



Boston Bar
ASSOCIATION

2008

SUMMER

Solo & Small Firm Section

Summer 2008 Newsletter

Section Co-Chairs Corner

The 2007-2008 year was a productive one for the Solo and Small Firm Section. The Section was the primary sponsor of seven brown bag programs and co-sponsor of two others. We also reprised the successful CLE, Managing the Client Relationship. In the winter newsletter, we filled you in on programming from September to December 2007 - see the Summary of 2007-08 Programs in this issue for an update on the balance of the year.

This issue of the SSF Newsletter draws from just some of the excellent materials prepared for the programs held since January. Hopefully, the contents will whet your appetite for new and relevant programs beginning this fall.

I complete my two-year stint as co-chair certain that the Section is in capable hands, with Rodney Dowell as "senior" Co-Chair and Lori Yarvis joining him. Lori practices business and real estate law with Schlesinger and Buchbinder LLP in Newton. **Welcome Lori!**

On Rodney's and Lori's behalf, I invite you to join the Steering Committee at noon prior to each section meeting. The Section welcomes your participation!

Clare D. McGorrian

On behalf of myself, I would like to thank Clare for the time and effort she put into the last two years to make the Solo and Small Firm Section stronger. Due to her efforts, we were able to put together some excellent programs, increase participation, and provide our section members with excellent written materials through the newsletter. Clare has undertaken the newsletter task almost exclusively on her own and her excellent writing and editing are always evident.

Lori and I are fortunate to be able to further build upon Clare's efforts. We look forward to this upcoming year and hope that you can join us in furthering the goals of our section.

Rodney S. Dowell

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Summary of Section Programs: January - June 2008

February

Time Management: Tips for Powering up Productivity and Powering Down Stress*
Anne Braudy and Dr. Jeffrey Fortgang addressed time management techniques to run a law practice efficiently as well as strategies to combat the internal obstacles to applying effective time management methods.

March

Home Office, Shared Office: Operations, Ethics, and Tax Consequences*
This program, held in Waltham, featured Don Lassman and Connie Rudnick, who compared practical and ethical issues that arise in establishing a home-based practice versus sharing space with other attorneys. Morris Robinson of M. Robinson & Company, P.C. covered tax considerations involved in different practice settings, including issues related to choice of entity.

April

Intellectual Property Primer for Non-IP Lawyers*
Robert Plotkin and Zick Rubin led an engaging discussion on patent, copyright, trademark, and trade secret issues for non-IP lawyers, addressing how to spot the issues, how to avoid common mistakes, and when to seek assistance from an IP specialist.

May

Using Microsoft Outlook or an Integrated Client Management System in Your Office
Nancy Brush of Just Solutions, Inc., Jo Ann Citron of Citron Law, and Steve Viegas of the Law Offices of Stephen Viegas shared perspectives on choosing software to manage a client docket, contrasting integrated client management systems such as TimeMatters and PCLaw with Microsoft products, including Outlook and Excel.

June

CLE: Managing the Client Relationship
This program, brought back for a third year, addressed the major ethical and practical considerations in representing clients, covering best practices from initial contact through the conclusion of the case. Former SSF Co-Chair Ed Gorman chaired the seminar, which featured panelists Joseph Berman of Looney & Grossman, Susan Cohen of Peabody & Arnold, current SSF co-chair Rodney Dowell and Jane Rabe of the Office of Bar Counsel.

* See related article inside this issue.



Upcoming Section Programs: Fall 2008

Note: The Steering Committee of the Solo & Small Firm Section will meet during the first ½ hour of each program

September

Thursday, September 25, 2008

9:00 am – 12:00 pm

BBA CLE:

Co-Sponsored Event with the Health Law Section

Growing Problem of Consumer Medical Debt

By Clare McGorrian (**no steering committee meeting**)

Friday, September 26, 2008

12:00 pm – 1:30 pm

Paperless Office Program

By Robert Plotkin and co-panelist (**no steering committee meeting**)

October

Thursday, October 2, 2008

12:00 pm – 2:00 pm

Spotting Trouble in Immigration Cases: When Should I Call a Professional?

