

Boston Bar Journal

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Boston Bar Journal

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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.



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President's Page

The BBA and the Preservation of Justice

By Donald R. Frederico

In April, I received a call from John Broderick, the former Chief Justice of the New Hampshire Supreme Court and currently the Dean of the University of New Hampshire School of Law. He told me that the law school would be hosting a hearing of an [American Bar Association Task Force on the Preservation of the Justice System](#), and invited me to testify about the Boston Bar Association's efforts to secure funding for the Massachusetts courts. Given the dire underfunding of our state courts, I readily accepted his invitation.

The ABA Task Force is chaired by attorneys David Boies and Ted Olson, the two opposing counsel in the *Gore v. Bush* Supreme Court case. Its focus is the underfunding of courts throughout the country and the corresponding impairment of the courts' ability to perform their constitutional functions and provide access to justice. They held their first hearing in Atlanta in February, followed by the New Hampshire hearing on May 26th.

The May hearing consisted of three different panels. The first panel heard testimony from the Chief Justices of New Hampshire, New York, Vermont, Connecticut and Maine, and our own CJAM, Robert Mulligan. Each of the chiefs described the cutbacks in funding and the effects on their court systems. One justice explained that, because of a lack of resources, some of the courthouses operating in her state have no security screening, so that a weapon could be brought into the courthouse without being detected. In yet another state, some courts are closed for several weeks each year because there isn't enough money to pay the court staff. Chief Justice Mulligan articulated the strains on the Massachusetts Trial Court in poignant detail.

The second panel heard from real people who have been hurt by the courts' lack of resources, including one couple who have been unable to get a hearing to regain custody of their children despite the questionable reasons their children were removed from their care. Professor Laurence Tribe also testified, arguing that our



profession needs to improve its public image if it hopes to persuade the public to support increases in court funding.

I appeared on a third panel, and described the efforts of the BBA to advocate for funding for the Trial Court. I spoke about the reports we have issued in each of the last three years, making the case for court funding. I also described our other advocacy efforts, including the op-ed piece we published in the *Boston Herald* the day after we released this [year's report](#); our email alerts urging members to call their state representatives; and the variety of communications tools we use to keep our members informed about the current crisis.

I concluded with three general observations. First, that the courts have no natural constituency, and that it is therefore imperative that bar associations speak up on their behalf. Second, that increasingly there is a need to educate legislators about the court system because fewer legislators are lawyers. And finally, that we have to be clear and persistent in reminding government officials that the courts are not just another state agency, but are a co-equal branch of government, on which we all depend for the peaceful resolution of disputes, for public safety, and for the preservation of our liberties.

Since our report and the *Herald* op-ed were published, I have received numerous reminders from judges, court staff and practitioners of the many difficult situations that exist in our trial courts: lengthy delays in time-sensitive proceedings; concerns for public safety because of the shortage of court officers; and low morale among judges and court staff who are constantly expected to do more with less. From the feedback I have received, three things are clear.

First, conditions in our trial courts are bad and getting worse, and the courts' ability to deliver effective justice is near, and in some cases may be past, the breaking point.

Second, our judges and other court personnel greatly appreciate our efforts. If not for the bar's advocacy on their behalf, some have told me, they would feel as though no one cared. Regardless of what the legislature does or does not do in any one particular session, we need to persist because no one else will.

And third, we must redouble our efforts year in and year out, and look for new ways to educate those in government who just don't seem to get it, and the public who put them there. ■

Voice of the Judiciary

Just the Facts

By Judge Judith Fabricant

Civil litigators devote much time and attention, and much of their clients' money, to motions for summary judgment. In the Superior Court, such a motion requires a "statement of the material facts as to which the moving party contends there is no genuine issue to be tried," with the opposing party's response, pursuant to Superior Court Rule 9A(b)(5). In preparing the statement, counsel would be well advised to keep in mind the phrase made famous by Sergeant Joe Friday on "Dragnet": Just the facts.

Rule 9A(b)(5) sets stringent requirements for the statement and response and prescribes consequences for failure to comply. Unfortunately, statements submitted often depart from both the letter and the spirit of the rule. I have tried a variety of approaches in response to such submissions, including scolding footnotes, orders that motion papers be revised and resubmitted, denial of motions for a moving party's failure to comply, and, on rare occasions, deeming facts admitted due to non-compliance by the opposing party. See, e.g., *Dziamba v. Warner & Stackpole*, 56 Mass. App. Ct. 397, 399-401 (2002). None of these techniques seems to be getting the message across. So, I offer a few words of advice.



Judith Fabricant has been an Associate Justice of the Superior Court since 1996. She has sat in the Business Litigation Session half of each year since 2007, and currently serves as its Administrative Justice. She served as regional administrative justice for Norfolk County from 2005 to 2007, and currently chairs the Court's Education Committee. Before her appointment to the bench she was an Assistant Attorney General and Chief of the Attorney General's Government Bureau. She is a graduate of Yale College and Yale Law School.

An understanding of the purpose of the rule, and of how a judge uses the statement, may assist. The purpose, quite simply, is to help the judge find his or her way around the record, as efficiently as possible. That is its only purpose. Summary judgment motion packages are often voluminous, sometimes filling multiple bankers' boxes. The judge needs a road map.

To serve that purpose, the statement must identify clearly the facts that are and are not disputed and, as to the former, must point out the particular evidentiary materials the judge must examine to determine the genuineness of any purported dispute. The judge can then rule as a matter of law, having considered the arguments in the memoranda, on whether any disputed fact is material and on the legal significance of the undisputed facts. Anything in a statement that does not serve these purposes merely adds clutter, making pertinent evidentiary material difficult to find and genuine disputes difficult to identify. The credibility of counsel suffers and, with it, the persuasive effect of the entire effort.

A well-crafted statement under the rule bears some resemblance to skillful cross-examination. The factual assertions, like good cross-examination questions, are short, direct, and purely factual, phrased in words that have clear and precise meaning, without characterization or conclusion. A party responding to such an assertion, like a witness under effective cross-examination, has no choice but to respond directly. Assertions that do not fit this description invite the kind of response a witness may give to a poorly-framed question: an assertion of a purported dispute based on quibbling over the meaning of words or phrases, or over purportedly misleading selectivity, or over part of a compound assertion. The result is useless to the Court and to the party seeking to establish that the material facts are undisputed.

