

Volume 56

Number 2

▶ ABOUT THE BBJ

▶ EDITORIAL POLICY

▶ BOARD OF EDITORS

▶ CONTACT US

▶ THE BBA

▶ LETTERS TO THE EDITOR

▶ ARCHIVES

▶ DOWNLOAD THIS ISSUE



PRESIDENT'S PAGE

A Community of Lawyers Contributing to Justice

By Lisa C. Goodheart

4

CASE FOCUS

To Err Is Human; To Correct, Difficult:

In *Smaland Beach Association*, The Supreme Judicial Court

Sets Demanding Standards for the Amendment of Deposition Testimony

By David Clancy

7

CASE FOCUS

Commonwealth v. Aviles and the Continuing Evolution of the First Complaint Doctrine

By Anne Pogue Donohue

11

HEADS UP

Transgender Equal Rights In Massachusetts: Likely Broader Than You Think

By M. Barusch and Catherine E. Reuben

14

PRACTICE TIPS

Tips for Handling Cases Under The New Alimony Law

By Fern L. Frolin

19

VOICE OF THE JUDICIARY

Reflections on My Freshman Year on the Bench

By Judge Denise J. Casper

23

PRACTICE TIPS

Guidelines on Abuse Prevention Proceedings: Navigating Rough Seas

By Rebecca Cazabon

26

Boston Bar Journal

SPRING 2012

Officers of the Boston Bar Association

Lisa C. Goodheart, *President*
James D. Smeallie, *President-Elect*
Paul T. Dacier, *Vice President*
Julia Huston, *Treasurer*
Carol Starkey, *Secretary*

Members of the Council

Jonathan Albano	Lee Gesmer	Michelle O'Brien
Lisa Arrowood	Gerald Hendrick	Colin Owyang
Katharine Bachman	Renee Inomata	Lon Povich
Navjeet Bal	Robert Iuliano	Michael Ricciuti
Jonathan Chiel	Diana Lloyd	Jennifer Rivera-Ulwick
John Donovan	Elizabeth Lunt	Ingrid Schroffner
Susan Finegan	Christina Miller	William Sinnott
Donald Frederico	Maureen Mulligan	Mark Smith
Anthony Froio	Martin Murphy	Richard Toomey
	Camille Nelson	Gina Walcott

Past Presidents

Edward J. Barshak	Michael B. Keating
Joseph W. Bartlett	Joseph L. Kociubes
John G. Brooks	Renée M. Landers
R.J. Cinquegrana	Edward P. Leibensperger
John J. Curtin, Jr.	Joan A. Lukey
Gene D. Dahmen	Hon. Sandra L. Lynch
Anthony M. Doniger	James J. Marcellino
Thomas E. Dwyer, Jr.	Hon. Margaret H. Marshall
Donald R. Frederico	Edward I. Masterman
Hugh R. Jones, Jr.	John A. Perkins

Boston Bar Journal

Bonnie Sashin, Editor
Catherine F. Meeks, Layout and Design

The *Boston Bar Journal* is published four times a year by the Boston Bar Association at 16 Beacon Street, Boston, Massachusetts 02108. Tel. (617) 742-0615. Articles from the members of the Boston Bar Association are encouraged. Mail all correspondence to the *Boston Bar Journal*, 16 Beacon Street, Boston, MA 02108.

Visit the Boston Bar Association at www.bostonbar.org. Articles appearing in the *Boston Bar Journal* represent the views of their authors and do not necessarily carry the endorsement of the Association.
©2011 Boston Bar Association.
All rights reserved.

Advertising inquiries:
Call (617) 742-0615.

Board of Editors

Manisha H. Bhatt
Adam Bookbinder
David S. Clancy
Hon. Frank M. Gaziano
Hon. Linda E. Giles
Hon. Mark V. Green
Rachel Hershfang
Paul Holtzman
Hon. Mitchell Kaplan
Hon. Gary S. Katzmann
Edmund C. Kenealy
David A. Kluff
Andrea Studley Knowles
Paul G. Lannon, Jr.
Peter M. Leftkowitz
Constance L. Martin
Martha Ann Mazzone
Timothy M. Murphy
McCray S. Pettway
Kathleen B. Shields
Hon. Gabrielle R. Wolohojian
Richard J. Yurko

Board of Editors



Paul G. Lannon, Jr., Chair
Holland & Knight



Manisha H. Bhatt
Greater Boston Legal Services



Adam Bookbinder
U.S. Attorney's Office



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



Hon. Frank M. Gaziano
Superior Court Administrative
Office



Hon. Linda E. Giles
Massachusetts Superior Court



Hon. Mark V. Green
Massachusetts Appeals Court



Rachel Hershfang
U.S. Securities and Exchange
Commission



Paul Holtzman
Krokidas & Bluestein



Hon. Mitchell Kaplan
Massachusetts Superior Court



Hon. Gary S. Katzmann
Massachusetts Appeals Court



Edmund C. Kenealy
Liberty Mutual Group



David Alan Kluff
Foley Hoag



Andrea Studley Knowles
Sugarman, Rogers, Barshak &
Cohen



Martha Ann Mazzone
Fidelity Investments



Tejal Mehta
Middlesex District Attorney's
Office



Peter M. Lefkowitz
Oracle USA, Inc.



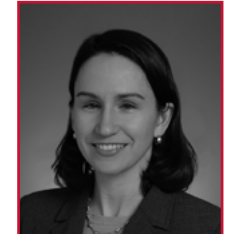
Constance L. Martin
Peabody & Arnold



Timothy M. Murphy
Sunstein Kann Murphy &
Timbers



McCray S. Pettway



Kathleen Burdette Shields
U.S. Securities and Exchange
Commission

Statement of Editorial Policy

The *Boston Bar Journal* is the premier publication of the Boston Bar Association. We present timely information, analysis, and opinions to more than 10,000 lawyers in nearly every practice area. Our authors are attorneys, judges, and others interested in the development of the law. Our articles are practical. Our publication is a must-read for lawyers who value being informed on important matters of legal interest. The *Boston Bar Journal* is governed by a volunteer Board of Editors dedicated to publishing outstanding articles that reflect their authors' independent thought, and not necessarily the views of the Board or the Boston Bar Association.

N.B. Judges serving on the Board of Editors of the *Boston Bar Journal* do not participate in discussions about or otherwise contribute to articles regarding impending or pending cases.