By Ellen Kief and Paul Glickman

November

Thursday, November 6, 2008

12:00 pm – 2:00 pm

Secret to Attracting Clients

By Roger Glovsky

December

Thursday, December 4, 2008

12:00 pm – 2:00 pm

Developing Your Personal Brand and Marketing It Professionally

By RoseEllen McCaig and Stewart Hirsch

Spotlight on the Law: Patent and Trade Secret Law Primer for Non-IP Lawyers

Excerpts from a Presentation by Robert Plotkin¹

In April, Robert Plotkin gave an engaging and informative presentation on patent and trade secret law for non-specialists. The Q&A below summarizes some of the topics Robert covered.

Patent and Trade Secret Law: Q&A

What do patents do?

Patents protect inventions – such as machines, chemicals, biological materials and processes of various kinds.

What makes an invention patentable?

To be patentable an invention must be (see 35 U.S.C. § 101 et seq.):

- Patentable subject matter
- New (novelty)
- Useful (“utility”)
- Non-obvious

Many inventions are patentable – always investigate the patent potential of an invention.

What are trade secrets?

To qualify as a trade secret, the information or subject must:

- not be generally known to the public and
- confer a competitive advantage on the holder of the secret

How does one obtain a patent?

To obtain a patent a person or business must submit an application to the US Patent and Trademark Office that:

- describes how to make and use invention and
- points out (in the “claims”) what is patentable about invention

Timely patent application is essential.

Avoid provisional patent applications if possible, but if filing one cannot be avoided, make sure it is as complete as possible

What happens if the patent examiner rejects the application?

You will have the opportunity to respond and challenge the rejection.

What happens if the examiner decides the invention is patentable?

The examiner allows the application and grants a patent.

How does obtaining trade secret protection differ from getting patent rights?

There is no application for protection of trade secrets; instead a person or company obtains trade secret rights by taking steps to maintain the secrets.

What is the effect of getting a patent on an invention?

¹ Robert Plotkin is the principal of Robert Plotkin, P.C. in Burlington, which focuses on patent and trade secret law in the computer hardware and software industries. Robert can be reached at 978-318-9914 or by email at rplotkin@rplotkin.com. IP specialist Zick Rubin of Newton addressed copyright and trademark issues at the April session. We expect to include a piece on that topic in a future newsletter.

The patent owner has the right to exclude others from making, using or selling the patented invention in the United States for 17 years.

Be aware that foreign patent rights are distinct from U.S. patent rights and must be separately obtained.

Should a person or company always seek a patent on a new invention?

Not necessarily. Sometimes trade secret protection is the better route than getting a patent; this depends on the particular facts and careful evaluation of pros and cons.

Is there anything else the non-specialist should know about patents?

Patent law is complex and generally calls for consultation with a specialist. Here are just a couple of other things to remember about patents:

Better Time Management (or How to Deal Effectively with Procrastination)

A Compilation of Tips from Three Experts

Better Time Management (or How to Deal Effectively with Procrastination): A Compilation of Tips from Three Experts¹

While many of us tend to procrastinate in one area of life or another, when lawyers put off key tasks there can be serious consequences for their clients, their colleagues, and themselves. Naturally, the tendency to avoid tasks is greatest when we anticipate a certain amount of unpleasantness, e.g., when we see the task at hand as beyond our current knowledge, or it is likely that our efforts will elicit negative reactions. Beyond that, patterns of procrastination may also reflect fundamental beliefs that we have about ourselves.