A proper response by the opposing party to a factual assertion consists of the word "undisputed" or "disputed" and, if the latter, a record reference and/or a statement that the evidence cited by the moving party does not support the assertion. Nothing more. Record references should be precise and specific, identifying the particular paragraph of an affidavit, the page and line of a deposition, or the particular part of a document.

Argument, whether about how or why the record does or does not support the assertion, or about what is or is not material, or about any other topic, belongs only in the memorandum of law. The Rule 9A(a)(5) statement is not an opportunity to circumvent the page limit for memoranda. Qualifying assertions — such as that the factual assertion is not a complete description of the matter referred to, that the party admits the fact for the purpose of summary judgment but reserves the right to contest it at trial, or that the cited portion of a document is not the only portion of significance — accomplish nothing except to add words and pages.

One area where statements and responses often run into trouble is in description of contracts, insurance policies, or other instruments. Often a moving party describes or characterizes the document or quotes part of it. The responding party then asserts a purported dispute based on disagreement about the description or characterization, or incompleteness, of the portion quoted. The exercise is fruitless. A better approach is to say only that “Exhibit 2 is a true copy of a contract executed by John Smith and Jane Jones.” Unless the opposing party disputes authenticity, he or she has no choice but to respond, “undisputed.” The parties then make their arguments about the meaning or effect of the document, or the significance of its various provisions, in their memoranda; and the Court evaluates those arguments by reference to the document itself.

Rule 9A(b)(5)(iv) authorizes the opposing party to “assert an additional statement of material facts,” with record references, as “a continuation of the opposing party’s response.” This does not mean that the opposing party is free to add facts within its response to the paragraphs of the moving party’s statement. That makes the document unintelligible. An opposing party’s statement of additional facts should follow after the moving party’s entire statement and the opposing party’s paragraph by paragraph response to it.

The point of the Rule 9A(b)(5) statement, overall, is to identify each fact that either side considers material and, with respect to each separately, to enable the Court to determine whether a genuine dispute exists. Counsel who prepare their submissions with these purposes in mind will assist the judge, enhance their own credibility, and promote prompt and just resolution of their motions. ■

Practice Tips

Some Thoughts on Amicus Briefs

By Jonathan M. Albano and David B. Salmons

According to legal lore, the first amicus to appear in the United States Supreme Court was Henry Clay, who appeared as amicus because the Court suspected collusion between the parties to a land dispute involving Virginia and Kentucky. Today, amicus briefs filed in the Supreme Court each year far outnumber briefs of the parties. Closer to home, in the last eighteen months alone, over 100 amicus briefs were filed in appellate cases in Massachusetts state and federal courts.

Some judges have lauded the ability of “friend of the court” briefs to bring a wider perspective that assists courts in discharging their responsibility to non-litigants. Judith S. Kaye, “*One Judge’s View of ‘Friends of the Court’*”, (<http://www.nysba.org/KayeFriendsOfCourt>) N.Y. St. Bar. J., Apr. 1989, at 8, 13. Others, like Judge Posner, famously have disagreed:

The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants’ briefs, in effect merely extending the length of the litigant’s brief. Such amicus briefs should not be allowed. They are an abuse. The term “amicus curiae” means friend of the court, not friend of a party.



Jonathan M. Albano is a partner at Bingham McCutchen, LLP in Boston and co-authored the amicus brief submitted by the BBA in *The Real Estate Bar Association For Mass., Inc. v. National Real Estate Information Services*, 608 F.3d 110 (1st Cir. 2010).



David Salmons is the chair of Bingham’s Appellate Group in Washington D.C. where he previously practiced before the United States Supreme Court as a member of the United States Solicitor General’s Office.

Ryan v. Commodity Futures Trading Com'n, 125 F. 3d 1062, 1063 (7th Cir. 1993) (Posner, C.J., in chambers). Despite this difference of judicial opinion, following certain guidelines can increase the prospect that a court will view an amicus brief as more of a friend than a foe to the judicial process.

1. Do More than Repeat the Arguments Already Made

If the primary purpose of an amicus brief is to show the importance of the issue at hand or to explain how a particular holding will have a broad, negative effect, a short brief saying so is generally far more persuasive — and welcome — than a brief repeating arguments already made by the parties. None of us wants to be on the receiving end of a critique like Justice Robert Jackson once leveled against the American Newspaper Publishers Association: “[The amicus brief] does not cite a single authority that was not available to counsel for the publisher involved, and does not tell us a single new fact except this one: “[Our] membership embraces more than 700 newspaper publishers whose publications represent in excess of eighty per cent of the total daily and Sunday circulation of newspapers published in this country.” *Craig v. Harney*, 331 U.S. 367, 397 (1947) (Jackson, J., dissenting).

2. Find the Gaps and Fill Them.

Amicus briefs have the luxury of addressing issues the parties are not able to tackle, either because of strategic considerations or page limits. For example, an amicus brief can:

a. Expand on arguments that a party could not make, or could make only in summary form.

Amicus briefs can place an issue in historical context, explain the practical impact of a decision, or thoroughly analyze legislative history in ways that can significantly aid the court. See, e.g., *Polaroid v. Travelers Indemnity Co.*, 414 Mass. 747, 760 n.15 (1993) (“the most comprehensive and instructive argument on behalf of [the plaintiff’s] position on this issue is made in [a] brief filed as amicus curiae”). See also *The Real Estate Bar Association For Mass., Inc. v. National Real Estate Information Services*, 608 F.3d 110 (1st Cir. 2010) (adopting First Amendment argument advanced by Boston Bar Association as amicus curiae).

b. Provide reliable information beyond the record in a case.

In *Mueller v. Oregon*, 208 U.S. 412, 419 n.1 (1908), future Supreme Court Justice Louis Brandeis, then a lawyer at Nutter, McClennen & Fish in Boston, prepared an amicus brief addressing non-record evidence of social science

research on the impact of long work hours on the health of women. The “Brandeis brief,” as we now know it, is an amicus brief that typically uses policy-oriented, non-record evidence of which a court may take judicial notice to support a party’s position. See *Thompson v. Oklahoma*, 487 U.S. 815, 830 n.34 (1988).