Hon. Gabrielle R. Wolohojian
Massachusetts Appeals Court



Richard Yurko
Yurko, Salvesen & Remz

President's Page

A Community of Lawyers Contributing to Justice

By Lisa C. Goodheart

The Boston Bar Association has one of the best views in the City, but I'm not talking about the one you'll see from the second story picture windows at the top of Beacon Hill. The more impressive sight is that of a great many lawyers doing good things to promote justice every day. The engagement of so many of our members in community service has always been one of the hallmarks of the BBA. And a big part of what makes the BBA a great organization is the high quality of the meaningful public service opportunities that it provides for members of our legal community. Let me tell you about just a few of those opportunities.

The Public Interest Leadership Program ("PILP") was created nearly a decade ago, out of the shared recognition by Chief Judge Mark Wolf of the federal district court and then-BBA President Michael Keating of the importance of enabling newer lawyers to become more engaged as community leaders earlier in their careers. PILP was launched to enable newer lawyers to deepen their understanding of the meaning of community leadership, while forming new and lasting connections with a like-minded group of colleagues. Each year, a class of PILP participants is chosen through a selective application



process, and each class of “PILPers” works together on public service projects of their choosing. This year, following some thoughtful programmatic refinements, PILP is being re-launched under the able leadership of Kathleen Henry and Darren Braham, both of whom are graduates of the program. PILP will continue to assemble diverse groups of newer lawyers, who are committed to collaborating on pro bono and public service work and serious about developing their own leadership potential. When they graduate from the 14-month program, they will join a network of alumni who mentor and support their successors. Please consider whether there is a newer lawyer who would benefit from your encouragement to apply for a spot in the next PILP class, and consider applying yourself if you are eligible for this unique public service opportunity.

The youth of the City of Boston are a particular focus of several BBA community service initiatives. Our summer jobs program, for example, clearly reflects this focus. Through this program, participating law firms and legal departments provide a diverse group of outstanding students from the Boston public high schools with invaluable exposure to the legal profession in the form of 8 weeks of summer employment. Our Law Day program in the Boston public schools is likewise aimed at our city’s youth. For the Law Day program, volunteer attorneys go into elementary, middle and high schools in all the different neighborhoods of Boston, highlighting the rule of law and planting seeds of interest in the legal profession. Our members’ commitment to young people is also demonstrated through the M. Ellen Carpenter Financial Literacy Program, which is run by the BBA’s Bankruptcy Law Section in partnership with the U.S. Bankruptcy Court. This program teaches high school students in Boston and across Massachusetts about the importance of making informed and effective decisions regarding their finances. Volunteer lawyers provide the students with very practical information about checking accounts, payroll information, tax deductions, budgeting, credit cards, buying a car and the

consequences of poor financial management. For many, these critical practical lessons might not otherwise be learned.

Our members also serve the community by direct participation in public policy advocacy. We make a positive difference by showing up and speaking out in support of broad access to justice and the sound administration of justice. The BBA offers a number of organized opportunities for advocacy, often in partnership with legal service organizations, other bar associations and the courts. The Annual Walk to the Hill for Legal Services is one such an opportunity. This year, some 700 lawyers rallied at the State House to support increased funding for civil legal aid for the poor, highlighting the importance of the legal safety net on which our most vulnerable fellow citizens must depend for protection of their most basic rights. More recently, on Court Advocacy Day, members of the legal community gathered again at the State House, this time to support the third branch of our state government by reminding the lawmakers who determine court budgets that “the judiciary is not a state agency whose capacity to function can expand or contract depending on changes in public policy and available resources,” as stated the BBA’s 2011 report, *Justice on the Road to Ruin*. Lawyers have a special understanding of the importance of a high-quality court system, and a corresponding obligation to highlight the consequences of sustained underfunding of our courts. Court Advocacy Day offered an important opportunity to meet that obligation, and others will follow.

To me, the essence of being a member of the BBA is being a part of a great community. There is a real energy and a genuine commitment that is apparent in our members’ efforts to serve the public interest. Please take a look. What you will see are many ways to contribute to justice – including but extending well beyond the few I’ve mentioned here. Please get involved. Your participation is important, and you will definitely make a difference. ■

Case Focus

To Err Is Human; To Correct, Difficult: In *Smaland Beach Association*, the Supreme Judicial Court Sets Demanding Standards for the Amendment of Deposition Testimony

By David Clancy

Imagine you depose an adverse witness who answers a key question with a categorical “Yes.” This is an important admission, and you’re pleased -- until an errata sheet arrives changing that answer to “No.” Can an errata sheet really change “Yes” to “No”? In *Smaland Beach Association, Inc. v. Genova*, 461 Mass. 214 (2012), the Supreme Judicial Court addressed that question for the first time, and the answer is ... “Maybe.”

The propriety of a substantive change to sworn deposition testimony, holds the SJC, depends on the circumstances. In elaborating on that point, the SJC provides detailed — and cautionary — guidance on the proper use of deposition errata sheets, an important day-to-day practical issue that had previously been unsettled in Massachusetts state court.

Smaland was a contentious real-estate dispute. Smaland Beach Association, in Plymouth, sued its own members Arthur and Patricia Genova, who owned adjoining property, for encroachment and



David S. Clancy is a partner at Skadden, Arps, Slate, Meagher & Flom LLP where he handles individual and class action lawsuits in federal and state court, at the trial and appellate level.

trespass, and the Genovas responded with various claims against Smaland, its officers and directors, and another local property-owner. Various individuals associated with Smaland were deposed. Evidently dissatisfied with their own sworn testimony, they made aggressive changes to it with a sheaf of errata sheets. “At various points in these errata sheets,” states the SJC, “the deponents wholly reversed their testimony from an affirmative to a negative response, or vice versa, struck existing testimony and replaced it with a different narrative, or added explanatory text to existing deposition testimony.”

An eyebrow-raising footnote 5 to the decision gives specific examples. “I’d say no” was changed to “I’d say yes.” “I don’t believe” was changed to “I believe.” Testimony about the Genovas cutting down a tree was changed from “I knew [the tree] was blocking” to “I knew [the Genovas] claimed it was blocking.” Another witness struck seven lines of testimony about an affidavit she signed at her counsel’s office and replaced it with “four paragraphs of testimony emphasizing her [own] role” in composing the affidavit. The errata sheets euphemistically described these changes as “clarifications.”