In her book *It's About Time*, Dr. Linda Sapadin gives labels to six procrastination patterns that convey the kinds of thinking/motivation involved: The Perfectionist, The Crisis-Maker, The Dreamer, The Defier, The Worrier, and The Overdoer. Along similar lines, Dr. William Knaus' book, *Do It Now! Break the Procrastination Habit*, addresses the need to identify thoughts that promote task-avoiding behaviors and replace automatic responses with conscious choice.

Putting off a task is rewarding on an immediate level (i.e., "I'll worry about that tomorrow" means an immediate decrease in pressure even if it makes for more pressure later on), so the behavior can easily be learned – but it can also be unlearned. There are many, many ways to attempt to tackle procrastination, and what works best for one person might not work for another. You might, for example, try these steps:

1. Start with small steps, e.g., in a writing task, one might initially settle for one poorly-worded paragraph or sentence, just to get some kind of process rolling. If you expect too much of yourself at one sitting, the idea of avoidance becomes very appealing.

¹ This piece is based on the discussion at February's time management program, featuring Anne Braudy and Dr. Jeffrey Fortgang and chaired by Rodney Dowell. Rodney is Director of the Law Office Management Assistance Program (www.masslomap.org) and co-chair of the Solo and Small Firm Section. He can be reached at (857) 383-3250. Anne Braudy is an attorney and, at the time of the February program, was principal of Braudy Legal Consulting. Jeffrey Fortgang, Ph.D. is a psychologist at Lawyers Concerned for Lawyers (LCL), Inc. and can be reached at 617-482-9600.

2. Impose a schedule on yourself, e.g., "I will work on my most difficult cases every day from 11 AM to noon." If an hour produces too much discomfort, try a half-hour; over time, your "tolerance" will probably increase.
3. Reward yourself for time spent on tasks that have not yet reached their "last minute." For example, you might allow yourself some unstructured internet time (or a nap, a walk, etc.) after spending time on a target activity.
4. Limit avoidant behaviors to a certain schedule as well, e.g., "I will only check my email or surf the web, etc., from 9 to 10 and 3 to 4."
5. Involve someone else, like a colleague, spouse, therapist, or coach. You might meet weekly to review your progress on the work that you tend to avoid, or "break the ice" by telling that person your thoughts about the task and how it might be addressed. You are much more likely to sustain changes in your habitual behaviors if you have someone to "answer to" over an extended time. Certain kinds of professional coaches are particularly accustomed to this role.

Time Management Skills

Effectively managing your time in the law office often raises the same issues as dealing with procrastination. Time management requires that you seize control of your time and not allow others, to the extent possible, dictate your actions. It also requires the willingness to schedule a time to deal with the worst clients/matters/attorneys and sticking to the scheduled commitment. My favorite recommendations to effectively manage time are:

- ◆ **Do not duplicate efforts.** The most effective ways to avoid duplication of efforts is:
 - (1) implementing an integrated front and back office case management system and
 - (2) creating form banks and using document automation (where appropriate).

Systems are KEY - Turn your best time management actions into systems so that you do them as routinely as brushing your teeth.

♦ **Schedule Your Day with Focused Goals.** You must strategically determine your goals by developing a comprehensive to do list. You need to then prioritize the lists based on things such as, but not necessarily weighted in the following order: client service, risk management, deadlines, client development, professional development, and office administration. Schedule the most important goals (based on time pressure, risk management issues, difficulty of task, etc.) for the time of day where you work most effectively. However, within your schedule leave time to manage unexpected events. **DON'T WASTE YOUR BEST TIME RESPONDING TO EMAIL OR TELEPHONE MESSAGES.**

Planning is KEY - End every day by planning what you will do for the next day.

♦ **Avoid Distractions.** Set aside a couple of hours every day for Do Not Disturb (DND) Time – with no interruptions. There are times that interruptions are unavoidable, but you should minimize distractions while working on high priority items. Put your telephone and e-mail on “do not disturb.” Studies show that modern employees stay on task for approximately 3 minutes due to e-mail. Additional studies show that if you act upon an email notification it takes, on average, approximately 16 minutes to get back on task.

