrary to the statute’s purpose, particularly when a conviction is reversed as a result of uncontroverted scientific evidence and the claimant’s innocence should not be in question. As a result, Standing Order 1-88 should be amended to allow for Chapter 258D cases to be brought under an accelerated schedule. In the alternative, Chapter 258D should be amended to provide a right to a speedy trial, akin to other civil matters. Another possible solution is mandatory mediation between a claimant and the Commonwealth in cases where convictions are overturned on the basis of uncontroverted scientific evidence. This final idea finds further support in light of the newly-enacted Chapter 278A, which provides for post-conviction access to DNA testing for convicted individuals asserting their innocence. G.L. c. 278A, et seq.

2. The Commonwealth’s Right to Interlocutory Appeal of Eligibility Determinations

Another cause of significant delay in Chapter 258D actions is the Commonwealth’s right to interlocutory appeal of an adverse decision on the issue of a claimant’s eligibility. The Commonwealth may pursue such an interlocutory appeal pursuant to the doctrine of present execution because Chapter 258D represents a limited waiver of sovereign immunity. See Irwin
The claimant is then faced with a difficult choice: (a) stay discovery, preserve resources, and wait for a potentially lengthy appeal period to be completed or (b) proceed with discovery, incur expenses, and impose on the claimant’s time and mental health, while running the risk of losing the appeal on the threshold issue of eligibility.

One possible solution is for the Appeals Court to alter its internal practices, prioritizing Chapter 258D actions when the issue is one of a claimant’s eligibility. The Appeals Court regularly expedites cases involving custody and adoption issues concerning children; the same could be done for Chapter 258D erroneous conviction claims. An alternative would be to amend Chapter 258D to impose a fee-shifting measure for any unsuccessful appeal by the Commonwealth on the issue of eligibility.

B. The Statutory Cap on Monetary Relief Prevents Fair Compensation

After a decade in practice, the Chapter 258D damages cap of $500,000 should be increased or modified. Simply put, an individual who was erroneously convicted and served months, years, or decades in prison is very likely to receive a damages award exponentially lower than one who alleges that the Commonwealth violated his civil rights or discriminated under Chapter 151B, as neither of those claims has a cap on damages.

When the statute was enacted in 2004, capping monetary damages at $500,000 was intended to limit the Commonwealth’s fiscal exposure. This concern, however, is outweighed by the moral imperative of providing individuals the opportunity to be compensated for years lost in wrongful confinement. In the initial years after Chapter 258D’s passage, the Commonwealth settled many claims with people exonerated long before the law’s enactment, resulting in millions of dollars of damages awards. But since 2011, the Commonwealth has paid less than a million dollars in compensation under Chapter 258D to only a few exonerees, and nothing since 2013.

Modifying the damages cap would provide the Commonwealth, courts, and juries with the flexibility to compensate more fairly those individuals most deserving. For example, Angel Hernandez served 13 years before being cleared through DNA evidence. He ultimately received a maximum settlement under the statute; however, that amount equaled only around $38,000 for every year he should not have been in prison.

The Commonwealth need not forgo a cap – other jurisdictions with analogous compensation schemes have more flexible forms of relief, some providing limits based on years of incarceration. As a result, claimants could be entitled to a maximum amount of money for every year they erroneously served in prison, for example $100,000 per year, thereby providing greater compensation to those persons who have suffered the greater harm.
The enactment of Chapter 258D filled a critical void – it both acknowledged that mistakes are made in our criminal justice system and that the Commonwealth should compensate the victims of such errors. After a decade in practice, however, Chapter 258D presents certain obstacles for erroneously convicted individuals to receive compensation for the years they were wrongfully imprisoned. Consistent with the statute’s goal to address the Commonwealth’s moral obligation to these individuals, Chapter 258D should be amended to advance its original intent: fairly and efficiently compensating erroneously convicted individuals.


[iv] Such relief must have vacated or reversed the conviction and either the indictment or complaint was dismissed (or a *nolle prosequi* entered) or the individual was found not guilty if a new trial was conducted. G.L. c. 258D, § 1(B)(ii).

[v] The Court in *Guzman* also provided a non-exhaustive list of procedural, evidentiary, and structural deficiencies that may serve as the basis for the reversal of a defendant’s conviction, but would not satisfy Chapter 258D’s eligibility provision in light of the Governor’s amendment: a violation of a defendant’s Sixth Amendment right to confrontation; a violation of a defendant’s *Bruton* rights; a prosecutor’s improper closing argument; and an erroneous disallowance of a defendant’s peremptory challenge. *Guzman*, 458 Mass. at 358 n.6; see *Silva-Santiago v. Commonwealth*, 85 Mass. App. Ct. 906, 909 (2014); *Riley v. Commonwealth*, 82 Mass. App. Ct. 209, 215-16 (2012).

[vi] One concern of legislators prior to Chapter 258D’s enactment was the financial burden it might place on the Commonwealth. In the end, the payment of the $500,000 annuity to Leaster in 1992 served as a guidepost for the maximum amount of recovery allowable under the statute. See Note 3 (citing then-Representative Jehlen’s testimony before the House Committee on Public Safety (Mar. 15, 2001)); McCarthy, Brendan, “House passes wrongful conviction bill,” *The Boston Globe* (Oct. 23, 2003); G.L. c. 258D, § 5.

[vii] Individuals whose convictions had been overturned prior to 2004 had three years after the enactment of Chapter 258D to file suit. *2004 Mass. Acts c. 444, § 3*. 

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This includes the settlements for, among others, Stephen Cowans, the Estate of Louis Greco, Angel Hernandez, Donnell Johnson, Dennis Maher, Neil Miller, Marvin Mitchell, Marlon Passley, Anthony Powell, Guy Randolph, and Eric Sarsfield. See http://www.newenglandinnocence.org/category/exonerees/ (last visited January 2, 2016).

See Note 8.

Certain legislative sponsors of the original statute anticipated that such cases would be handled promptly. Then-Senator Diane Wilkerson said she “might understand [the Attorney General] scrutinizing a case involving a defendant who was wrongly convicted because of, say, a flawed police investigation” but questioned the delays in compensation for those who filed claims who “were exonerated because of airtight DNA evidence.” Saltzman, Jonathan, “Reilly accused of funds delay for ex-inmates,” The Boston Globe (June 21, 2005).

See, e.g., G.L. c. 151B, § 9 (for unlawful discrimination); G.L. c. 231, § 59F (for parties age 65 or older).