Smaland’s attorney was heavily involved in the preparation of these errata sheets, and the Genovas’ counsel argued that he had thereby made himself a witness at trial. On that basis, and because of an advice-of-counsel defense, the Superior Court judge disqualified him. “I’ve never seen errata sheets of that nature in my legal career,” the judge stated at the hearing. “They essentially totally changed the deposition testimony. Not to allow [the Genova’s counsel] to call him as a witness would be prejudicial...”

On an interlocutory appeal, the SJC vacated the disqualification ruling, but not because the SJC approved of the errata sheets. Instead, the SJC believed that the trial judge did not “sufficiently analyze the factors” relevant to the “severe” penalty of attorney disqualification. For that essentially procedural reason, the SJC remanded for further consideration, recognizing that after “further review” the trial judge might properly “again disqualify” the challenged attorney. In doing so, the Court referred to the

errata sheets as “unusual,” and took “this opportunity to clarify the use of errata sheets to alter deposition testimony.”

First and foremost, held the SJC, an errata sheet *can* make a substantive change to accurately-transcribed deposition testimony. A minority of federal courts have held otherwise. The SJC considered but rejected that strict rule, in large part because Massachusetts Rule of Civil Procedure 30(e) expressly contemplates changes to the “form or substance” of deposition testimony. The SJC described the minority view as imposing “an artificial stricture on the analogous Federal rule,” and described its own view as permitting “legitimate corrective changes and advanc[ing] the underlying purpose of the discovery process, i.e., ‘for the parties to obtain the fullest possible knowledge of the issues and facts before trial.’”

Nevertheless, the SJC cautioned, its more “expansive” reading of the rule does not mean that changes to substance may *freely* be made. Quite the contrary. A substantive change is improper unless counsel has first advised the witness “that any changes they make must represent their own good faith belief, and may not be undertaken simply to bolster the merits of a case.” It is also improper unless it is accompanied by a statement of reasons, which reasons “must be advanced in good faith and provide an adequate basis from which to assess their legitimacy.” The SJC puts counsel on notice that, “if there is any indication that an attorney has exploited the rule by arranging or facilitating the submission of errata sheets for the purpose of strategic gain in a case and not to correct testimony, his conduct may be grounds for sanctions.”

Also, under the SJC’s holding, even where a change is permitted as a matter of substance, it can have important procedural consequences. The deposition may be reopened if the new answers “would reasonably have triggered further inquiry” during the initial deposition — with an award of associated costs and attorneys’ fees “where fairness requires.” In addition, the original answers may be read at trial, along with the changed answers and the reasons provided for the change.

Preparing an errata sheet is a recurring aspect of litigation practice, but, until now, Massachusetts-specific guidance on this issue was sparse. The SJC identified only two Massachusetts state-court decisions, both by the Superior Court. Federal decisions (which are in any event non-binding in take an approach that Massachusetts state court) are inconsistent. As the SJC observed, a majority of federal courts take an approach that “allows any changes, whether in form or in substance, clarifying or contradictory,” but a “growing minority” of federal courts have adopted “a narrower interpretation.” That minority is itself divergent, with some courts permitting the correction of typographical and transcription errors only (“a deposition is not a take-home examination,” stated one federal district court), and some courts also permitting the addition of text that clarifies, but does not contradict, existing testimony.

So while the issue remains unsettled in federal court, it is now settled in Massachusetts: a substantive change to a deposition transcript is a *possibility*, but only where specified procedural requirements have been satisfied, and only where the underlying reason for the change — which must be contemporaneously stated in writing — is legitimate. And, as the SJC warns in its coda,

[W]e caution deponents and attorneys to use this privilege sparingly. The errata sheet is intended as a tool to correct mistakes in deposition testimony or subsequent transcription. It is not to be used as a mechanism to inject additional facts into the testimony of a single deponent, or to align testimony across deponents.

This article began by asking rhetorically whether an errata sheet can change an answer from “yes” to “no,” and summarized the SJC’s recent answer as “maybe.” On reflection, perhaps it is appropriate to conclude by amending that “maybe” as follows: “Maybe, *but only where the party and counsel proceed in good faith and with great care.*” The reason of course is the SJC’s detailed, firm, and cautionary guidance. ■

Case Focus

Commonwealth v. Aviles and the Continuing Evolution of the First Complaint Doctrine

By Anne Pogue Donohue

Recently, in *Commonwealth v. Aviles*, 461 Mass. 60 (2011), the Massachusetts Supreme Judicial Court announced a significant reformulation of the “first complaint” doctrine in sexual assault cases. The SJC created the “first complaint” doctrine seven years ago, when it abandoned the “fresh complaint” doctrine. See *Commonwealth v. King*, 445 Mass. 217 (2005), *cert. denied*, 546 U.S. 1216 (2006). Prosecutors could no longer have multiple witnesses testify about what a sexual assault victim told them about the assault; instead, a prosecutor would be limited, generally, to introducing the testimony of only the first person to whom the victim disclosed the assault. In other words, the prosecution could introduce only the victim’s “first complaint.” The purpose of the “first complaint” doctrine, as had been the purpose of the “fresh complaint” rule it replaced, was to support a victim’s credibility by countering the widely-held assumption that a victim who is not fabricating her allegations would have made a contemporaneous complaint of the assault. Another purpose of the “first complaint” doctrine was to avoid unfairly enhancing a victim’s credibility by allowing multiple repetitions of the victim’s complaint as had been permitted under the “fresh complaint” doctrine.

As the SJC confronted difficulties in applying the first complaint doctrine, two concurring opinions appeared. They suggested that at least some of the justices were thinking about changing the doctrine yet again, or possibly even abandoning it altogether. See *Commonwealth v. McCoy*, 456 Mass. 838,



Anne Pogue Donohue started her legal career as a law clerk at the Superior Court and then for Justice Ariane D. Vuono at the Appeals Court; since 2007 she has been an appellate prosecutor at the Middlesex District Attorney’s Office.

854-856 (2010) (Marshall, C.J., Botsford and Gants, JJ., concurring); *Commonwealth v. Dargon*, 457 Mass. 387, 405-406 (2010) (Marshall, C.J., Botsford and Gants, JJ., concurring). These ruminations culminated in *Aviles*, where the SJC affirmed the vitality of the first complaint doctrine but significantly modified the standard of review on appeal.