Although the use of Brandeis briefs allows an amicus to expand the record before a court, there are limits. Extra-record facts are best limited to those of which the court may take judicial notice or which are established as facts typically relied upon by experts in the applicable field. See *generally U.S. v. Ortiz*, 742 F.2d 712, 713 (2d Cir. 1984) (refusing to take judicial notice of “facts” contained in newspaper articles).

c. Explain the Effect of the Court’s Ruling on Individuals, Professions and Businesses

Amicus briefs are an appropriate means of explaining the effect a decision will have on individuals, professions and businesses. Although some view this as nothing more than judicial lobbying, the fact remains that judges — like all lawyers — depend upon parties (and clients) to place legal rulings in context and to better understand how the law may — or may not — serve its intended interests. Sometimes an industry or public policy group can speak to the broader impacts of a legal rule with more authority and experience than can any individual litigant. Amicus briefs that legitimately speak on behalf of broad or disproportionately affected segments of society often can have a significant impact on the resolution of a case.

3. Avoid Unnecessary Partisanship

A case involving the pre-Bill Belichick New England Patriots illustrates the dangers of an amicus who identifies too closely with a litigant. In 1978, Patriots coach Chuck Fairbanks announced that he was leaving the Patriots for greener pastures at the University of Colorado. A lawsuit followed, and Fairbanks was permitted to appear as an amicus on appeal to oppose an injunction prohibiting the University from employing him. The First Circuit made clear its disappointment with the coach’s amicus brief.

In granting permission we had assumed, wrongly, it proved, that counsel knew what an amicus is, namely, one who, “not as parties, ...but, just as any stranger might,” [] “for the assistance of the court gives information of some matter

of law in regard to which the court is doubtful or mistaken,” [] rather than one who gives a highly partisan, (“eloquent,” according to defendants) account of the facts.

New England Patriots Football Club, Inc. v. University of Colorado, 592 F.2d 1196, 1198 n.2 (1st Cir. 1979) (citations omitted).

In preparing amicus briefs, the balance between, on the one hand, zealous advocacy and, on the other hand, the loss of credibility by partisanship, is as critical as in all other aspects of litigation. ■

Links:

[Ryan v Commodity](#)

[Craig v. Harney](#)

[Polaroid v. Travelers](#)

[The Real Estate Bar v. National Real Estate](#)

[Mueller v. Oregon](#)

[Thompson v. Oklahoma](#)

[US v. Ortiz](#)

[NE Patriots v. Colorado](#)

The Profession

Reflections In Retirement

By William I. Cowin

At age 34 in 1972, I voted in favor of an initiative petition that amended the Massachusetts Constitution to provide for the mandatory retirement of all state-court judges who reached the age of 70. I thought it was a good idea at the time and still do. Besides, I thought it unlikely that I would ever be a judge, and it was by no means a certainty that I would ever reach 70. Wrong on both counts, I awoke on my birthday in 2008 to the realization that I was out of a job.

I need to have work to do (if only as an excuse to get out of the house), and I have been fortunate to have positions both in the Government Bureau of the Massachusetts Attorney General's Office and at JAMS, a national mediation and arbitration firm with a regional office in Boston. Each has given me opportunities to participate in interesting and meaningful cases, and I have been privileged to work with stimulating colleagues of great ability. Perhaps more important for the purposes of this piece, I have had a chance during the past three years to breathe mentally, and to step back somewhat from the day-to-day pressures of judging (and the years of private practice that preceded it) and think about some aspects of the profession in which I have worked for half a century.

At the outset, I believe that the technical competence of attorneys as a class is greater than it has ever been. Lawyers simply know more and can do more. This may have come about in part by increased concentration in defined subject-matter practices, which in turn enables attorneys to learn



Now retired from the Appeals Court, Justice Cowin previously practiced with the Boston law firm of Friedman and Atherton. He is presently Co-Chair of the BBA Administration of Justice Section.

more about their particular specialties; or it may be a product of intensifying competition and client expectations; or it may be that our system of educating lawyers, and of continuing to train them after they enter practice, has improved substantially.

At the same time, lawyers appear to be more aware of ethical obligations than ever before. They engage to a greater extent in continuing education. They play an increasing role in community activities, both public and private. Pro bono efforts are widespread and the profession's commitment to them grows each year.

So why is it that lawyers are so often the subjects of derision and even hatred? Some of that is undoubtedly attributable to public uncertainty regarding what the lawyer does and the difficulty and expense associated with doing it well. Some is a product of the reality that clients often encounter lawyers in times of trouble: a criminal charge; a frustrating business negotiation; a civil law suit; settlement of a difficult estate; a divorce. Some is simply the product of class warfare and the perception (frequently not true) that lawyers make a great deal of money. Perhaps all we need is a good public relations firm.

I think it is going to take considerably more than that. I recall that a number of years ago Harvard President Derek Bok wrote a report containing the famous reflection that "there is too much law, not enough justice." I would revise the sentiment somewhat to say that there is a great deal of lawyering, a lot of which serves no discernible legitimate purpose. Put differently, we know how to do it; but we often fail to consider whether doing it is useful.

Because my experience as lawyer and judge has been in litigation, I draw my examples from that discipline. I suspect, however, that they would have their counterparts in transactional or other aspects of legal practice. For one thing, there are too many law suits. We have encouraged American society to view the courts as the place to resolve all grievances. In fact, courts are often an undesirable place. Litigation is a blunt instrument, not a scalpel, and is often ineffective in dealing with the subtleties that may have caused the controversy. Likewise, it falters when forced to confront other disciplines, such as medicine, that have different ways of doing things, different means of communication and different patterns of reliance. It can be cumbersome, time-consuming and expensive. Yet lawyers can, for various reasons, be ineffective in advising clients that access to the courts may not be the right answer for them.

(Keep in mind that a very high percentage of civil cases settle before trial. Many of those disputes could be settled without the commencement of a formal proceeding.)

Assuming that a law suit takes place, lay criticism of the process is in many instances justified. The proceeding is episodic, with meaningful events frequently months apart. It can be hard to get a judge's attention. Discovery abuses have been well-documented. But I wonder whether there is sufficient recognition of how wasteful much of civil discovery is. Experienced trial lawyers know that much of the discovery product is never used even if a trial takes place. Much of it merely reiterates what the parties already know; revelation of "smoking guns" is extremely rare; and parties who are determined to conceal unfavorable information are often successful in doing so. Ordinarily, you win cases with your own evidence, not from what is obtained from the other side. Yet voluminous discovery has become the norm, a trend that will only be exacerbated by the opportunities and temptations that the advent of e-discovery will generate.