The latter is what occurred in Irwin. The Commonwealth appealed the denial of its motion to dismiss in August 2011; the claimant did not agree to a stay pending appeal; the parties engaged in full discovery for nearly two years; and in July 2013, the Supreme Judicial Court dismissed the case due to the claimant’s ineligibility.


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Watershed Changes to Eyewitness Identification Law in Massachusetts

by Scott P. Lopez and Lauren J. Weitzen

Heads Up

Over the past year, the Supreme Judicial Court (“SJC”) has fundamentally changed the law on the admissibility of eyewitness identifications in criminal cases. Specifically, the SJC restricted the use of in-court identifications by eyewitnesses and adopted new jury instructions for assessing eyewitness testimony. This article summarizes these changes to Massachusetts law.

The Supreme Judicial Court has acknowledged that “research regarding eyewitness identification procedures is complex and evolving” and “eyewitness identification is the greatest source of wrongful convictions but also an invaluable law enforcement tool in obtaining accurate convictions.” Commonwealth v. Walker, 460 Mass. 590, 604 n.16 (2011). Following the Walker decision, the SJC convened a Study Group on Eyewitness Identifications (“Study Group”). The Study Group was tasked with determining how the Commonwealth could best deter unnecessarily suggestive identification procedures in criminal cases. In addition, the Study Group assessed whether existing model jury instructions provided adequate guidance to juries in evaluating eyewitness testimony. Three subcommittees of the Study Group focused on police protocols, pretrial evidentiary hearings on identification procedures, and improving jury instructions to better assist juries. See Executive Summary, Supreme Judicial Court Study Group on Eyewitness Evidence, Report and Recommendations to the Justices (July 25, 2013) (“Study Group Report”). The Study Group presented its Report in July 2013. By late 2014, the SJC began citing to the Study Group Report when issuing a trilogy of decisions that implemented many of the Study Group’s recommendations.

Prior Legal Landscape

Massachusetts law permits the admission of an out-of-court eyewitness identification unless a defendant proves, by a preponderance of the evidence, that the identification procedures employed by the police were unnecessarily suggestive. Commonwealth v. Johnson, 420 Mass. 458, 463-64 (1995); Commonwealth v. Thornley, 406 Mass. 96, 98 (1989). The relevant inquiry is not whether the witness was mistaken. Rather, the question is whether the identification was the product of impermissibly suggestive police procedures. If the identification is admissible, a jury is free to weigh the reliability of the identification evidence. See Walker, 460 Mass. at 599; Johnson, 420 Mass. at 463-64. See[1]

While the SJC previously adopted a per se rule of exclusion for unnecessarily suggestive out-of-court identifications, the Court had never adopted such a rule for in-court identifications. Until recently, in-court identifications were excluded only if tainted by an out-of-court confrontation

**In-Court Eyewitness Identifications – New Crayton and Collins Rules**

In Commonwealth v. Crayton, 470 Mass. 228 (2014), the Court addressed whether an in-court identification is admissible when there has been no prior out-of-court identification. Historically, a defendant’s only protection against admission was to seek alternative, less-suggestive, out-of-court identification procedures in advance of trial, or to challenge the reliability of the in-court identification through a cross-examination focusing on the witness’s demeanor and statements during the in-court identification. Using the Study Group Report as support, Crayton held that an in-court identification is admissible only when there is “good reason” for its admission. Id. at 241. Crayton reasoned that in-court identifications may be more suggestive than one-on-one show-up[2] identifications conducted out of court. Id. at 237. Also, Crayton noted that a defendant’s presence in a courtroom acts “as confirmation that the prosecutor...believes the defendant is the [perpetrator].” Id. Therefore, the eyewitness is likely to conform to the behavior of others and identify the defendant. Id. (quoting Evan J. Mandery, Due Process Considerations of In-Court Identifications, 60 Alb. L. Rev. 389, 417-18 (1996)).

Crayton further reasoned that even though the jury can observe the witness during the in-court identification, jurors will not be “better able to evaluate the accuracy of the in-court identification” because statements attributed to “a witness’s level of confidence in an identification are not a reliable predictor of the accuracy of the identification.” Id. at 239. Moreover, it is very difficult to convince a jury through cross-examination that such statements are attributable to surrounding suggestive circumstances. Id. at 240.

Following Crayton, in-court identifications are admissible only where there is “good reason” for their admission. “Good reason” exists where the witness’s identification is not based solely on his memory of witnessing the incident; for example, if a witness was familiar with the defendant before the crime or if the witness was both an eyewitness and an arresting officer. Id. at 242. In practice, Crayton places the initial burden on prosecutors to move in limine for the admission of an in-court identification. Only then must the defendant demonstrate there is no “good reason” to permit such an in-court identification. Id. at 243. This new rule aims to avoid the “unfair evidentiary weight of a needlessly suggestive show-up identification that might be given more weight by a jury than it deserves.” Id. at 244.
In Commonwealth v. Collins, 470 Mass. 255 (2014), the Court addressed whether an in-court identification is admissible when a prior out-of-court identification resulted in “something less than an unequivocal positive identification of the defendant.” Id. at 262. Citing the Study Group Report, Collins noted that an eyewitness who is unable to make a positive identification before trial, or lacks confidence in his identification, is likely to regard the defendant’s prosecution as “confirmatory feedback” that the defendant is the “right” person. As a result, the witness may develop an “artificially inflated level of confidence” in any subsequent in-court identification. Id. at 262-63. This “enhancement of memory” makes assessing the accuracy of the in-court identification more difficult for juries. Id. at 263-64. Cross-examination will not always reveal prior, inaccurate in-court identifications because most jurors are unaware both of the weak correlation between confidence and accuracy and of a witness’s susceptibility to manipulation by suggestive procedures or confirming feedback. Id.

Following Collins, the prosecution must move in limine to admit an in-court identification where an eyewitness to a crime has not made an unequivocal positive identification of the defendant before trial but the prosecutor nonetheless intends to ask the eyewitness to make an in-court identification of the defendant. Once the prosecution makes this motion, the defendant then bears the burden of demonstrating that there is no “good reason” for the admission of the in-court identification. “Good reason” in this context “usually would require a showing that the in-court identification is more reliable than the witness’s earlier failure to make a positive identification and that it poses little risk of misidentification despite its suggestiveness.” Id. at 265 (emphasis added).