In *Aviles*, the eight-year-old victim told her mother in 2002 that the defendant (who was her mother's boyfriend) had "touched" her, but she did not provide any further detail. The victim and her mother moved out of the house. Three years later, after seeing the defendant's photograph on TV, the victim told her grandmother the details of the sexual assault three years earlier. The grandmother then told the victim's mother, who in turn contacted the police. The defense theory was that the victim fabricated the allegations against the defendant, with whom the victim and her mother were living, because she wanted to go live with her grandmother.

The defendant moved *in limine* to restrict the complaint testimony to the victim's initial report to her mother that the defendant had "touched" her, thereby excluding any evidence relating to the victim's more detailed disclosure three years later to her grandmother. The trial judge agreed that the substance of the victim's statement to the grandmother was inadmissible under the first complaint doctrine. However, she allowed the witnesses to testify that the victim had made a disclosure to the grandmother after seeing the defendant's photograph on television, and that the disclosure led the mother to the police.

Given that the victim's 2002 statement to her mother was the "first complaint," the SJC accordingly affirmed the trial court's ruling that the substance of the victim's disclosure to her grandmother was inadmissible under the first complaint doctrine. The Court also held that it was error to admit the fact of the later disclosure to the grandmother because the victim's "testimony regarding the fact of her disclosure was essentially the same as permitting her grandmother to testify, thereby lending improper credence to [the victim's] account." *Id.* at 69. Nevertheless, the Court ruled that the error was harmless because the testimony was independently admissible "to rebut the defendant's

suggestion that [the victim] had fabricated her accusations in order to return to her grandmother's house." *Id.* at 70-71.

Aviles re-affirmed the vitality of and established new parameters for the first complaint doctrine. The SJC also explicitly changed the standard of appellate review. The Court held that the first complaint doctrine would no longer be treated as an evidentiary rule. Rather, to give trial judges "greater flexibility," the doctrine should be viewed as "a body of governing principles to guide a trial judge on the admissibility of first complaint evidence." *Id.* at 72-73. As a result, the trial judge's decision to admit such evidence will be reviewed on appeal for abuse of discretion. If an abuse of discretion is found, presumably the appellate court will order reversal only if the error is prejudicial (in the case of preserved error) or if it created a substantial risk of a miscarriage of justice (in the case of unpreserved error).

What does this mean for us as practitioners going forward? Perhaps the biggest question mark left open in *Aviles* is whether the new rule will apply retroactively to cases tried before the decision issued. *Aviles* did not address this question, so for now, we must await further guidance from the appellate courts on this issue. With regard to trials, the effects of *Aviles* will be more subtle and will vary from case to case. The SJC unequivocally stated that *Aviles* does not signal "a relaxation or erosion of our first complaint jurisprudence." *Id.* at 73. Accordingly, practitioners should expect trial judges to continue applying the first complaint doctrine but with greater latitude, as provided by *Aviles*, in assessing what complaint evidence may properly be admitted based on the circumstances of each case. A big difference will no doubt come on appeal as a result of the new standard of appellate review. To reverse for abuse of discretion, the appellate courts must find that "no conscientious judge, acting intelligently, could honestly have taken the view expressed by [the trial judge]." *Commonwealth v. Ira I.*, 439 Mass. 805, 809 (2003) (internal quotes and citations omitted). Because it is more difficult for defendants to meet this higher standard, it is likely that fewer cases will be reversed on the basis of admission of evidence in violation of the first complaint doctrine. ■

Heads Up

Transgender Equal Rights In Massachusetts: Likely Broader Than You Think

M. Barusch and Catherine E. Reuben

On November 23, 2011, Governor Patrick signed into law legislation designed to protect transgender persons. [Chapter 199 of the Acts of 2011](#), “An Act Relative to Gender Identity,” adds the words “gender identity” to the list of protected classes in a broad array of Massachusetts anti-discrimination laws, including laws that prohibit discrimination in employment, housing, education, lending, and credit. Yet, there was at least one general anti-discrimination law that was not amended — M.G.L. c. 272, §98 — which prohibits discrimination by places of public accommodation. Does this mean that restaurants, grocery stores, museums, and other places of public accommodation are free to tell transgender persons, “you aren’t welcome here”? If past is prologue, the answer to that question is “No.” Advocates will be using existing laws and precedent, unaffected by the recent legislation, to protect transgender persons from discrimination by public accommodations.

Some Definitions

The new law, effective July 1, 2012, defines gender identity as “a person’s gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or



M. Barusch is a public defender at the Committee for Public Counsel Services. She also serves as the Vice Chair of the Steering Committee of the Massachusetts Transgender Political Coalition, a member of the board and the Committee on Transgender Inclusion of the Massachusetts LGBTQ Bar Association and is a past Junior Supervising Attorney for Massachusetts Transgender Legal Advocates.



Catherine E. Reuben is one of the founding partners of the law firm of Hirsch Roberts Weinstein LLP where she provides counseling, training, and litigation defense for employers in labor and employment matters. She is an active participant in the labor and employment law community, including numerous bar association activities, continuing legal education programs, and initiatives related to transgender rights.

behavior is different from that traditionally associated with the person's physiology or assigned sex at birth" and goes on to explain some of the evidence that could prove a person's gender-related identity. Although the law does not actually use the term transgender, one of its primary purposes was to protect transgender persons. Transgender is an umbrella term that includes people who transition from one gender to another and/or people who defy social expectations of how they should look, act, or identify, based on their sex assigned at birth. An example of a famous transgender person is Chaz Bono. Mr. Bono's assigned sex at birth was female, but he now lives his life as a man; he went through a gender transition, in other words, a process by which he went from living and working as one gender to another. Chaz Bono would be protected under the new law as a person who expresses a masculine identity, appearance, and behavior even though his assigned sex at birth was female. The new law also protects people who do not undergo a gender transition or do not identify with a gender different than the one traditionally associated with their sex assigned at birth, but who do not fit traditional gender roles, such as the female employee in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), who was told that, if she wanted to make partner, she should walk, talk, and dress in more feminine manner.

Debate Over the Law

Proponents of the bill focused their advocacy on telling the stories of the many transgender persons whose lives were impacted by discrimination and violence. [In the largest national survey of transgender persons regarding discrimination against them](#), 76% of Massachusetts respondents reported experiencing harassment or mistreatment on the job, 20% had lost a job because they were transgender, and 22% were denied equal treatment by a government agency or official. The Judiciary Committee hearings went late into the night, with long lines of individuals and organizations testifying in support of the bill.