REMEMBER - 30 extra billable minutes per day means \$24,000 more a year.²

Additional Resources

Robert Benchley, How to Get Things Done by (1949) (available as of August 18, 2008 at <http://hackvan.com/pub/stig/etext/how-to-get-things-done-despite-procrastination.txt> and <http://www.idlehacker.com/?p=16>)

Linda Sapadin, Ph.D., It's About Time! The Six Styles of Procrastination and How to Overcome Them (Penguin 1996)

Dr. William J. Knaus, Ed. D. Do It Now! Break the Procrastination Habit (John Wiley & Sons Inc. 1997)

Michael E. Gerber, The E-Myth Revisited: Why Most Small Businesses Don't Work and What To Do About It (Harper Collins 1995)

Steven Keeva, Transforming Practices: Finding Joy and Satisfaction in the Legal Life (McGraw Hill 1999)

Dan Kennedy, No B.S. Time Management for Entrepreneurs: The Ultimate No Holds Barred Kick Butt Take No Prisoners Guide to Time Productivity and Sanity (McGraw Hill 2004)

² Assumes \$200 per hour and 48 work weeks per year.

Technology for the Home Law Office

By Donald R. Lassman¹

In 1999, having been through two law firm closings in five years, I decided to start my own law practice. Being a bankruptcy lawyer, I had seen firsthand the financial crisis suffered by startups burdened with too much staff and too much overhead and I was determined to keep my overhead and staffing as low as possible. After viewing many workspaces and speaking to many solo practitioners, I decided that a home office offered the best alternative to meet these twin goals.

I always had secretarial and paralegal assistance, but as a startup, the time and expense of managing and paying salaried employees was too daunting. Could I make the transition from well-supported attorney in a midsize firm to a solo with no support staff whatsoever? Ten years ago I probably could not have done it, because the technology that I rely so heavily upon today was not widely available, fast or reliable. But, the technology now available for solo practitioners makes my business model — solo practitioner with no support staff — attainable. This article discusses the technology that I obtained when I set up my practice that has continued to make my practice work.

Getting started

A successful home office requires a dedicated workspace and separate space to meet with clients. The nomadic approach — moving your workstation from room to room and from computer to computer depending upon availability — is much too disruptive and inefficient. You must have a room in your home that is dedicated office space where you may locate all your files and your office equipment, just as you would expect to find in an office in commercial premises. I have a large study — 10 feet by 12 feet — that is very suitable for a home office. The study is separated from the rest of the house by two doors; when I am in the study, I can close the doors and work quietly, even when my two children are home from school.

Of course, not all practice areas are conducive to a home office. Appearances may be more important in some areas of the law than in others, and you must consider the effect that working in your house may have on the type of client that you are servicing.

In my bankruptcy practice, I have not found this to be a

problem — most of my clients really appreciate the low overhead. Moreover, many of my business clients insist on meeting me in their place of business. In the rare cases where I may be concerned about appearance or simply may not want a particular client to come into my home, I have an arrangement with a small firm in my town to use its conference room. This offsite option is used two or three times a year, most often in connection with depositions. A home office requires that you are comfortable meeting clients in your home — acceptable for consumer bankruptcy lawyers but perhaps not for criminal lawyers or trial attorneys.

I have a separate conference room in my home for meeting clients with a conference table and four chairs and all of my professional diplomas and awards hanging on the wall. I will typically escort clients into the conference room and then join them after several minutes so that they have an opportunity to familiarize themselves with my credentials — a helpful exercise and credibility builder. I believe the most important attribute for an attorney to maintain a successful home-based practice is discipline — you have to be able to work effectively and efficiently and not be distracted.