Similarly, motion practice, particularly with respect to attempts to obtain summary judgments, has become excessive. Many motions for summary judgment fail, and in a substantial percentage of those cases competent attorneys should have concluded in advance that the motions could not succeed. Many discovery motions escalate to court attention disputes that counsel operating in good faith should have resolved by themselves. In addition, much of the paper that is filed in connection with motions of all kinds is made up of useless repetition. Is it really necessary to reiterate over and over the criteria for summary judgment that judges and lawyers can recite in their sleep?

As the process becomes more detailed, complex and protracted, the right answer in any given case becomes more elusive. The difficulty and expense by themselves frequently dissuade parties from pursuing meritorious claims or asserting valid defenses. Even when parties are willing to tolerate those burdens, the search for truth is often frustrated, not facilitated, by the sheer volume of paper and the many opportunities to use the system to distract and to obfuscate.

As with most things, there are multiple reasons why we have come to this point. Lawyers are trained and encouraged to consider all possibilities, to look beneath surfaces, and not to surrender opportunities. We are less adept at determining what overtures are likely to be productive, and at calculating what level of effort is reasonable in light

of the value of the case. There is a cultural pressure within the profession, a pressure applied particularly to newer lawyers, to do more rather than less in preparing a case without sufficient regard to whether the client's prospects are likely to be improved as a result. And inevitably money is not far from the heart of it. As expenses of operating law practices increase, and as partners and associates achieve or maintain substantial incomes, work expands in order to generate the revenues necessary to support the business.

The "more is better" principle is now so engrained in the litigation psychology that it will not change absent the introduction of an economic disincentive to the continuing of present practices. It seems to me that it is time for a meaningful reappraisal of the "American Rule" that each party bears its own litigation fees regardless of the outcome. While the policy is modified on occasion by fee-shifting provisions in certain statutes and contracts, most cases are not affected. Furthermore, judges rarely take advantage of opportunities to shift fees even when forced to endure frivolous claims or defenses that would justify fee awards under G.L.c.231, §6F or Mass. R. App. P. 25.

I understand the reluctance to superimpose a factor that could chill the ability of litigants to seek access to courts or to defend themselves when sued. At one time that was the dominant consideration. In my view, conditions have changed to such an extent that concerns with the system's capacity to function must take precedence. I can think of nothing that would more effectively bring to the process a renewed sense of sanity than the realization that losing the case will expose the litigant to liability for the prevailing party's reasonable fees and expenses.

It will not work in all cases. Obviously, it is not feasible in criminal proceedings. It is undesirable in personal injury actions where, absent contingent-fee arrangements, many injured parties would go unrepresented. There may be other categories that should be exempted, especially when low-income parties are involved. I recognize also that it would create work for judges who would be required to act on fee applications; but that additional effort would be offset by a large margin by the reduction in workload brought about by fewer and more streamlined cases.

I have through much of my life defined myself as a lawyer. Being a judge for a while did not change that. I have always liked being a lawyer, and have always believed that what we do is important. But "retirement" has not relieved me of the increasing concern that the system's arteries are clogged and that some new thinking about the process is long overdue. If we do not do it, others will do it for us. Just ask your doctor. ■

Practice Tips

Social Networking, Mobile Devices, and the Cloud: The Newest Frontiers of Privacy Law

By David J. Goldstone and Daniel B. Reagan

Social networking, mobile devices, and cloud computing are enabling new forms of commerce and communication. In turn, businesses, regulators, and courts are confronting the expanded role of social media and cloud services in litigation and investigations and particularly the privacy issues raised by seeking social media and cloud-based content for litigation. Legal rights to access this information will have to be balanced with privacy rights under contracts, common law rights, statutes and the Constitution. The precise contours of that balance is still evolving. Because some recent cases that have been decided may provide guidance about how such a calculus is beginning to be performed, we have summarized recent cases below.

Growth of the Cloud and Social Networks as Potential Source of Evidence

While it may sound mysterious and foreboding, the “cloud” concept is a simple one — to harness the instantaneous remote access of the Internet and seemingly limitless storage for common use. “Hotmail” and “gmail” email accounts are an omnipresent example of cloud application and storage. Email functionality is provided by remote Hotmail or Gmail servers, which then store the email sent and received. For a user, these cloud services achieve email functionality at no cost and with no requirement that the user have his own servers or any sort of technology infrastructure other than access to the internet.



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That the federal government has begun to adopt the “cloud” paradigm may be evidence of increasing acceptance of cloud computing . On September 15, 2009, Obama administration Chief Information Officer Vivek Kundra announced the cloud computing initiative apps.gov, a site for federal agencies to browse and purchase cloud-based IT services. In July 2010, Google earned FISMA compliance for its Google Apps suite of IT applications – the first platform to achieve such certification. FISMA, or the Federal Information Security Management Act (44 U.S.C. § 3541 *et seq.*), requires agencies to establish security standards for information systems and hold vendors to them. Google has relied on its FISMA certification as it competes for government contracts against other enterprise and cloud-based services.

Growth in cloud and social media and mobile computing has quickly been followed by efforts to seek records for litigation. The federal government now trains its investigators on collecting information from social networking sites. One such Department of Justice presentation, “Obtaining and Using Evidence from Social Networking Sites,” presents social networking sites as valuable sources of information in investigations about the target and potential witnesses and identifies legal and practical issues for investigators to be aware of when they gather evidence from these sites that may reveal communications, motives, relationships, location information, alibis, or the existence of a crime. It was obtained by a FOIA request and is now publicly available at http://www.eff.org/files/fieldname/social_network/20100303__crim_socialnetworking.pdf.

Private litigants also have found information from social networking sites to be valuable evidence. A recent New York Times article highlighted the use of social networking sites to gather evidence in divorce actions. A divorce lawyer interviewed for the article said, “It has changed the way we do business. Before ... we would strive forever to get evidence, and now people can’t wait to post on MySpace or Facebook who they are out drinking with. We just come along and scoop that up.” Nadine Brozan, *Divorce Lawyers’ New Friend: Social Networks*, N.Y. Times, May 13, 2011.