New Jury Instructions

The Study Group was also charged with determining whether existing model jury instructions provide adequate guidance to juries in evaluating witness testimony. The prior Massachusetts model jury instruction on eyewitness identifications, adopted in 1979, delineated factors for the jury to consider when evaluating an eyewitness identification; however, it did “not instruct the jury as to how those factors may affect the accuracy of the identification.” Commonwealth v. Gomes, 470 Mass. 352, 363 (2015) (emphasis added). Gomes held that there are five principles pertaining to eyewitness identifications that are “so generally accepted” that they must be included in a model jury instruction. Id. at 376. Those principles are: 1) human memory does not function like a video recording, but is a complex process that consists of the stages of acquisition, retention, and retrieval; 2) an eyewitness’s expressed level of certainty, by itself, may not indicate the accuracy of his or her identification; 3) high stress can reduce an eyewitness’s ability to make an accurate identification; 4) a witness’s recollection of the memory and the identification can be influenced by unrelated information that is received both before or after making that identification; and 5) a prior viewing of a suspect at an identification procedure may reduce the reliability of a subsequent identification procedure with the same
suspect. Id. at 369-76. Gomes adopted a provisional jury instruction, and the SJC issued a new model jury instruction in November 2015. supra This new instruction incorporates many of the principles discussed in the Study Group Report and in Gomes and is designed to educate jurors, in plain language, on the science of memory so that jurors are better equipped to assess the credibility and reliability of eyewitness testimony. This new instruction will increase jurors’ understanding of the complexities surrounding eyewitness identifications. Id., at 376-77. However, as Gomes noted, the new jury instruction is not intended to preclude additional expert testimony at trial; rather, such expert testimony remains crucial to elaborate on the principles addressed within the jury instruction and to further explain how other relevant variables in each individual case may affect the accuracy of an identification. Id., at 378. With an eye to the future, Gomes acknowledged the potential need to revise eyewitness jury instructions “as science evolves.” Id., at 368.

**Conclusion**

Just as the science associated with eyewitness identifications will continue to evolve, so will the case law. The Crayton, Collins, and Gomes holdings are positive steps toward reforming case law to conform to science. In addition to issuing these three decisions, the SJC announced a new Standing Committee on Eyewitness Identification in 2015. This Committee is tasked with offering ongoing guidance to the courts regarding eyewitness identification procedures. The Massachusetts criminal justice system is now poised to more fairly address the issues raised when an individual is accused of committing a crime based on eyewitness testimony.


[2] A show-up is an identification procedure wherein a witness to a crime is shown only one person. Usually, the person is someone the police believe is a suspect. The witness is usually shown the person at the scene of the crime or the witness is brought to where the suspect is detained.


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Raising the Bar on Sentencing Policy: The Massachusetts Sentencing Commission
by Hon. John T. Lu and Kevin Riley

The Profession

“Empower the Sentencing Commission to revisit the state’s approach to sentencing and sanctions”, this was one of several key criminal justice policy recommendations proposed by the Massachusetts Criminal Justice Coalition in 2013. At the urging of criminal justice leaders, the Massachusetts Sentencing Commission, originally codified in Massachusetts G.L. c.211E, was re-established in 2014 and met for the first time that October to consider the performance of our sentencing system. Nearly nineteen years after the publication of the first “Report to the General Court” in 1996, once again the members and staff of the Massachusetts Sentencing Commission eagerly embrace the opportunity to reposition the Commonwealth at the forefront of criminal justice policy development.

The current sentencing guidelines are used by many judges on a voluntary basis. The guidelines are in the form of a grid where the seriousness of the offense and the criminal history of the defendant are systematically considered in making a sentencing recommendation.

Comprised of three judges, three prosecutors, and three defense attorneys, along with the Secretary of the Executive Office of Public Safety and Security, a representative of the Massachusetts Sheriffs’ Association, the Commissioner of the Department of Correction, a designee of the Parole Board, the Commissioner of Probation, and a designee of the Victim Witness Assistance Board, the Commission represents a diverse cross-section of subject-matter experts, including:

- Hon. John T. Lu (Chair): Associate Justice, Superior Court;
- Daniel Bennett, Esq: Secretary, Executive Office of Public Safety and Security;
- Michael J. Callahan, Esq: Executive Director, Massachusetts Parole Board;
- Edward J. Dolan: Commissioner, Massachusetts Probation Service;
- Mary Alice Doyle, Esq: Deputy First Assistant DA, Essex County DAs Office;
- Peter L. Ettenberg, Esq: Defense Attorney (MACDL);
- Hon. Kenneth J. Fiandaca: Associate Justice, Boston Municipal Court;
• Pamela Friedman, MSW: Chief, Victim Witness Unit Norfolk County DAs Office;
• Brian S. Glenny, Esq: First Assistant DA, Cape & Islands DAs Office;
• Hon. Mary Elizabeth Heffernan: First Justice, Newton District Court;
• Carol Higgins O’Brien: Commissioner, Massachusetts Department of Correction;
• Dean A. Mazzone, Esq: Senior Trial Counsel, Criminal Bureau Attorney General’s Office;
• John S. Redden, Esq: Attorney-in-Charge, Brockton Superior Court Trial Unit (CPCS);
• Martin Rosenthal, Esq: Defense Attorney (MACDL); and,
• Steven W. Tompkins: Sheriff, Suffolk County.

Commission members, appointed in accordance with Massachusetts G.L. c. 211E, serve on a voluntary basis and are generally appointed for six-year terms; no voting member may serve more than two full terms. The enabling legislation envisions the Massachusetts Sentencing Commission as an ongoing entity that supports, monitors and assesses the implementation of sentencing initiatives throughout the Commonwealth. Under the statute the Commission and its staff seek to:

• Analyze the impact of existing and proposed sentencing policies and practices on criminal justice resources using computer simulation models;
• Provide training and support to court practitioners on the use of sentencing guidelines;
• Recommend the appropriate placement of newly-created crimes on the sentencing guidelines grid;
• Conduct research on sentencing and other criminal justice issues to help guide the formulation of policies and legislation;
• Collaborate with criminal justice agencies on system-oriented research initiatives; and,
• Serve as a clearinghouse for information on sentencing.