Hardware

I have two desktop computers and a laptop computer, all of which are part of a hardwired network. I initially had a wireless network, but found that it was unreliable and too slow. I have two flat screen monitors (I wanted to preserve as much desktop space as possible), a flatbed scanner with 50-page auto feed capability (the auto-feed feature is very important!), high-speed laser printer and a copier/fax machine.

Communications

Obtain easy-to-remember numbers if possible. When I called the phone company, I asked for numbers that were consecutive with as many 0's as possible and was able to buy (781) 455-8400 for my telephone. These numbers are easy to remember and the phone number has the added benefit of suggesting a large organization with multiple extensions — I am frequently asked for my extension number when I provided a new client with my business card.

¹

Donald R. Lassman focuses his solo practice in Needham on bankruptcy law. Don can be reached at 781-455-8400 or at don@lassmanlaw.com. This article originally appeared in the 2006 Massachusetts Bar Institute Section Review (Vol. 8, No. 3) and is reprinted with the permission of the author.

Also, be sure to obtain a dedicated fax line. Do not share phone and fax lines — it will cost more but it is more than worth it. Also remember to line up an answering service and cell phone service. As a solo, I find that out-of-office access to phone and data can be very important — get that cell phone and Blackberry set up right away!

Technology team

You are a lawyer; you cannot keep up with the rapid advances in technology. If something breaks down, you will probably not be able to fix it and probably do not want to spend all day trying. Get the name and phone number of reputable IT firms that are responsive and fairly priced. I did this immediately and my IT professional has been a lifesaver on more than one occasion.

Internet

I think the fastest service available is the way to go, as I found that so much of my other technology worked much better with high-speed Internet service. Also, promptly register for an Internet address with a reputable Internet Registry Service.

Software

Many law practices have specialized software programs that greatly enhance productivity. My practice area certainly does and I use EZ Filing for all my bankruptcy cases. The software package is intuitive and readily prompts entry of the correct information for the many forms that a bankruptcy case requires. I find that data entry is quick and simple. The process can also be very helpful, as it requires you to focus much more carefully on the data. On many occasions it has led me to seek additional information or question information that I might otherwise have overlooked. Also, the Bankruptcy Court, where I practice most frequently, is paperless — all pleadings are filed electronically. The software I use interfaces with the Bankruptcy Court clerk's office seamlessly, easing the task of electronic filing.

I cannot overstate the importance of effective billing software. The software must be reliable and easy to use, both when entering data and when generating bills. I chose to use Timeslips when I started my practice and have been pleased with the product.

Lastly, the importance of electronic legal research cannot be overemphasized. I thought about the library route at first, but it was much too time consuming and cumbersome. I promptly obtained a subscription to the Westlaw service that has a program specially tailored to bankruptcy practitioners and can generate the same

quality legal research as the large law firm with its extensive paper library.

The service is easy to use and is available around the clock, so you can do your research when you want to, not just when the law library is open.

Benefits and drawbacks of the home office

The chief benefits of a home office are the low overhead, no commute time, a pleasant environment with no office politics, minimal distractions and ready availability of files. The chief disadvantages: The image of professionalism may be more easily conveyed in a commercial office setting, more opportunities for networking and brainstorming in an office setting and fewer personal distractions (like television, chores and refrigerator).

Conclusion

Technology makes my practice work. I have also found that technology has made my practice much more flexible — I have access to legal research and can file court documents anytime. As courts increasingly move to a paperless environment and clients increasingly become more comfortable with electronic data, I am confident that a home office business model will continue to be successful.

Important Practical and Ethical Points in Space Sharing

By Constance L. Rudnick¹

Sharing space with other lawyers or non-lawyers, while an attractive set up for practical and financial reasons, gives rise to liability and disciplinary issues:

Firm Name

1. Rule 7.5(d) and Comment [2] prohibit using a firm name that implies a partnership when one does not exist, unless a disclaimer is also included, for example, Smith & Jones, “An association of independently practicing attorneys, not responsible for the liability of any other attorney in this office.” The goal is to insure that the public is not misled into thinking a partnership exists when it does not.
2. It is deceptive to call your “firm” Smith & Associates, when you are in fact a solo practitioner.