Opponents of the bill were also present, vocal, and passionate. Of particular concern was the use of restrooms. Among other things, opponents argued that the law would allow men posing as women to gain access to women's restrooms for improper purposes. At the Judiciary Committee hearings,

some women testified about their fear of being assaulted in a public restroom, even though there was no evidence that such incidents had increased with the passage of transgender rights laws in Boston, Cambridge, and other municipalities and nearby states, and even though the national survey indicated that transgender women were frequently the victims of such crimes, not the perpetrators.

Largely as a result of this debate, the law that was passed did not address public accommodations. Gender identity was added to the list of protected classes in the laws prohibiting discrimination in employment, housing, credit, and public education, but the law regarding public accommodations, M.G.L. c. 272, §98, was not so amended. By not addressing public accommodations, the Legislature left the law of public accommodations unchanged and presumably free for further development by the courts.

Public Accommodations and Transgender Persons

Public accommodations cover a great deal more than restrooms. M.G.L. c. 272, §98 prohibits discrimination by places that are open to and accept or solicit the patronage of the general public, including hotels, transportation carriers, retail stores, restaurants, libraries, hospitals, and more. Under this statute, public accommodations may not discriminate on the basis of race, color, religious creed, national origin, sex, sexual orientation, deafness, blindness or any physical or mental disability, or ancestry.

The Legislature's failure to add the term "gender identity" to the list of protected classes in the public accommodations law, while adding it to so many other non-discrimination statutes, appears at first blush to create the potential for incongruous results. A restaurant is now prohibited from terminating an employee because the employee transitions from female to male, but can that same restaurant lawfully refuse to sell food to that employee after he clocks out? A hospital is legally required to permit a transgender female nurse to use the ladies' room, but can it lawfully refuse similar access to a transgender female patient?

Lawyers representing transgender individuals in such public accommodations situations have a number of options for resolving this seeming incongruity. One place to start is the public accommodations law itself. While the term "gender identity" may not have been added, the terms "sex" and "disability" were not removed. Depending on the circumstances, discrimination against a transgender person

by a place of public accommodation could be deemed discrimination on the basis of sex or disability. Well before the new law was passed, there were numerous court and agency cases in which discrimination against transgender persons was deemed to constitute unlawful sex/gender and/or disability discrimination. For example, in *Doe v. Yunits*, 15 Mass. L. Rptr. 278 (Mass. Super. Ct. 2001), Judge Gants, now an Associate Justice of the Supreme Judicial Court, held that a transgender girl who had been diagnosed with gender identity disorder could proceed on a claim of disability discrimination when her school refused to permit her to wear clothing typically worn by girls. See also, *Jette v. Honey Farms Mini Market*, 2001 WL 1602799 (MCAD) (where employer was on notice of complainant's diagnosis and treatment for transsexuality, yet failed to provide her with the reasonable accommodation of allowing her to identify by name and otherwise as female, complainant could proceed on a claim of disability discrimination); *Lie v. Sky Publishing*, 2002 WL 31492397 (Mass. Super.) (male to female transsexual who is denied permission to wear female clothing at work can proceed with claims for both disability and gender-based discrimination); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (discrimination against a transgender individual constitutes sex discrimination in violation of federal law). If transgender persons are denied access to public accommodations, they could, and still can, file complaints with the Massachusetts Commission Against Discrimination (MCAD).

Transgender persons facing discrimination in public accommodations can also look to local law. A number of cities, including Boston, Cambridge, and Northampton, have enacted ordinances prohibiting discrimination on the basis of gender identity by public accommodations.

Another source of protection is Executive Order 526, issued by Governor Patrick in February 2011. Executive Order 526 provides that “all programs, activities, and services provided, performed, licensed, chartered, funded, regulated, or contracted for by the state shall be conducted without unlawful discrimination” based on, among other things, “gender identity or expression.” Many public accommodations, including homeless shelters, hospitals, and other human service organizations, are regulated and funded by the Commonwealth and thus could well be subject to the Governor's order.

There is also “An Act Relative to Gender Identity” itself. To the extent a place of public accommodation is also an employer — and most are — it will be required to refrain from discrimination in

employment on the basis of gender identity. A public accommodation's practice of discriminating against transgender patrons could increase its chances of being held liable for employment discrimination, since such practice could be deemed admissible as evidence of gender identity bias. Similarly, banks, credit unions, credit card companies, and other public accommodations that provide loans and/or credit are prohibited under the new law from discrimination in credit and lending on the basis of gender identity. If such an entity were to refuse to open an account for a transgender patron, even if that person did not specifically request a loan, it could well constitute a violation of the law, since credit and loans are usually among the services offered to account-holders. Further, to the extent such entities adopt non-discrimination policies aimed at compliance with the new law, the failure to follow such policies could give rise to a claim for breach of an express or implied contract.

Conclusion

While "An Act Relative to Gender Identity" may not expressly include places of public accommodation, many such entities are covered in their capacity as employers, lenders, creditors, and/or state contractors. Discrimination on the basis of gender identity may also violate existing discrimination laws and ordinances, either expressly or as interpreted in precedent. In short, advocates for transgender rights in Massachusetts may well confirm that those rights are broader than you may think from a quick read of the new act. ■

Practice Tips

Tips for Handling Cases Under The New Alimony Law

By Fern L. Frolin

On March 1, 2012, An Act Reforming Alimony, M.G.L. c. 208, §§48 – 55, became law in the Commonwealth. The new law changes the structure and rules of judicially ordered support payments between former spouses. The statute establishes different types of alimony, provides criteria for courts to consider in deciding alimony cases, and encourages end dates for most alimony orders.

Alimony in Massachusetts was historically based on the recipient's need and the payor's ability to pay at the time of the order. Because most recipients' future needs and most payors' future ability to pay are speculative, nearly all orders had open-ended duration. Thus the notion evolved that alimony is usually a life-time arrangement, changeable only after circumstances requiring modification had already occurred. If a recipient increased income or conscientiously saved, he or she risked termination or reduction of alimony. If the payor suffered involuntary financial reversal, the recipient's alimony could be abruptly terminated or reduced, despite ongoing need. The scheme encouraged dependency, left recipients vulnerable to unplanned events, and left payors with no ability to foresee when alimony obligations would end.