Since the Commission’s initial meeting in October 2014, members and staff have convened on a monthly basis to discuss a wide scope of proposed sentencing changes, initiatives, and policies. The Commission’s commitment to data-driven decision making and evidence-based practices is furthered by the appointment of University of Massachusetts Lowell Professor James Byrne, an authority on evidence-based sentencing practices, to the position of outside technical advisor and the Commission’s access to the expertise of staff and faculty at the Robina Institute of Criminal Law and Criminal Justice at the University of Minnesota Law School. On November 18, 2015 the Commission held a public hearing to solicit public commentary on sentencing matters. Further, in addition to strongly considering valuable public input on sentencing, the
Commission has called upon the expertise of the following nationally recognized leaders to help guide the work of the Commission:

- Michael Coelho: Deputy Commissioner of Programs at the Massachusetts Probation Service, Coelho addressed the Commission on the Pew Results First Initiative, a cost-benefit approach to guiding policy and budgetary decisions throughout the Massachusetts criminal justice system.

- Professor Mark Kleiman: Then a Professor of Public Policy at the Luskin School of Public Affairs, UCLA at Berkeley, Professor Kleiman engaged Commission members in discussion of the HOPE model of probation supervision and best practices in the sentencing of drug offenders.

- Professor Kevin Reitz: Professor of Law at the University of Minnesota Law School, Professor Reitz provided a national perspective on the work of other sentencing commissions and how Massachusetts can incorporate nationally recognized best practices into our sentencing guidelines model.

- Professor Richard Frase: Co-Director of the Robina Institute of Criminal Law and Criminal Justice, Professor Frase provided valuable insight on developing a safety-valve provision offering qualified offenders relief from mandatory minimum sentences.

- Commissioner Edward Davis (ret.): Former Boston Police Commissioner Davis presented Commission members with a law enforcement perspective on sentencing and best practices for promoting successful post-incarceration reintegration for offenders.

- District Attorney Daniel Conley: Suffolk County District Attorney Conley provided Commission members with a prosecutorial perspective on sentencing and crime control.

- Judge Nancy Gertner (ret.): A former Federal Judge, Gertner presented Commission members with her experience and perspectives in working with the federal sentencing guidelines.

In addition to participating in full Commission meetings, Commission members also serve on sub-committees. Detailed below is a brief synopsis of each sub-committee and the responsibilities and work they are engaged in:

- Community-Based Sanctions Sub-Committee: Focusing on innovative solutions to incentivize compliance with community-based sanctions, restructuring of supervision fees, community relations through outreach initiatives, and considering the implications of “zero-based” conditions of probation where every condition must be justified.
• Guidelines and Legislation Sub-Committee: Focusing on the development of a comprehensive sentencing guidelines model, one supported by data and grounded in research. Sub-committee members are actively debating and considering improvements designed to strengthen statutory criminal justice provisions.

• Outreach and Training Sub-Committee: Responsible for the coordination of public hearings as well as making recommendations to improve the web presence of the Commission. Further, sub-committee members are also responsible for the development of training resources and for providing technical support to guidelines users at the local court level.

• Research and Data Sub-Committee: Responsible for the review and approval of all research related requests, including the development of information sharing protocols. Sub-committee members also serve as a review board to monitor any mutually agreeable external research projects the Commission engages in. Further, sub-committee members may analyze sentencing data to monitor developing trends and rates of compliance and departure from recommended sentencing ranges.

The Massachusetts criminal justice system is engaged in many initiatives that share the mission of, and parallel the work of the Commission. The Council of State Government’s Justice Reinvestment Initiative and the best practices in sentencing committees within the Trial Court are two such initiatives.

The Council of State Government’s Justice Reinvestment Initiative in Massachusetts is a significant cost-savings. Experts from the Justice Reinvestment Initiative will present these findings to a bipartisan task force that will debate and present these recommendations to the legislature. The cost-savings generated through these recommendations can then be reinvested in front-end programs designed to reduce recidivism. Currently, 24 states and 17 local jurisdictions throughout the United States participate in the Justice Reinvestment Initiative.

Led by Chief Justice Ralph Gants, working groups on best practices in sentencing are active in each court department with significant criminal jurisdiction. Committee members, which include judges, probation officers, prosecutors, defense attorneys and police chiefs, are tasked with the development and implementation of sentencing best practices specific to each of these court departments. It is the intent of these committees to develop a set of sentencing best practices to serve as a judicial decision making support tool, guiding judges in crafting individualized sentences that are consistent with best practices whenever possible.

Moving forward, the Sentencing Commission is developing data-driven policy recommendations and remains committed to collaborating with nationally recognized experts from the academic
and legal communities. Given the diverse backgrounds of Commission members, significant differences of opinion on how to best improve sentencing in Massachusetts are unavoidable, and despite this, many Commission members are encouraged by a shared vision. This common vision is one that does not compromise public safety and scarce correctional resources, and seeks to reduce prison populations when consistent with public safety, to reduce recidivism, to enhance the utilization of intermediate sanctions, and to support an economically sustainable correctional model. The Commission extends its sincere gratitude to the many local champions and nationally recognized leaders who have whole-heartedly endorsed and supported our mission as we work to bring evidence-based practices to sentencing policy in Massachusetts.

*John Lu is a Superior Court justice and chair of the Massachusetts Sentencing Commission as well as an Adjunct Professor of Law at Boston University. He is the lead Superior Court judge for a Bureau of Justice Assistance-funded Demonstration Field Experiment of HOPE probation principles, a randomized control trial of supervision of high-risk probationers. Lu’s professional interests include criminal justice and sentencing innovation, leadership and management, and teaching.*

*Kevin Riley is a research analyst at the Massachusetts Sentencing Commission. A graduate of the University of Massachusetts Lowell, Riley’s professional interests include statistical analysis, geographic information systems (GIS) and economically efficient alternatives to justice system intervention.*

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**The Rise of the On Demand Economy: The Tension between Current Employment Laws and Modern Workforce Realities**

**by Nancy Cremins**

**Heads Up**

Over the last several years, startups brought convenience to the masses by providing virtually anything on demand. Rides, groceries, takeout service, house cleaning, and more are all accessible with a few taps on your smartphone. The sheer volume of human capital needed to make these on demand businesses function, along with the unpredictable demands of consumers, caused companies such as Uber, Lyft, Postmates, and Instacart (to name a few) to make the business decision to classify these service workers as independent contractors.

Building the infrastructure for an on demand business that serves many customers in multiple cities, or even multiple countries, is an incredibly expensive endeavor. For example, Uber has gone through **13 rounds of funding and raised over $6.6 billion** to support its large-scale operation. By necessity, these startups must be cost conscious with their capital or risk
failure. Classifying their workers as independent contractors saves them substantial sums of money on employment taxes and benefits. These businesses claim that independent contractor status is also beneficial for the workers who are permitted to retain flexibility to work on their own terms as often as they want. For valid reasons, some (though not all) on demand workers do not agree.