Given the interest in obtaining information from social networking sites, sometimes access to this information is contested. But courts have not shied from compelling production of discovery from social networking sites. In

one discrimination lawsuit, *EEOC v. Simply Storage Mgmt., L.L.C. et al.*, 270 F.R.D. 430, 436 (S.D. Ind. 2010), the District Court for the Southern District of Indiana allowed discovery of plaintiff's social network content despite claims of privacy. Two female plaintiffs alleged that they were sexually harassed by their supervisors. Defendant requested discovery on the contents of plaintiffs' Facebook and MySpace accounts, including photographs, videos, updates, and messages. Defendant argued that this discovery was relevant because plaintiffs had placed their mental health status at issue. Plaintiffs objected that these requests were overbroad and irrelevant and invaded their privacy. The court found that the discovery requests were not barred because plaintiffs made their social network profiles "private," noting that plaintiffs' privacy concerns could be addressed by the protective order in the case. The court compelled discovery on any social network "profiles, postings, or messages" that relate to any emotion, feeling, or mental state, and all photographs, reasoning that plaintiffs' appearance may reveal their "emotional or mental status."

Recent Cases Balancing Access To the Cloud Against Privacy Rights

While courts may be willing to countenance discovery and collection of evidence from social networking sites and the cloud, courts also recognize their role in protecting privacy. For example, courts have already begun to issue decisions establishing that email in the cloud deserves privacy protection. It is noteworthy that courts have awarded privacy protection on multiple grounds and in multiple contexts. Privacy protection has been awarded against access attempts by individuals, employers and the government.

There is no doubt that the ultimate calculus in awarding privacy protection will continue to evolve. What follows below is a sampling of some recent cases where courts have addressed the privacy interests that are presented in the context of the cloud, social media, and mobile computing.

In civil litigation contexts, courts have protected privacy interests in email stored in the cloud. One statute that they have relied on is the federal statute known as the Electronic Communications Privacy Act (ECPA), and specifically the portion of ECPA known as the Stored Communications Act (SCA), codified at 18 U.S.C. 2701 *et seq.* In *Jennings v. Jennings*, 697 S.E.2d 671, 675-80 (S.C. Ct. App. 2010), the Court of Appeals of South Carolina

held that an individual violated the SCA by accessing her father-in-law's Yahoo! Mail account without authorization. In divorce proceedings, the husband's daughter-in-law accessed his email using his password and disclosed communications to his wife that were allegedly between him and his girlfriend. The husband sued his daughter-in-law for, among other things, violation of the SCA's prohibition against accessing without authorization a "facility through which electronic communication service is provided" to access an "electronic communication" while it is in "electronic storage." The court found that Yahoo! is an electronic communications service and that emails stored on Yahoo! servers were stored electronic communications under the SCA. The court therefore found that plaintiff's daughter-in-law violated the SCA by accessing plaintiff's email account.

Another source of privacy protection for information in the cloud arises from the common law privilege. Such cases often arise when employees consult with an attorney for personal matters via their employer's company network. For example, in *Stengart v. Loving Care Agency*, 990 A.2d 650, 665-66 (N.J. 2010), the New Jersey Supreme Court held that attorney-client privilege protected email sent to and from a cloud-based email account, even though it was transmitted over company networks. Thus, the attorney-client privilege protected emails sent by an employee to her attorney from her Yahoo! Mail account on her employer's computer. The employer obtained the emails through monitoring software without the employee's knowledge. The employer had a policy that employees had no expectation of privacy on company-owned computers. The court nonetheless found that this policy did not invalidate or waive the employee's privilege. The court therefore found that the employer did not have the right to read the emails because they were protected by the attorney-client privilege.

In criminal cases, courts have found privacy protection for information in the cloud to arise from the Constitution. The Sixth Circuit Court of Appeals recently held that email stored on a remote server is protected by the Fourth Amendment, requiring a search warrant for government access to emails even though the email is stored on a server — not stored on the recipient's own computer. In *United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010), the Sixth Circuit Court of Appeals held that an email subscriber has a reasonable expectation of privacy under the Fourth Amendment in emails stored or received through an internet service provider (ISP). Defendant

Steven Warshak and others were convicted of federal charges for fraudulent marketing and distribution of herbal supplements. The Stored Communications Act (SCA), which limits access under some circumstances (such as those noted above in *Jennings vs. Jennings*) actually authorizes the government to compel a service provider to disclose electronic communications older than 180 days by subpoena or court order based on less than probable cause. During its investigation, the government compelled the ISP that provided Warshak email service to disclose his emails by subpoena and then court order. Defendants appealed their convictions, arguing that this warrantless seizure violated the Fourth Amendment. The court held that Warshak had a reasonable expectation of privacy in his emails stored by the ISP, finding that emails are subject to the same Fourth Amendment protections as letters and phone calls. The court found the SCA unconstitutional to the extent that it permits the government to obtain emails without a warrant.

The Added Dimension of Mobile Computing

Today, about as many users access social networking sites through a mobile device as do through a stationary computer. The prevalence of sophisticated mobile devices has led to increasing attention to laws protecting privacy on those devices. For example, on May 10, 2011, the Senate Judiciary Committee's Subcommittee on Privacy, Technology, and the Law held a hearing on "Protecting Mobile Privacy: Your Smartphones, Tablets, Cell Phones and Your Privacy." Testimony was provided by witnesses from the Federal Trade Commission, Google, Apple, and others.

As a result, the courts have begun to weigh in as well on the issue of legal privacy rights in mobile devices against efforts to obtain this information for litigation. Most notably, in 2010, the Supreme Court for the first time addressed privacy rights on mobile devices. In *City of Ontario et al. v. Quon et al.*, 130 S.Ct. 2619, 2629-31, 2635 (2010), the Supreme Court addressed public employees' rights on mobile devices under the Fourth Amendment. Plaintiff Quon was a SWAT team officer in Ontario, California. Quon repeatedly exceeded the monthly allotment of messages on his city-issued pager, and the city audited his message records over his objections. The audit showed that many of Quon's messages were not work-related and that some were sexually explicit. The city disciplined Quon, and Quon

sued the city arguing that the audit was an unreasonable search under the Fourth Amendment. The Court assumed without deciding that Quon had an expectation of privacy in his work-issued pager. Nonetheless, the Court found that the audit was a reasonable search. The Court emphasized Quon knew his pager could be audited at any time and that knowing whether Quon's overages were due to non-work messages was a legitimate work-related rationale supporting the audit.

It is significant that the Supreme Court, by assuming that Quon had an expectation of privacy in his pager, recognized the viability of such a constitutional right. Moreover, the Court declined to lay down a hard and fast rule regarding mobile devices, noting changing technology and cultural attitudes toward technology. In his concurring opinion, Justice Scalia criticized the majority's opinion for its reticence, writing "Applying the Fourth Amendment to new technologies may sometimes be difficult, but when it is necessary to decide a case we have no choice... . The times-they-are-a-changin' is a feeble excuse for disregard of duty." Nonetheless, the majority reasoned, "A broad holding concerning employees' privacy expectations vis-à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted."