Against this backdrop, and public pressure for change, the legislature passed the new law. The alimony law retains "need and ability to pay" concepts and permits judicial discretion in most instances, but it expands the narrow restrictions of present need and ability to pay, adding reasonable forward-looking presumptions. It also allows different forms of alimony for different circumstances. Mastery of the new law will require study, practice, and development of a lucid body of interpretive appellate law. In the meantime, the following tips may aid practitioners.



Fern Frolin practices family law at Grindle Robinson Goodhue & Frolin. She served on the joint judiciary committee task force that drafted the Alimony Reform Act of 2011.

UNDERSTAND EACH TYPE OF ALIMONY AND DETERMINE WHICH IS BEST FOR YOUR CLIENT.

General term alimony is granted to a spouse who is economically dependent. It will usually follow a mid to long term marriage. Except for judgments that the parties agreed were non-modifiable, orders entered before March 2012 are deemed general term orders. General term alimony terminates when either party dies; when the payor reaches “full retirement age” (as defined in the statute); on the recipient’s remarriage; on a date fixed by court order; or perhaps if the recipient maintains a common household with a third party. The order is modifiable unless the parties agree otherwise.

Presumptive duration depends on the length of the marriage. After a marriage of twenty years or longer, alimony presumptively ends when the payor reaches full retirement age. The new statute measures marriage length for alimony purposes from the date of marriage to the date of service of the complaint for divorce. Some practitioners question whether the date of service rule will cause payors to rush to serve a complaint in order to establish a marriage length cut-off. Lawyers should advise their clients of presumptive limits but also recognize that judicial discretion may override the statutory presumptions. For example, the court may consider a significant period of premarital cohabitation or a significant marital separation in determining the length of the marriage.

Rehabilitative alimony is granted to a spouse who is expected to be self-sufficient by a predicted time. It is available after any length marriage and is payable for up to five years. It is also available after child support ends. It terminates at a set date, recipient’s remarriage, or on death of either party. It is modifiable in amount. It may be extended for compelling reasons if unforeseen events prevent the recipient from becoming self-supporting and the payor can continue to pay without “undue burden.” Because rehabilitative alimony may last longer than the presumptive limit on general term alimony for marriages of five years or less, this may be the most advantageous form for a recipient after a short marriage.

Reimbursement alimony is compensation for the recipient’s contribution to the payor’s financial resources. It is only available if the marriage was five years or less. It is not modifiable, and it is not subject to presumptive durational limits. Reimbursement alimony ends only on the death of either party

or a date certain, so it may be a good choice for a recipient who plans to remarry or live with a new partner.

Income guidelines do not apply to reimbursement alimony. Therefore, reimbursement alimony may be optimal for a recipient who contributed substantially to the payor's future where the investment has not yet paid off – for example, when one spouse put the other spouse through graduate school.

Transitional alimony is granted to transition a recipient to a new location or an adjusted lifestyle after a marriage of five years or less. It terminates at a date certain or the death of either party, is not modifiable or extendable, and is available for up to three years. It may not be replaced with a different form of alimony.

CONSIDER DEVIATING FROM THE PRESUMPTIVE TERMINATION DATE WHEN THE ORDER IS FIRST ESTABLISHED. Under the new statute, all alimony orders presumptively terminate when the payor reaches full retirement age, if not sooner. The statute adopts the United States Social Security Act designation of full retirement age, which means that the age varies depending on the payor's birth date. Further, when the order originates, the court (or the parties by agreement) may set a different alimony termination date for good cause shown. Deviations in initial orders require only written findings of the reasons. Agreements to deviate should state the reasons. Requests for the court to deviate should include proposed findings.

Extension of an established termination date will be difficult to secure. An extension requires a material change of circumstances that occurred after the order was entered, and clear and convincing evidence of reasons for the extension. Practitioners should determine at the outset whether facts warrant an order that is longer than the presumptive duration. Advise recipient clients that they will face a heightened burden of proof if they need to extend the order.

CREATE A CHECKLIST OF REASONS TO DEVIATE FROM THE PRESUMPTIONS. The non-exhaustive statutory list includes: parties' advanced age; medical concerns; sources and amounts of income, including investment income from assets that were not allocated in the divorce; tax considerations; a party's inability to provide self-support because of the payor's abusive conduct; a party's lack of employment opportunity; and orders that one party maintain medical insurance or life insurance.

(The latter factor directly conflicts with a provision of the equitable division statute, M.G.L.c. 208, §34, but the legislature is expected to remedy the conflict soon.) Because the statute presumes that alimony ends at the payor's retirement age, lawyers should also consider the client's expected retirement resources, especially if the parties will not be similarly situated after a long term marriage. Divorce lawyers may want to maintain a checklist of deviation reasons and expand the list as new appellate decisions develop.

“COMMON HOUSEHOLD” IS A QUESTION OF FACT. The new statute permits alimony modification, suspension or termination if a general term alimony recipient cohabitates with another person in a common household for at least three continuous months. A finding of “common household” requires a factual determination that the recipient and the third party reside together as a “couple.” Indicia include reputation as a couple, economic interdependence and other factors. Not expressly mentioned in the statute, but facts that practitioners may want to research, include: family memberships, joint bank accounts, and joint ownership of real estate. Look also for “couple” and “status” postings on social network media.

Conclusion: Watch for appellate interpretations of key new statutory provisions. For example, where recipients' “need” remains the basis for alimony, does the new presumptive maximum order amount now trump “need”? In the meantime, the message of the new law is that each party should plan financially. The new law requires us to think about spousal support in terms of the client's future needs, resources and lifestyle. ■

General Term Alimony
Presumptive* Maximum Durations

If married :

Up to 5 years 50% of months married

Up to 10 years 60% of months married

Up to 15 years 70% of months married

Up to 20 years 80% of months married

More than 20 years up to presumptive retirement age

*All presumptions are subject to Court's statutory exercise of discretion

Voice of the Judiciary

Reflections on My Freshman Year on the Bench

By Judge Denise J. Casper

I recently passed the one-year anniversary of my appointment to the U.S. District Court for the District of Massachusetts. Over the past year, attorneys have asked what has surprised (or not surprised) me about joining the bench. When the BBA approached me about writing this article, I was happy to have the opportunity to provide some reflections. I hope that these insights might be helpful for those attorneys who find themselves appearing in my courtroom and that they might shed some light on the transition to the bench for those who might consider applying to be a judge.