Advertising

1. Use of firm name above requires disclaimer wherever the firm name is used.
2. Sole practitioners should maintain separate signs on the door, separate business cards and stationery.

Sharing Technological Services - Computers, Faxes, Phones

1. Sharing a fax line has been held in some jurisdictions to create an unintended and unwanted relationship between the attorneys. Thus, all telecommunications equipment should be separate whenever possible.
2. Maintain separate phone lines, voice mail should be accessible only by attorney and his/her support staff. Same with e-mail.
3. If one computer is used for multiple lawyers, work product should be stored only in password protected part of computer or on jump drive.

Sharing Assistants—Lawyer and Non Lawyer

1. Lawyers must instruct subordinates—lawyers and non-lawyers—concerning their ethical obligations, which include the duty not to share confidential information of one client with anyone not directly associated with the attorney handling the case.
2. Employees should be careful to make sure snail mail is directed to the proper attorney, particularly if the practice is to remove it from an envelope first.

Malpractice Insurance and Other Financial Considerations

1. Whether a “group practice” (group of sole practitioners sharing space on one policy) can purchase one group policy was covered in Space Sharers, Beware! By Daniel Crane, former Bar Counsel, and John Marshall, First Assistant Bar Counsel, accessible on the Office of Bar Counsel website (www.mass.gov/obcbbo). The authors questioned whether joint coverage on one policy would eliminate the need for a disclaimer under Rule 7.5(d) and Comment [2]. Further, some policies may exclude coverage for liability resulting from acts of other attorneys who appear to be, but are not intended to be, partners. Check with your malpractice insurer for the latest coverages available.
2. Each attorney must maintain separate operating, IOLTA or other client accounts.
3. Expenses shared by the group should reflect actual costs incurred or to be incurred; over or under allocating costs could be construed as creating a relationship not intended to exist. Put terms in writing.
4. Group should not maintain one joint bank account for payment of expenses. Expenses should be paid separately by each member of the group.

¹ Constance L. Rudnick is a Professor of Law at the Massachusetts School of Law where she teaches Legal Ethics, among other courses. She is a member of the Boston firm of Gargiulo/Rudnick LLP and serves on the Standing Advisory Committee on the Rules of Professional Conduct. Connie can be contacted at rudnick@msslw.edu.

Do not volunteer to “front” another lawyer’s financial obligation unless strict record is kept of the transaction in writing.

Sharing Files, File Storage and Conference Rooms/ Libraries

1. Each lawyer’s files should be kept in separate file drawers, which can be locked. Only the attorney and dedicated (working for one attorney only) subordinates should have the key. Do not keep keys in a place where other lawyers or employees can have ready access.

Miscellaneous

1. Don’t refer to your colleagues with whom you share space as “my partner.”
2. When paying a referral fee to another attorney in the group, include that attorney specifically on the fee agreement as you would if he/she were in another office entirely. See *Saggese v Kelley*, 445 Mass. 434 (2005), on the requirement of advance client consent in writing to a referral fee arrangement.
3. If possible, each individual lawyer should be on the lease. If that is not possible or practicable, then sub-leases should be executed providing that is permitted by the lease agreement.
4. Configure office so that attorney-client communications cannot be heard by other lawyers or support personnel in the office.

Sharing Space with Non-Lawyers

1. Take care not to publicize the relationship in a way that implies you have a legal relationship with the space sharer(s). Just as with sharing space with other lawyers, maintain independent public identity.
2. Protect client confidences; store files in separate room if possible, or in separate locked file if not.
3. Do not take or give referral fees or share fees with the non-lawyer.
4. Allocate expenses according to actual amount incurred or to be incurred; over or under allocating expenses can look like fee sharing.