Conclusion

As the Supreme Court recognized in Quon, "Rapid changes in the dynamics of communications and information transmission are evident not just in the technology itself but in what society accepts as proper behavior." The cloud, social networks and mobile computing are a growing and important source of information in furtherance of investigations and litigation. Recent court decisions confirm that legal rights to access this information must be balanced with privacy rights under contracts, common law rights, statutes and the Constitution. In short, privacy law is playing an essential role in mediating emergent issues in the evolving seams of cyberspace. ■

Voice of the Judiciary

At the Land Court — Innovation Is the Order of the Day

By Judge Karyn Scheier

The Massachusetts Land Court was created by the Legislature as the “Court of Registration” in 1898. Chief Justice Leonard A. Jones, along with one associate justice, Recorder, Chief Engineer, and a small staff administered the Torrens System of Land Registration throughout the Commonwealth from one room of the Tremont Building, at the corner of Beacon and Tremont Streets. One hundred thirteen years and five moves later, the Land Court sits in the “New” Courthouse at Three Pemberton Square, steps from its original location. Chief Justice Jones would recognize little from the court’s beginnings in the 21st century Land Court: Seven judges, a staff of forty-five, three and one-half floors of the courthouse, an enormously expanded jurisdiction, and computer technology embedded in every aspect of our operation.

Since its creation, the Land Court’s caseload has grown consistently, often prompted by legislative action expanding both the court’s exclusive and concurrent jurisdictions, as well as the size of the bench. The first substantial broadening of the court’s exclusive jurisdiction in 1915 opened the court to



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foreclosure of tax titles in all of the Commonwealth's municipalities, followed in 1934, by the addition of cases determining the validity and scope of local zoning laws, now codified as G. L. c. 240, § 14A. These cases are an important part of the court's original exclusive jurisdiction, together with land registration and the superintendency of Land Court Registry Districts in all Registries of Deeds.

In 1935, commenting on the unique role of the Land Court, its second Chief, Charles Thornton Davis, offered "[w]hat has made the Land Court here in Massachusetts is the Bar as it has grown and developed and changed its character. . . It has been in response to the demands of the Bar that use it and the real estate owners who wish to take advantage of it." In recent years, the active real estate and municipal bars remain the driving forces in continuing to expand the court's jurisdiction and to partner with us to improve our operations.

Through the Bar's efforts, in 1982, the Land Court was vested with concurrent jurisdiction over appeals from municipal boards under G. L. c. 40A (the Zoning Act), and G. L. c. 41 (the subdivision control law). In each year since then, these land use cases have constituted a significant percentage of the Land Court's docket, and the Bar looks to the court's substantial body of written work for guidance on issues which have not been the subject of appellate decisions. In 2006, in response to advocacy by the development community, the Legislature created a "permit session" within the Land Court, where all permit-related litigation involving large projects may be heard by a designated judge on an accelerated track in order to promote speedy disposition of disputes. This legislation, now codified as G. L. c. 185, § 3A, greatly expanded the court's substantive jurisdiction to include de novo review of City of Boston zoning appeals and administrative review of decisions of the Division of Administrative Law Appeals, the Housing Appeals Committee, and other administrative agencies. Also in 2006, the court was given concurrent jurisdiction with the Probate and Family Court over petitions for partition, which now comprise a healthy portion of our docket and have brought many self-represented litigants to the court.

With respect to the court's operation, after several meetings with the real estate bar throughout the Commonwealth, in 2004 the court updated its rules and procedures for the first time in decades and instituted an individual calendar

system for most cases. Every case entered in the court is assigned automatically at random to one of the judges who shepherds the case throughout. Under our rules, the judge must conduct a substantive case management conference within 90 days of the entry of the case, at which counsel and the judge discuss the entire dispute between the parties, other potential claims, including pending litigation between the parties, the possibility of settlement and the role of ADR, and set a schedule for proceeding through appropriately tailored discovery, motion practice, and trial. Each judge brings his or her own style and agenda to these conferences and requirements for a memorandum filed with the court, but for each of us, these conferences are a vital component of setting the stage for the efficient conduct of the case.

Since the Land Court has statewide jurisdiction, but is located only in Boston, many of our events are conducted over the telephone to save lawyers and litigants travel time and expense. The court also conducts trials and motion sessions, as needed, on a regular basis throughout the Commonwealth. In FY 2010, the court held trials in all but two counties. One important aspect of the court's practice is that motion and trial dates are firm and reliable. They may be continued for good cause, on motion, but they are not continued by the court except for emergency.

In 2003, based on requests from the Bar and the Administrative Office of the Trial Court, the Land Court became the first court to develop and implement "MassCourts," the data management system planned for implementation throughout the seven trial court departments. All of our records have been on MassCourts since February, 2005. Our dockets have been recently made available on public access computers in all registries of deeds and probate in all counties, on their way to availability on the internet.

In 1930, speaking to the Middlesex Bar Association, Judge Clarence C. Smith, who had been the Land Court's first Recorder, described his early role each night carrying the court's files and papers in a bushel basket to a vault for safekeeping. At the end of three years, he wrote, there "were nearly eight bushels of records" when the court moved to the Pemberton Building, where Center Plaza is now located. In 1911, the court moved to the "Old" Courthouse, now the John Adams Courthouse. According to our records, in FY 1948, there were 3,042 cases filed.

Who could have envisioned then that in FY 2010, the caseload would be 30,743, a tenfold increase? The most significant increases in the court's caseload have actually taken place steadily within the last ten years. For example, in FY10 cases entered were 20% higher than those entered in FY09. Much of the increased caseload in recent years has been attributable to the volume of cases brought under the Servicemember Civil Relief Act, a predicate to mortgage foreclosure, but the caseload has increased across most case types.

In the past several years, the Land Court has been severely tested by its increasing caseload and decreasing staff resulting from budgetary deficiencies and the hiring freeze which has stripped our court of much needed assistance from law clerks and other staff. We continue to work with the Bar for innovative ways to respond to these challenges. We believe that our individual calendar, the expanded jurisdiction in the Permit Session, our implementation of MassCourts, digital recording of all court sessions, and our use of telephone conferencing, reflect a willingness and ability to respond to our limited resources in ways that augur well for the Land Court's future. That said, we have never seen such challenging times as the ones we currently face. We have just begun to explore LAR to respond to the needs of our self represented litigants, and others who find complete representation beyond their financial means. We will continue to explore new and innovative ways to do more with less.