Workers classified as independent contractors do not have access to company-provided benefits and protections such as paid time off. They are not given the payment protections of minimum wage, and overtime pay. Nor do they have the safeguards of worker’s compensation and unemployment insurance. These workers also shoulder the cost of the business expenses incurred in performing their jobs, such as their tools, supplies, or the cost of vehicle operation (though those are deductible business expenses). In addition, workers are responsible for paying all taxes on pay, which means the company is not contributing to employment taxes, Social Security, or Medicare. Opponents to the present on demand economy practice of classifying workers as independent contractors argue that tight standards on employee classification provide better protections and more financial security for workers.

Around the country, workers, businesses, and localities are approaching the shift to the independent contractor model in a variety of ways. A host of lawsuits were filed by workers against a number of on demand businesses asserting claims for worker misclassification. These lawsuits are costly and place tremendous pressure on the companies, often resulting in stagnating growth or even closure of the business. For example, in July 2015, on demand home services business, Homejoy, shut down because it ran out of money defending worker lawsuits and could not raise an additional round of investment due to pending litigation.

Some on demand businesses are attempting to avoid or prevent additional misclassification lawsuits by preemptively classifying their workers as employees. Instacart (which is defending its own misclassification lawsuit) announced, in June 2015, that it would commence classifying its workers as employees. Other companies are maintaining their practice of classifying workers as independent contractors while they wait for the outcome in the bellwether case on the issue, O’Connor v. Uber Technologies et al, C13-3826 EMC, pending in the Northern District of California.

In general, things have not gone Uber’s way in the litigation. On March 11, 2015, the Court denied Uber’s motion for summary judgment. On September 2, 2015, the Court certified the case as a class action. What’s more, during the pendency of the lawsuit, the California Labor Commission ruled that a specific Uber driver was an employee, and not an independent contractor. While the ruling was non-binding and impacted only one driver, it received considerable attention. The trial is set to commence on June 20, 2016 and the outcome will have a substantial impact on the freelance economy.
In another approach, the Seattle City Council voted in December 2015 to approve a bill that would permit drivers for Uber, Lyft, and other ride-hailing apps to form unions and negotiate wages. Such a city ordinance is unprecedented as it would be the first to allow independent contractors to engage in collective bargaining. Still, the ordinance may face legal challenges based on the contention that it is preempted by federal law and, if not preempted, that collective bargaining by independent contractors could constitute illegal price-fixing under antitrust law.

Here in Massachusetts, there is a presumption that a worker who provides services to a business is an employee unless all of the following are met:

- The worker is free from the company’s control and direction;
- The services provided are outside the company’s usual course of business; and
- The worker is customarily engaged in an independently established trade, occupation, or business of the same nature that is involved in the services performed for the company. M.G.L. c. 149, § 148B.

Given such stringent guidelines, the safe default position is that a company should classify its workers as employees, not independent contractors. However, in April 2015 the Supreme Judicial Court took a narrower approach than some anticipated in Sebago v. Boston Cab Dispatch, Inc., 471 Mass. 321 (2015).

In Boston Cab, the Court found: (i) taxi drivers did not provide services to the cab companies or garages; (ii) drivers were free from the direction and control of the cab companies; (iii) services provided by drivers were not in the ordinary course of business of cab companies; and (iv) drivers were engaged in an independently established trade, occupation or business. As a result, the Court found that the drivers were properly classified as independent contractors. In reaching this decision, the Court determined that the cab companies “are not concerned with the results of plaintiffs’ operations, as drivers are not required to remit a percentage of their revenues, which includes both fares and tips.” Id. at 334.

What sets the Boston Cab case apart from the Uber case is the existence of a regulatory framework that applies to cab companies and drivers that does not (at least not presently) apply to Uber drivers. The Court specifically stated that its conclusion rested in large part on the existence of the regulatory framework of Boston Police Department Rule 403, Hackney Carriage Rules and Flat Rate Handbook (2008) (Rule 403), which creates a system whereby drivers can “operate as either employees or entrepreneurs with their own separately defined and separately regulated business.” Boston Cab, 471 Mass. at 338. In holding that drivers were properly classified as independent contractors, the Court found that the “harmonious reading” of Rule 403 and the independent contractor statute as set out in M.G.L. c. 149, §148B led to the outcome
that the Legislature intended to preserve the ability of cab drivers to operate either as employees or independent contractors. *Id.*

There is no denying that regardless of the still-unresolved employment classification issue, there has been a cultural shift to more independent contractors as more people want to be their own bosses. In fact, the number of freelance workers in the U.S. grew from 20 million in 2001 to 32 million in 2014. A recent poll conducted by *Time Magazine* finds that now 22% of American adults—45 million people—have picked up some form of “gig” work for these on demand companies.

Some are advancing the position that perhaps there needs to be a new path forward to balance the realities of the rise of freelancing and the on demand economy. On November 10, 2015, a number of stakeholders, including startups, more established companies, labor activists, and academics, published on open letter advocating that “we must find a path forward that encourages innovation, embraces new models, creates certainty for workers, business, and government and ensures that workers and their families can lead sustainable lives and realize their dreams.”

To that end, these stakeholders advocate for the creation of a universal set of benefits accessible to all workers, whether independent contractor or employee, that would be portable and flexible. Following that open letter, many of the letter’s signatories participated in a policy discussion that included the Secretary of Labor, Tom Perez to discuss possible solutions.

Given the volume of worker misclassification lawsuits, the rise of freelancing as an increasingly popular choice for U.S. workers in lieu of more “traditional employment,” and the public interest in ensuring that the large number of independent contractors are provided certain basic protections, an innovative approach that provides more safeguards for independent contractors and more certainty to businesses regarding proper classification may be the right path to protect both workers and businesses.

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A Practical Guide to MassHealth Estate Recovery

by Joseph Belza, Ingrid Schroffner and Matthew Taylor

Legal Analysis

Introduction

Since 1993, Federal Law has required state Medicaid agencies to seek reimbursement from enrollees whenever possible.[i] The goal is to make the federal program more sustainable and to allow Medicaid to provide coverage to more low-income individuals and families. One mechanism for Medicaid reimbursement is estate recovery, a process by which state Medicaid agencies—here, the Division of Medical Assistance (DMA)—recover payments made to program members from their probate estate, if any.

Estate recovery sometimes comes as a shock to affected families and has been negatively characterized by the public unfamiliar with the process with inaccurate images—e.g., of a greedy government taking houses.[ii] This article explains the estate recovery process as it currently operates under the DMA’s Medicaid program, commonly known as MassHealth.