One of things that has not surprised me is the high quality of lawyering that I see day in and day out. Both in terms of oral advocacy and the quality of legal writing evidenced by the parties' filings, the general standard of practice is quite high. Great lawyering does not necessarily make my job of rendering decisions easier, but it is a much more comforting thought to understand that the best arguments are being made on both sides than the discomfoting feeling when I think that is not being done. Even the most skilled and experienced attorneys, however, should endeavor to make the most of their time during oral argument. At the beginning of a motion hearing, I often tell counsel that I have read the motion papers and supporting materials. I do that so that attorneys are free to begin their



Judge Denise J. Casper serves on the U.S. District Court for the District of Massachusetts.

arguments as they see fit, rather than beginning at square one, since I am familiar with the factual record and legal arguments. Similarly, it is important to take your cues from the judge. If I interject with a series of questions about your second argument, it may be because I think that is the toughest argument for your side and you have a greater burden of convincing me that your side should prevail. Use your time addressing those concerns.

There has certainly been a fair amount written by attorneys and judges about civility in our profession. In my brief time as a judge, I have not come to any conclusions about the state of civility in our practice, but I will share some observations from the past 56 weeks on the bench. Having been a practicing attorney, it comes as no surprise that attorneys involved in litigation — an adversarial system — come into my courtroom having engaged in a course of exchanges that may have been heated and contentious. Zealously representing clients in hard-fought cases can lead to vitriol between even the most reasonable attorneys. What has been surprising to me, however, is how much courtroom time some attorneys are willing to squander (if I would let them) on finger-pointing among counsel when the disputes are not material to the motion or matters that I need to decide. I am not talking about putting a pleasant face on the relationship between opposing counsel for the sake of the Court nor am I recommending that an attorney abandon well-founded arguments that turn upon the behavior of counsel or his/her conduct of a case. I merely suggest that attorneys stop to consider whether ad hominem attacks on fellow members of the bar in open court are advancing their client's case.

I certainly have not been surprised that cases on my docket generate occasional discovery disputes. What attorneys, however, may not fully appreciate is that unless I have heard the parties on a preliminary injunction, motion to dismiss or other substantive motion early in the life of the case, my knowledge of the allegations and claims in the case may not extend much further than my review of the pleadings and my discussion with counsel at the initial scheduling conference. Thus, counsel should take care to explain in their papers not only why the discovery that they seek to compel (or seek to protect from disclosure) is warranted under the appropriate legal standards, but why it is important, as a factual matter, in their case to their claims or defenses. Because counsel are intimately familiar

with the facts of the case, you may think that the importance of certain discovery is self-evident, but at least for this judge, that is not always true, so take the time to make it clear in your motion papers.

Many attorneys have asked me how I found the transition from being a member of the bar to becoming a member of the bench. It is no small change to go from trying to make the most persuasive arguments to deciding which arguments should prevail as a matter of law. I have found a few things have made the transition easier. First, the nature of my last job before the bench (as the Deputy District Attorney in the Middlesex District Attorney's Office) was one in which I often had to keep my own counsel about certain matters. I think that this fact has helped me adjust more readily to a position that necessarily requires a certain level of solitude. Second, the acute sense of isolation that many new members of the bench fear, I have not experienced. Instead, I was welcomed warmly by colleagues on this Court whose support and good humor has eased any trepidation I may have had about joining the bench. I have also had a number of opportunities to interact with my judicial colleagues across the country, many of whom are also "freshmen" on the bench. Finally, I have accepted responsibilities outside of my core job of judging that have allowed me to continue to engage in the type of civic activities and bar programs that I enjoyed as an attorney. It is my great pleasure to preside over Discovering Justice mock trials in my courtroom, to speak to teachers about explaining the judicial system to their students, to welcome new classes of Nelson Fellows and Lindsay Fellows into my courtroom where I can proudly point out Judge Lindsay's portrait to them and to work with bar leaders on the plans for the Court's next conference this fall. Although my role now may be different from my role when I participated in these programs as an attorney, I do them in the same spirit of increasing knowledge of the judicial system and advancing the dialogue between bar and bench. Having made the transition and marked my first anniversary, I look forward to the years of judicial service to come. ■

Practice Tips

Guidelines On Abuse Prevention Proceedings: Navigating Rough Seas

By Rebecca Cazabon

Sure to stir a wide range of emotions, restraining orders have become ubiquitous in our society. Practitioners in the criminal law and domestic relations law arenas, as well as others, encounter restraining orders on a frequent basis. For this reason, lawyers should become familiar with the particulars of Chapter 209A law, and resources available to help navigate what can appear to be a confusing process. One such resource is the *Guidelines for Judicial Practice: Abuse Prevention Proceedings*. Promulgated by the Office of the Trial Court in 1996, and later revised in 1997, 2000, and most recently in 2011, the *Guidelines* are an essential tool for anyone handling a 209A matter.

Enacted in 1978, the Abuse Prevention Act, M.G.L. Chapter 209A provides a statutory mechanism for those suffering from domestic abuse to seek legal recourse to stop and prevent abuse from occurring in the future. Court orders available under c. 209A include, instructing the defendant to stop abusing or threatening to abuse the plaintiff, forcing the defendant to stop contacting the plaintiff, requiring the defendant to leave and stay away from the plaintiff's household and workplace, granting temporary



Rebecca Cazabon is the Pro Bono Managing Attorney at Foley Hoag LLP, where she has specialized in domestic violence and sexual assault law for the past twelve years.

custody of a minor child/ren to the plaintiff, and directing the defendant to pay temporary support to the plaintiff or the minor child/ren of the relationship. While 209A proceedings are civil in nature, a violation of a 209A order is a criminal offense.

To be eligible for a 209A order, a victim must show an intimate or familial relationship with the defendant, including marriage, substantive dating, cohabitation, relation by blood or marriage, or having a child together. Victims who never knew their perpetrators, or knew them only marginally, such as many survivors of sexual assault, rape, and stalking, are ineligible to file for a 209A order. To provide these and other victims with legal recourse, in 2010, the legislature enacted an Act Relative to Harassment Prevention Orders, M.G.L. 258E. To be eligible for 258E relief, the plaintiff must prove the defendant committed at least three acts of willful and malicious conduct against the plaintiff, with the intent to cause fear, intimidation, abuse or damage to property, and that said conduct did in fact cause fear, intimidation, abuse or damage to property; or the defendant committed any act by force, threat or duress, that caused the plaintiff to engage in sexual relations; or the defendant committed a violation of a list of enumerated crimes. The Supreme Judicial Court recently held that appeals from 258E decisions are appealed to the Massachusetts Appeals Court (as are 209A appeals). *O'Brien v. Borowski*, 461 Mass. 415 (2012).