As Judge Smith noted in 1930, "[a]s regards the work of the Land Court, that must be known by its fruits." The fruits that have distinguished the Land Court for over a century have not just been its work product and the expertise of its staff and judges, but also its strong commitment to serving the community. Judges Jones and Smith would be proud to be part of this vital 2011 court, as my colleagues and I are. ■

Practice Tips

Helping Prisoners Get Paroled: A Vital Part of Public Safety

By Patricia Garin

The Parole Board's mission is to make reliable decisions about the appropriateness of releasing a prisoner on parole. The law requires the Board to grant parole when it is "of the opinion that there is a reasonable probability that, if such prisoner is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society." M.G.L. c.127, §130. When prisoners are not paroled, the Commonwealth's criminal justice system quickly becomes unbalanced. The system is now in that precarious state.

The BBA's Past Look at Parole in Massachusetts

In 2000, the BBA convened a Task Force on Parole and Community Reintegration to investigate a startling drop in parole rates during the 1990s. The Task Force published its report in August 2002 ("Parole Practices in Massachusetts and Their Effect on Community Reintegration," <http://www.bostonbar.org/prs/reports/finalreport081402.pdf>), finding that for prisoners serving state sentences, the parole rate declined from 69.6% in 1990 to 40.5% in 2000. For prisoners serving county sentences, the parole rate declined from 57.7% in 1990 to 48.7% in 2000. The decline was particularly troubling to the Task Force because one of its critical findings was that parole "works" if success is based on the percentage of people who are recommitted to prison as the result of new convictions. The statistics were compelling: parolees are far



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less likely to be recommitted for new convictions than were prisoners who wrapped-up their sentences in prison and left without any supervision. For example, the Task Force found that in 1995, only 5.8% of parolees were recommitted for new convictions, while 16.3% of non-parolees were; and, in 1996, 4.2% of parolees were recommitted for new convictions, compared to 18.2% of persons who wrapped-up. Parole, the Task Force found, reduces recidivism rates. Because 97% percent of those incarcerated will be released to the community, the Task Force concluded that parole is an important public safety tool.

A working parole system provides additional benefits. First, it helps to relieve the crisis of prison overcrowding. As of May 9, 2011, Massachusetts state prisons are at 143% of their design capacity, with some facilities operating at 222% and 295% of capacity. County facilities are at approximately 150% of design capacity, with some facilities operating at 363%, 275% and 239% of their capacity. Second, a working parole system results in significant taxpayer savings. The average cost of one year of incarceration in a state prison is \$47,500; the cost of a year of parole supervision is approximately \$5,000.

In 2002, one of BBA Task Force's major recommendations was for the Governor, the Governor's Council, the Bar, and the public to work to diversify the membership of the Parole Board, consistent with the statutory directive. The statute calls for a seven member Parole Board, appointed by the Governor, with the advice and consent of the Governor's Executive Council, to five year terms. M.G.L. c. 27, §4. Members of the Board must be graduates of a four-year college and have had at least five years training or experience in one or more of the following fields: parole, probation, corrections, law, law enforcement, psychology, psychiatry, sociology, and social work. *Id.* In 2002, all Board members had backgrounds in criminal justice. After the publication of the Task Force Report and changes to Board membership, the parole rates began to rise. By 2009, the county release rate was 68% and the state release rate was 66%.

The Current State of Parole

Parole in Massachusetts appears to be in crisis again. The December 26, 2010 fatal shooting of a Woburn police officer by a parolee led Governor Deval Patrick to demand the resignation of the Board's five members who voted for the man's parole two years earlier. Four of the Governor's replacements have backgrounds in criminal

justice (two former prosecutors, one former probation officer, and one former victims' advocate from a district attorney's office). Since these appointments, the paroling rates plummeted to the troubling numbers of 2000. From January 14, 2011 to May 10, 2011, the paroling rate for the county houses of correction was only 40% — a drop of 28% from the 68% paroling rate of 2009. For that same time period, only 31% of state prisoners were paroled — a drop of 35% from the Board's 66% paroling rate of 2009. This means that more prisoners will complete their sentences in prison and be released to the community without the benefit of parole supervision. Evidence based practice tells us that recidivism rates will rise, compromising public safety, adding to the overcrowded prisons, and costing taxpayers money.

The Bar Can Help Keep the Parole System on Track

Lawyers can help the Parole Board make more informed decisions by participating in the process. Even though only prisoners seeking release on a life-with-parole sentence are allowed to have representation at a parole hearing, there are certain things every criminal defense lawyer can do:

1. At parole hearings, the Board relies on the “official version” of the crime in cross-examining prisoners about the offense. The “official version” is written by a Department of Correction employee and is generally based only on police reports and grand jury minutes. Defense lawyers should request a copy of the “official version” early on in the incarceration and correct the errors, making the “official version” reflect the facts agreed to at the plea colloquy or proven at trial.
2. Defense counsel should write to the Board clarifying the victim's position at sentencing, explaining if a plea had been offered and rejected that would have allowed the client to be released by the time of the parole hearing, and balancing the Board's view of the client by emphasizing particulars about the crime, the defendant's background and family or other mitigating factors that favor parole. The Board should also be informed if the sentence was based in part on the judge's belief that the defendant would likely be paroled on the parole eligibility date.

Public safety in Massachusetts depends on a parole system that paroles. ■

Practice Tips

A Primer for Litigating Against the Massachusetts Securities Division

By Jonathan L. Kotlier and Allison D. Burroughs

The Massachusetts Securities Division (the “MSD”) possesses extraordinary power as it can put a broker-dealer or investment advisor out of business in the Commonwealth. The MSD enforces the Massachusetts Uniform Securities Act, G.L. c. 110A *et seq.*, which prohibits unlicensed and/or fraudulent activity by anyone who offers or sells a security in the Commonwealth. If it finds a violation, the MSD can impose financial sanctions, order a person to cease and desist from the unlawful practices, or suspend or revoke the registration of any broker-dealer, investment advisor, agent, or representative. (*Id.* at §204(a)).