Whom does estate recovery affect?

The scope of estate recovery varies by jurisdiction. Each state agency sets its own criteria to define which members are affected and what types of assistance payments may be recovered. In Massachusetts, for MassHealth members dying on or after April 1, 1995, estate recovery does not apply except to medical assistance paid for (1) any services for persons age 65 and over when he or she received the assistance, (2) only services provided on or after October 1, 1993 for persons age 55 and over when he or she received the assistance, and (3) only services provided on or after March 23, 1991 for inpatients in a nursing facility or other medical institution regardless of age.[iii]

It is important to note that, unlike some other states, DMA currently recovers only from the MassHealth member’s probate estate.[iv] MassHealth does not seek reimbursement from families of the deceased member. If the probate assets are less than the amount owed to MassHealth, then the remainder of the claim is left unsatisfied. Moreover, as detailed below, there are important exceptions and waivers which limit or preclude estate recovery.

How does estate recovery work?

The estate recovery process begins after the death of a MassHealth member. M.G.L. c. 118E, §32(a) requires a copy of the probate petition and death certificate to be sent to MassHealth’s Estate Recovery Unit (ERU) by certified mail. The ERU also conducts regular cross-matches of
new petitions with the probate courts. If a petitioner fails to send copies of the petition and death certificate to the ERU, “any person receiving a distribution of assets from the decedent’s estate [is] liable to [MassHealth] to the extent of such distribution” for which MassHealth is authorized to recover.[v]

After notification, the ERU checks the decedent’s records to determine if MassHealth has a “claim” for reimbursement in the probate proceedings. The ERU generates a *medical billing printout* calculating the total recoverable MassHealth payments and files a *Notice of Claim* for that amount, along with notice of the circumstances qualifying for deferral and waiver of recovery. The personal representative may request a copy of the medical billing printout.

The Notice of Claim presents the personal representative with three options: (1) pay the claim, (2) contest the claim, or (3) apply for an exception.[vi] Typically, the estate simply reimburses MassHealth in exchange for a Release of Claim. To contest a claim for reimbursement, the personal representative must reply in writing within 60 days of the Notice of Claim with sufficient documentation to support a finding that MassHealth’s claim is invalid or that an exception applies. Failure to respond within the 60 days statutory window is deemed an admission of the validity of the claim and that no exception exists.[vii] If the personal representative disallows the MassHealth claim, the ERU refers the case to the legal department of the Executive Office of Health and Human Services (EOHHS), which may *file suit* to enforce the claim.

For MassHealth estate recovery claims deemed valid, [viii] ERU works with the personal representative to collect payment. On a case-by-case basis, the ERU may accept alternative payment solutions, such as a promissory note secured by a mortgage deed. If the ERU is unable to resolve a claim or a personal representative is non-responsive, the legal division of EOHHS may seek a judgment and execution, which may be levied and suspended against any probate property of the deceased member by filing a *Petition to Compel Payment* in the probate court.[ix]

**Exceptions**

MassHealth will not enforce an otherwise valid claim in certain situations: if the estate qualifies for (1) a *deferral*, (2) a *hardship waiver*, or (3) a *long-term care insurance exception*. A deferral temporarily postpones collection of the claim during the lifetime of a surviving spouse, during the lifetime of any surviving child who is blind or permanently and totally disabled, or, for any surviving minor child who is *not* blind or permanently and totally disabled, until the child reaches the age of majority.

[x] Further, MassHealth is required to grant waivers if estate recovery would impose an *undue financial hardship* on an individual who has survived the decedent.
A waiver can be a permanent exemption. Where the probate asset includes real property, waivers are only available when a sale of real property would be required to satisfy the claim, and an individual was using that property as his or her principal place of residence at the time of the decedent’s death.

Specifically, MassHealth repayment cannot be required for assistance provided on or after April 1, 1995 “while any of the following relatives lawfully resides in the property: (1) a sibling who had been residing in the property for at least one year immediately prior to the individual being admitted to a nursing facility or other medical institution; or (2) a child who (i) had been residing in the property for at least two years immediately prior to the parent being admitted to a nursing facility or other medical institution; and (ii) establishes to the satisfaction of the division that he provided care which permitted the parent to reside at home during that two year period rather than in an institution; and (iii) has lawfully resided in the property on a continuous basis while the parent has been in the medical institution.”

Additionally, that individual must meet several criteria. He or she must have lived in the decedent’s property for at least one year prior to when the decedent’s eligibility for MassHealth began, and he or she must continue to live there when MassHealth files its Notice of Claim. Moreover, he or she must have inherited or received an interest in that property. This individual becomes ineligible for the waiver if other devisees or heirs are forcing him or her to sell the property. Finally, the individual must be financially eligible to qualify; the gross annual income of his or her family group must be at or below 133 percent of the applicable federal poverty line. If granted, a hardship waiver is not immediately permanent. Rather, it exists conditionally for the first two years. If all of the above criteria are still met when MassHealth reviews the situation at the end of the conditional period, then the waiver becomes permanent.

Finally, MassHealth will not recover under certain conditions if the deceased member had a long-term care insurance policy that, when purchased, met minimum coverage requirements described in its regulations.

In order to qualify for this exception, the deceased individual must have (1) been institutionalized; (2) notified MassHealth that he or she had no intention of returning home; and (3) on the date of his or her admission to a long-term-care institution, had long term-care insurance, that, when purchased, met the minimum coverage requirements of 211 CMR 65.00. The requirement that the member must have notified MassHealth that he or she had no intent of returning home in order for this estate recovery exception to apply has been strictly construed.

As the Massachusetts Supreme Judicial Court has noted, “Medicaid is, and always has been, a program to provide basic health coverage to people who do not have sufficient income or
resources to provide for themselves.” *Cohen v. Commissioner of the Division of Medical Assistance*, 423 Mass. 399, 403-404 (1996), *quoting from* H.R.Rep. No. 265, 99th Cong., 1st Sess., pt. 1, at 72 (1985). Estate recovery is simply another facet of the federal law designed to ensure that the Medicaid program is able to continue to fulfill its mandate of serving those for whom it was intended.


[iii] M.G.L. c. 118E, §31(b). See M.G.L. c. 118E, §31(a) for estate recovery applicable to members who died prior to April 1, 1995.

[iv] M.G.L. c. 118E, §31(b). See M.G.L. c. 118E, §31(a) for estate recovery applicable to members who died prior to April 1, 1995.