The *Guidelines for Judicial Practice: Abuse Prevention Proceedings* were issued to help judges and court personnel sensitively and objectively address the broad range of complex issues that arise under c. 209A. Intended to promote the safety of applicants, while ensuring the due process rights of defendants, the *Guidelines* provide uniformity and a coordinated response by the trial courts to domestic violence. It is important to note that the *Guidelines* apply only to 209A proceedings, and are not an amendment to the existing statute.

The *Guidelines* provide a detailed and expansive analysis of the legal requirements under 209A, recommended interpretations of the law, and best practices for 209A policy and procedure, particularly

in areas where the law is vague or silent. See *Guidelines for Judicial Practice: Abuse Prevention Proceedings* § 1:00 commentary (September 2011). Given the sensitive nature of the issues involved, and the high level of tension that is often present, lawyers can benefit from thoughtful and practical guidance on how to represent clients in these cases.

The fourth edition of the *Guidelines* was compiled and implemented by the Trial Court, with significant assistance from the Boston Municipal Court, District Court, Probate and Family Court, and Superior Court Departments. The revisions reflect several major substantive and procedural changes in 209A practice. The revised *Guidelines* can be found on the Trial Court website, <http://www.mass.gov/courts/formsandGuidelines/domestic/index.html>. Links to other documents, such as *Highlights of September 2011 Revisions to Guidelines*, and documents referenced in the *Guidelines*, including the newly revised c. 209A forms, which went into effect in January, 2012, can also be found on the Trial Court website.

The 2011 revisions to the *Guidelines* can be divided into three categories: changes based on appellate case law decided between December, 2000, when the *Guidelines* were previously revised, and September, 2011, when they were most recently revised; changes based on statutory amendments and new statutory law; and changes based on the Trial Court's desire to clarify and improve court policies and procedures covering 209A proceedings. Brief descriptions of the most significant revisions to the *Guidelines* can be found in the Highlights on the Trial Court website. Certain revisions, however, deserve special mention.

To begin with, the *Guidelines* have been revised to reflect that a court does not need personal jurisdiction over a defendant to issue a 209A order, except that it may not impose any affirmative obligations on a non-resident defendant, like ordering to pay child support or to surrender firearms. Additionally, in light of the rise of social media over the last decade, the *Guidelines* provide that a

209A order prohibiting contact can be violated through e-mail, texts, Facebook, and Twitter. The *Guidelines* now arm practitioners with helpful analysis based on key appellate law governing what a plaintiff must show in order to support a finding of risk of abuse to warrant an extension of a 209A order. These factors include, ongoing custody or other litigation that engenders hostility, the parties' demeanor in court, and the likelihood that the parties will encounter each other in their usual activities. In addition, the revised *Guidelines* reflect recent case law supporting the holding that the fact that abuse has not occurred during the pendency of a 209A order does not in itself constitute sufficient grounds for allowing an order to be vacated. In situations where the parties reverse roles in two different courts, and obtain 209A orders against one another, the revised *Guidelines* dictate that they be treated as mutual orders, which require specific written findings of fact, and should be issued only sparingly.

Further revisions that warrant special attention are those that are based on the Trial Court's desire to clarify and improve court policies and procedures. For example, the revised *Guidelines* now specify that a plaintiff should be informed that a defendant will have access to the affidavit supporting the 209A request. The revised *Guidelines* also clarify that discovery orders are within the court's discretion, but should be issued only upon a showing that such discovery is necessary to provide specific essential information, removing the presumption that discovery is not allowed in 209A cases except in extraordinary circumstances. In addition, the *Guidelines* reinforce that 209A cases are public hearings and as such should not be conducted at side bar. The revised *Guidelines* specify that a 209A order must be immediately transmitted by the court to police as promptly as possible, either by faxing it to the appropriate department or arranging for the police to retrieve the order from the courthouse. Orders that have expired or have been terminated by a judge are now referred to as "terminated" instead of "vacated". Finally, the *Guidelines* recommend that the clerk's office request photo identification from a plaintiff wishing to terminate an order.

While the *Guidelines* lack the force of law of a legislative statute, and are not legally binding on the courts, they do provide persuasive judicial interpretations of statutes, case law and court procedure. The Courts regularly apply the *Guidelines* to support their interpretation of domestic violence law. For example, in support of its assertion of the minimum standards of fairness that must be observed in abuse prevention proceedings, and addressing specifically that a judge is prohibited from cutting short an abuse prevention hearing because of her belief that it should move to another forum, the Appeals Court recently cited to the *Guidelines*, “If the court in which a person initially seeks protection under c. 209A has jurisdiction, the person should be heard as soon as possible in that court, and should not be sent to another court”. *Guidelines for Judicial Practice: Abuse Prevention Proceedings* § 1:01.” *S.T. v. E.M.*, 80 Mass.App.Ct. 423, 953 (2011).

As another example, the Supreme Judicial Court used the *Guidelines* to reinforce its holding that a trial court committed an error of law in ignoring the four factors contained in c. 209A that should be considered in deciding whether the parties are engaged in a “substantive dating relationship”, instead improperly relying on non-statutory factors, including, the existence of a pending criminal case, and the young age of the alleged victim. “[T]he issue of family violence has become the focus of legitimate and increasing public concern. However, that concern must not be permitted to affect or diminish the court’s responsibility to remain neutral, to protect the rights of the accused in each case, and to address each case individually on its own merits.’ *Judicial Guidelines* § 1:02 commentary.” *C.O. v. M.M.*, 442 Mass 648 (2004).

As the Trial Court acknowledges, “[t]he Abuse Prevention Act ... is one of the most sensitive and potentially volatile areas of Trial Court jurisdiction.” *Guidelines for Judicial Practice: Abuse Prevention Proceedings*, §1:00 commentary (September 2011). Fortunately, practitioners can look to the *Guidelines* for comprehensive guidance on handling the myriad of complex and emotionally charged issues that arise in any given 209A case. ■