Consequences of Imperfect Division

1. Joint civil liability/partnership by estoppel
 - Governed by Mass. Gen. Laws ch. 108A, § 16(1)(partnership by estoppel)
 - *Atlas Tack Corp. v. DiMasi*, 37 Mass. App. Ct. 66, 637 N.E.2d 230, 232 (1994) (Genuine issue of material fact existed concerning whether attorneys were partnership where, inter alia, they used a “firm name,” called themselves “a professional association”).
 - *Brown v. Gerstein*, 17 Mass. App. Ct. 558, 460 N.E.2d 1043, 1052 (1984)(evidence of use of firm name insufficient to prove partnership).
 - *Gosselin v. Webb*, 242 F.3d 412 (1st Cir. 2001) (Genuine issue of material fact existed concerning whether attorneys were partnership where evidence in addition to use of a “firm name” existed).
 2. Disqualification for conflict of interest
 - *In re Custody of a Minor*, 432 N.E.2d 546 (Mass.App.Ct.1982) (foster parents’ lawyer not disqualified even though she shared offices with lawyer who had represented natural mother earlier in proceeding, when each lawyer had own offices and files and was not connected with other’s cases).
 - *Commonwealth v. Allison*, 434 Mass. 670, 751 N.E. 2d 868 (2001) (Fact that attorney representing defendant and co-defendant shared space did not create conflict; no per se disqualification).
 - *Commonwealth v. Fogarty*, 419 Mass. 456, 646 N.E.2d 103 (1995) (attorneys’ joint ownership of building in which attorneys shared space did not create partnership and therefore conflict).
- Note:** If lawyers sharing space routinely work jointly on cases, or “cover for each other” in situations that require some knowledge of the case or access to it file(s), court could find disqualifiable conflict. See generally Rule 1.10, Comment [1] (Definition of “Firm”).
3. Discipline
 - *In the Matter of Godbout*, 18 Mass.Att’y.Disc. R. 254 (2002) (Firm name)
 - *In the Matter of Daniels*, 23 Mass.Att’y.Disc.

- R. (2007) (S.J.C. Docket No. BD-2006-111, Order of Term Suspension entered January 8, 2007) (Firm name) <http://www.mass.gov/obcbbo/bd06-111.htm>
- In the Matter of Zachery, 23 Mass.Att'y.Disc. R. (2007) (Public Reprimand No. 2007-3, January 26, 2007) (Firm name) <http://www.mass.gov/obcbbo/pr07-03.htm>

Resources

Rockas, Lawyers For Hire and Associations Of Lawyers: Arrangements That Are Changing The Way Law Is Practiced, 40-Dec Boston B.J. 8 (1996)

Crane and Marshall, Space Sharers, Beware! (Mass. Office of Bar Counsel, 2000) available at <http://www.mass.gov/obcbbo/space.htm>

The Massachusetts Independent Contractor Law

By Lori Yarvis¹

The Massachusetts Independent Contractor Law, Massachusetts General Laws, Chapter 149, Section 148B (the “Law”), also recently referred to by the Massachusetts Attorney General’s Office (the “AGO”) as the “Massachusetts Misclassification Law”, has often been ignored under the assumption that it should not apply to small businesses or that the AGO will not enforce the Law against small businesses.

Small businesses, including small law firms, should be aware that the AGO seems to be making enforcement of the Law a priority. To that end, the AGO has issued a 2008 Advisory providing clarification on the application and enforcement of the Law. The Advisory can be found at http://www.mass.gov/Cago/docs/Workplace/Independent_contractor_advisory.pdf or at the “Workplace Rights” link on the Attorney General’s website.

In addition, on March 12, 2008, Governor Deval Patrick created the Joint Task Force on the Underground Economy and Employment Misclassification. According to The Boston Globe, this panel of state officials “will consider steps to expand enforcement against employers who misclassify workers as contractors to evade taxes and skirt labor and licensing laws...A 2004 Harvard University study of the state’s construction industry estimated Massachusetts lost nearly \$100 million in unpaid income tax payments involving underground workers”.