[vi] The exceptions are specifically delineated by statute and regulation. M.G.L. c. 118E, §§ 31, 32(d) and 33; 130 CMR 501.013(B) and (C), 130 CMR 515.011(B), (C) and (D), 130 CMR 515.014.

[vii] M.G.L. c. 118E, §32(d). Another important deadline to note: a 12% interest begins to accrue on the claim amount 4 months and 60 days after the appointment of the personal representative. M.G.L. c. 118E, §32(g).

[viii] Either because (1) the personal representative admitted to its validity, or (2) the personal representative did not contest the Notice of Claim or submit a request for *and sufficient documentation* to satisfy the requirements for an exception.

[ix] See M.G.L. c. 118E §32(g).

[x] M.G.L. c. 118E, §31(b). See 130 CMR 501.013(B), 130 CMR 515.011(C).

[xi] Id. (M.G.L. c. 118E, §31(b)).

[xii] 130 CMR 501.013 (C).


[xiv] M.G.L. c. 118E, §32; 130 CMR 515.014, 130 CMR 515.011(B).
LearnedTreatise.com: The SJC Addresses the Use of Website Pages to Examine Experts

by David Kluft

Case Focus

Can Internet publications be reliable enough to qualify for the learned treatise exception to the hearsay rule? It is generally agreed that Wikipedia entries don’t make the cut, but what about the websites of indisputably credible healthcare institutions? In Kace v. Liang, 472 Mass. 630 (2015), the Supreme Judicial Court (SJC) addressed whether certain pages on the websites of the Mayo Clinic and Johns Hopkins Hospital would qualify. They did not, but the Court signaled that similar Internet material may qualify in some future case, provided certain foundational requirements are met.

The Learned Treatise Exception

The learned treatise exception to the hearsay rule allows authoritative texts on scientific and scholarly subjects to be used at trial during the examination of an expert witness. The rationale for the exception was described by Justice Black in Reilly v. Pinkus, 338 U.S. 269, 275 (1949), where he wrote that “it certainly is illogical, if not actually unfair, to permit witnesses to give expert opinions based on book knowledge, and then deprive the party challenging such evidence of all opportunity to interrogate them about divergent opinions expressed in other reputable books.”

Two separate learned treatise exceptions have developed in Massachusetts. The first exception, stated in G. L. 233, § 79C, and Massachusetts Guide to Evidence § 803(18)(A) (2015), permits
learned treatises to be admitted in evidence in medical malpractice actions, provided that the adverse party is given thirty-days' notice and the treatise author “is recognized in his or her profession . . . as an expert.” The second exception, adopted by the SJC in Commonwealth v. Sneed, 413 Mass. 387 (1992) and stated in Massachusetts Guide to Evidence § 803(18)(B), is not limited to medical malpractice actions and provides that:

To the extent called to the attention of an expert witness upon cross-examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

Unlike Federal Rule of Evidence 803(18), on which it is partly based, and unlike G. L. 233, § 79C, the Sneed exception is limited to the cross-examination of experts.

**Kace v. Liang**

In 2006, Jeffrey Kace visited a hospital emergency room with a fever, chest congestion and other symptoms. Although Kace allegedly was exhibiting symptoms of viral myocarditis (a serious heart condition), Dr. Ivan Liang sent him home with Tylenol and a prescription for antibiotics. Kace died during the night.

Kace’s estate brought a wrongful death action based on a claim of medical malpractice against Dr. Liang. On cross-examination, plaintiff’s counsel asked Dr. Liang if he was familiar with Johns Hopkins and the Mayo Clinic; of course he was. Counsel then asked Dr. Liang if he was familiar with those institutions’ website pages regarding viral myocarditis; he was not. These website pages, written for a lay audience, included lists of symptoms which Dr. Liang did not dispute were accurate, and which counsel asked Dr. Liang to read to the jury. Dr. Liang’s attorney objected, but was overruled on the grounds that the website pages went to the “standard of care.” In his closing statement, plaintiff’s counsel referred to the website pages as “studies.” The jury found that Dr. Liang had been negligent, but not grossly negligent, and awarded Kace’s estate approximately three million dollars. Dr. Liang’s appeal was transferred directly to the SJC sua sponte.

**How the Exception Applies to the Internet**

On appeal, the principal issue in Kace v. Liang was whether the website pages qualified as a “reliable authority” pursuant to the hearsay exception set forth in Sneed and Massachusetts Guide to Evidence § 803(18)(B). Dr. Liang argued that the pages did not qualify as reliable, notwithstanding the pedigree of the two institutions, because these particular pages were undated and without a named author. The plaintiff, on the other hand, argued in its brief that in
the “internet world in which lawyers, litigants and judges all now live . . . the statements appearing in the websites of the Mayo Clinic and Johns Hopkins certainly qualify as a periodical or pamphlet on a subject of medicine, satisfying [the reliable authority] element of the rule.” Brief of Plaintiff-Appellee, p. 22.

The SJC, in an opinion written by Justice Botsford, agreed with Dr. Liang that the website pages did not qualify for the learned treatise exception under Massachusetts Guide to Evidence § 803(18)(B). The SJC first reiterated that the standard for establishing reliability depends on the context of the publication. For a publication written or compiled by a single author (e.g., a well-respected medical textbook), it is enough that the single author is established as reliable and authoritative. But with respect to periodicals (e.g., a peer-reviewed medical journal) it is not enough that the publication is considered authoritative; the author of an article must personally qualify as a reliable authority. The SJC then went on to observe that “[a]long the continuum from treatises to journals, it is readily apparent that the Johns Hopkins and Mayo Clinic Web pages are very different from a treatise and resemble far more closely articles in a journal or a periodical.” Kace v. Liang, 472 Mass. at 643. Accordingly, the individual author of each website page had to be independently reliable. But because no authors were listed on the website pages (the Mayo Clinic page, for example, was written by “staff”), it was not possible to meet this requirement. “This is not to say,” wrote Justice Botsford, “that materials published on the Internet may never qualify.” Id. at 644. Had the authors been identified and established as reliable, the website pages might have been admissible.

The Court also held that the learned treatise exception requirements stated in Sneed and Massachusetts Guide to Evidence § 803(18)(B) were not satisfied because Dr. Liang was not testifying in an expert capacity. Furthermore, the Court noted that, because the requisite notice was not given to Dr. Liang’s counsel, the exception stated in G. L. 233, § 79C and Massachusetts Guide to Evidence § 803(18)(A) was not applicable. However, the Court found that no prejudice resulted from the erroneous admission of the website pages, which were cumulative of other properly-admitted evidence, and therefore the Court let the jury verdict stand.

Foundation

Based on the Court’s ruling and the authorities it cited, practitioners seeking to admit website pages as learned treatises should be prepared to lay the following foundation:

1. Identify a published website about a subject of science or art;
2. Establish that a specific statement on one of the website’s pages is relevant and material;
3. Establish the date of publication of the website page;
4. Identify the author by name;

5. Establish that the author is a reliable authority. This can be accomplished by way of an admission, through expert testimony or by judicial notice.

6. Finally, be prepared to establish the authenticity of the website pages; in other words, to show that these particular pages are not forgeries but are what they purport to be. The SJC recently addressed the foundational requirements for the authentication of Internet materials in *Commonwealth v. Purdy*, 459 Mass. 442 (2011).

Not addressed by the Court’s opinion in *Kace* is the significance of disclaimers and terms of use. In the case of Johns Hopkins, for example, the myocarditis page includes a link to a “Privacy Policy and Disclaimer,” which warns that patients should rely only on “official” information, and that the website “should not be considered official.” What happens if all of the foundation requirements for admission of a website page as a learned treatise are met, but the website contains boilerplate terms of use (as most websites do) which could be read to disassociate the website’s owner from that content? Until this and other issues are more fully tested, litigants are advised not to rely exclusively on digital sources as learned treatises; be prepared to make the same point the old-fashioned way.

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**Recent Amendments to the Superior Court Rules and Standing Orders**

by Heather V. Baer

**Heads Up**

On January 1, 2016, a number of amendments to the Superior Court Rules went into effect. These amendments, which were approved by the Supreme Judicial Court, adopted new Rules 19, 30A, 31 and 33; amended Rules 7, 9A, 9C, 13, 17, 22, 29 and 30A; incorporated Standing Orders 1-06, 1-07 and 1-09 into new Rules; and deferred action on proposed new Rule 17A. This article highlights many of the significant amendments to the Rules. Readers are advised to review the Superior Court Rules in full to ensure that they are fully informed of all of the changes that affect their practices.

**Rule 9A: Civil Motions.** A noteworthy amendment to Rule 9A, at 9A(a)(3), modifies the procedure related to reply memoranda. Litigants are no longer required to seek leave of court to file a five-page reply. To file a longer reply, which is “strongly disfavored,” a party must seek leave of court in the manner outlined in the revised Rule 9A(a)(3); and under the unchanged
portion of Rule 9A(a)(5), any longer reply memoranda “shall not exceed 10 pages.” Sur-replies continue to be “strongly disfavored,” and leave to file them must be sought from the court. The Rule 9A amendment does not expand the circumstances in which reply memoranda are permitted, which remains “[w]here the opposition raises matters that were not and could not reasonably have been addressed in the moving party’s initial memorandum” and the reply is “limited to addressing such matters.” Furthermore, it does not alter the requirement in Rule 9A(b)(2) that the full Rule 9A package be filed within ten days of receipt of the opposition.

**Rule 13: Hospital Records.** Amended Rule 13 now requires that applications for orders for hospital records comply with Rule 9A if they are opposed. While previously a request could be filed after seven days notice to the opposing party, under the amended Rule 13 a party seeking an order for hospital records must now serve the adverse party with the request at least thirteen days before the order is needed, to allow for the possibility that the request will be opposed and that such opposition will be served by mail.

**Rule 17: Recording Devices.** Revised Rule 17 now requires recordings and transmissions of court proceedings to comply with *Supreme Judicial Court Rule 1:19* (Electronic Access to Court), which prohibits photographs, recordings and transmissions in any courtroom, hearing room, office, chambers or lobby of a judge or magistrate without prior authorization of the judge or magistrate. The amendment to Rule 17 also eliminates the requirement that any court order authorizing the recording or reproduction of the proceedings be issued upon the condition that no such recordation may be used to impeach, discredit or otherwise affect the authenticity or accuracy of the record or the official transcript.

**Rule 22: Money Paid Into Court.** Rule 22 has been amended to increase the threshold at which money paid into Court must be deposited into an interest-bearing account from $500 to $5,000. The revised Rule 22 also contains a new, second paragraph which provides that, when money paid into court is unclaimed for 30 days “after the claim(s) of every party to the funds has been eliminated by default or court order,” the clerk is directed to schedule an assessment hearing after which the session judge may enter final judgment escheating the funds to the Commonwealth. However, judgment to this effect may not enter any sooner than three years after the funds are paid into Court. This amendment is consistent with M.G.L. c. 200A § 6, which provides that money paid into court is considered abandoned after three years or as soon after three years as all claims made for those funds have been disallowed or settled by the court.

**Rule 29: Cover Sheet; Statement as to Damages.** Rule 29(5) previously required Superior Court judges to transfer cases to the District Court if it appeared from the statement of damages in the civil action cover sheet that there was no reasonable likelihood that recovery would exceed the Superior Court threshold. It also permitted – but did not require – judges to transfer such cases if it appeared from any pre-trial event that the threshold would not be met.
Amended Rule 29(5) is consistent with M.G.L. c. 212 §3A(b), and now limits the basis for such a determination to the statement of damages in the civil action cover sheet, as opposed to any information developed at a pre-trial proceeding. It also permits the parties to make written submissions and be heard at a hearing on the issue. Finally, Rule 29 no longer compels the transfer of such cases to the District Court; instead, it permits (but does not require) judges to dismiss such cases without prejudice.

**Former Rule 30A/[New] Rule 9C(b).** The provisions of former Rule 30A (Motions for Discovery Orders) have been renumbered without change as new Rule 9C(b) (the title of Rule 9C remains Settlement of Discovery Disputes).

**[New] Rules 30A, 31 and 33.** Three former Standing Orders were incorporated into the Rules. The verbatim texts of Standing Orders 1-06 (Continuances of Trial), 1-07 (Consolidation of [Civil] Superior Court Cases) and 1-09 (Written Discovery) were incorporated into the Superior Court Rules as new Rules 33, 31 and 30A, respectively, and those Standing Orders were repealed. This amendment streamlines the rules that govern Superior Court procedure as more of the procedures governing practice before the Superior Court can now be found in the same location, although lawyers should still check the Standing Orders.

The Rules in their Proposed form and the Supreme Judicial Court’s approval, may be viewed on the Judicial Branch’s [website](https://www.masscourts.gov).

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