An amendment to the Law was enacted in 2004. The effect of this amendment is to further narrow the test for determining whether an individual is an employer or an independent contractor, making it less likely that a worker will qualify as an independent contractor under the test. The Law is summarized as follows:

Under Section 148B, a worker is presumed to be an employee unless the employer can prove otherwise. In order to prove otherwise, the employer must show that all three prongs of the Section 148B test, also known as the “A, B, C Test” have been met. The three prongs are as follows:

- a. The worker must be “free from control and direction in connection with the performance

of the service, both under his contract for the performance of service and in fact” in order to be deemed an independent contractor.

- b. The service the worker performs must be “outside the usual course of business of the employer” in order for the worker to be regarded as an independent contractor. This is the prong of the test that was changed by the 2004 amendment to the Law. Prior to 2004, if an employer could show that the work was performed “outside of all places of the business” of the employer, the worker might be deemed an independent contractor if prongs 1 and 3 were also met. As of the 2004 amendment, the employer must show that the worker’s services are different than those usually performed by the employer. For example, a manufacturer can hire an accountant as an independent contractor, but a home health care business cannot hire a home health care aide as an independent contractor as that is their business.
- c. The worker must be “customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed” for the worker to be deemed an independent contractor.

A worker must meet all prongs of the A-B-C Test in order to be considered an independent contractor.

The Attorney General is authorized to impose substantial civil and criminal penalties on the employer for violations of the Law, whether or not the violation is intentional. In addition, a business may be retroactively liable for income taxes for failure to withhold such taxes from an incorrectly classified worker’s salary, payroll taxes (FICA and FUTA), overtime pay, unemployment insurance payments, workers’ compensation insurance premiums (and possible liability for workplace injuries), health insurance and providing workers with coverage and benefits under employee benefit plans.

¹ Lori Yarvis is a lawyer at the Newton firm of Schlesinger and Buchbinder LLP. Lori concentrates her practice on transactional law involving business clients and real estate transactions. She is the incoming co-chair of the Solo and Small Firm Section of the Boston Bar.

Even though the impetus for the 2004 amendment to the Law came from trade unions in the construction industry, where workers are routinely misclassified, the AGO is targeting other industries, as well. In December 2007, the AGO assessed penalties of more than \$190,000 against FedEx Ground Package System, Inc. for intentionally misclassifying 13 drivers as independent contractors rather than as employees.

As a result of the current climate, small businesses using independent contractors should both reevaluate their contracts with these workers and their actual relationships with these workers to ensure that the classification is correct under the Law. Businesses affected include: construction contractors, accountants, attorneys, temporary employment agencies, health care agencies, newspapers and magazines, health and fitness facilities, beauty salons and food and hospitality companies.

The Massachusetts Division of Unemployment Assistance, the Department of Industrial Accidents and the Department of Labor have taken the same position as the AGO regarding the Law. One state agency, however, the Department of Revenue, takes the position that for purposes of tax withholding, the Department of Revenue will follow the much broader federal Internal Revenue Service “20 Factor Test” rather than the state “A, B, C Test” in determining who is an employee for tax purposes. Thus, a business could have a worker classified as an independent contractor for tax withholding purposes, but an employee for unemployment, worker’s compensation and wage and hour law purposes.

As stated above, businesses should reevaluate their contractual and actual relationships with workers who are classified as independent contractors. If certain workers have been misclassified, and a business chooses to do nothing, there is a risk of an enforcement action by the AGO. There may be an even greater risk of a worker complaint due to a worker’s termination or injury. If a business decides to reclassify its workers as employees, the business will need to determine whether the reclassification should be retroactive and how the reclassification affects the employee benefits status of the worker. Employer handbooks, policies and benefit plans will need to be reviewed as well.

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