In matters that are actually litigated, the MSD has a home-court advantage. The Presiding Officer of an adjudicatory proceeding is usually an employee of the Secretary of the Commonwealth, not a neutral third party. In addition, the MSD has the advantage of having conducted an extensive investigation, including subpoenaing documents and deposing witnesses. And yet, the MSD does not voluntarily produce any discovery, except what it discloses in a “pre-trial memorandum,” which is often no more than a summary of the Administrative Complaint.

In carrying out its stated (and laudable) goals of protecting investors and doing so expeditiously, the rights of respondents can sometimes be given short shrift. This article suggests strategies for best overcoming the significant tilt of the playing field and for positioning your case for review by the Superior Court.



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1. Presiding Officers

After conducting its investigation and recommending charging a respondent, the MSD also gets to appoint the Presiding Officer for the administrative proceeding. By its own regulations, the Director of the MSD is designated as Presiding Officer, although he is empowered to delegate that authority to another person inside or outside the MSD. 950 CMR 10.02. In practice, the Director usually appoints an employee of the Secretary of the Commonwealth. While the employees of the Secretary of the Commonwealth are, no doubt, fair-minded and of high character, it is not unreasonable to be concerned that in exercising discretion, the Presiding Officer might lean in favor of the MSD.

This concern was on display in *Cohmad Securities Corp.*, where the Presiding Officer, the Acting Director of the MSD, found the respondent in default when it filed its answer *seven days* late. On subsequent review, Judge Hinkle of the Superior Court reversed, holding that entry of a default judgment was an abuse of discretion where there was insufficient evidence that the respondent willfully violated the MSD's regulations. *Cohmad Sec. Corp. v. Galvin*, Civ. A. No. 2009-02226, 2009 WL 2450537, *7-8 (Mass. Super. Ct. Aug. 10, 2009). In an action currently pending before the Business Litigation Session of the Superior Court (10-3633-BLS), the respondent in *Cohmad* has subsequently alleged that the Presiding Officer participated in the investigation of the matter prior to serving as the hearing officer and, therefore, should have been disqualified.

If a respondent believes that the appointed Presiding Officer might show a bias in favor of the MSD, the respondent should carefully consider moving for the Presiding Officer to recuse herself. While such a motion is unlikely to succeed, the issue is preserved for subsequent review by the courts.

2. Discovery

Getting adequate discovery in adjudicatory proceedings is unlikely as the MSD typically opposes a respondent's efforts to use civil discovery tools. The MSD has stated that it is not required to engage in civil discovery and has frequently and strenuously resisted efforts to obtain such discovery. This position, however, runs counter to the regulations governing administrative procedures, which provide for civil discovery and set forth mechanisms to ensure due process in administrative hearings. See Massachusetts Administrative Procedure Act, M.G.L. c. 30A ("the Mass. APA") and regulations promulgated thereunder at 801 CMR 1.00 *et seq.* The MSD takes the position that these regulations only apply to executive offices of the Commonwealth, which do not include the Secretary of the Commonwealth. Respondents should nonetheless cite to these regulations with the hope that a Presiding Officer or a reviewing court will be troubled by the argument that due process protections afforded respondents in other Massachusetts administrative actions are not available in proceedings before the MSD.

It has been the MSD's view that 950 CMR § 10.09 only contemplates an exchange of trial evidence through the submission of pre-trial memoranda, which are generally due shortly prior to the actual hearing. MSD resists all attempts at earlier or additional discovery, claiming that all of the relevant and necessary materials will be provided in the pre-trial memoranda, which they advertise as being a comprehensive road map. In reality, MSD's memoranda are often legal boiler plate and a restatement of the allegations set forth in the complaint, without a summary of anticipated testimony by witnesses. If the MSD's memorandum is bare bones, Respondent should file a motion for a more definite statement. Respondent should also move the Presiding Officer for permission to delay its own pre-trial submission until after it has reviewed the MSD's memorandum.

3. The Administrative Hearing And Appellate Review

The Mass. APA provides guidelines for conducting adjudicatory proceedings, but much is left to the discretion of the Presiding Officer. As part of those guidelines, it provides that every "party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine witnesses who testify, and to submit rebuttal evidence." See §11. If these "rights" are not afforded during the administrative proceeding, a respondent may have a solid basis for appeal. For example, if the Presiding Officer refuses to preserve testimony through the deposition of unavailable witnesses, it can be argued that the respondent has been denied the right to call and examine witnesses. Similarly, if the Presiding Officer refuses to order the MSD to turn over prior inconsistent statements of its witnesses (which the MSD maintains it is not required to disclose), has the respondent really had an opportunity to cross-examine witnesses? Such refusals could provide a solid basis for an appeal to the Superior Court, which can set aside a decision of an agency if it finds that the agency decision was made upon unlawful procedure, based upon an error of law, or in violation of constitutional provisions. M.G.L. c. 30A, §14.

Litigating a case against the MSD, although it can be expensive and time consuming, can be beneficial and can produce a better result than settling earlier in the process. First, litigation may expose the warts on MSD's case and may create a better environment for settling. There will be a delay between the close of evidence and a decision by the presiding officer. This time may be used to negotiate a settlement more favorable than might have been possible at the outset, particularly if the hearing process has exposed weaknesses in enforcement's case or there are viable issues preserved for appeal. Second, getting the case before the Superior Court can produce a good result. Appeals have been successful. In *Bergin v. Galvin*, No. Civ. A. 98-6016-H, 2000 WL 744567 (May 18, 2000), the Superior Court (Gants, J.) outright dismissed claims against two respondents and remanded for further findings of fact and law against the others because the record was so "tainted by errors of law of the Hearing Officer." ■

Heads Up

Ballistics Opinion Held Admissible With Limitations

By Michael A. Collora

In *Commonwealth v. Heang*, 458 Mass. 827 (2011), defendant appealed his conviction for first degree murder, arguing certain expert testimony concerning ballistics evidence should have been excluded. In upholding the conviction, the Supreme Judicial Court ruled that an expert may give an opinion as to ballistic evidence, but that given the subjective nature of such opinion testimony, an expert's conclusion must be limited to no more than "a reasonable degree of ballistic certainty." *Id.* at p. 848. At issue in *Heang* was the opinion of a firearms expert linking a gun seized at a location tied to the defendant with the bullets and cartridges found at the murder scene. Since the expert had been limited in his testimony at trial to the newly enacted standard, the conviction was upheld.

The Court reviewed its previous rulings on ballistic opinions, noting a long history of admissibility starting with a 1902 opinion authored by then Chief Justice Holmes. See *Commonwealth v. Best*, 180 Mass. 492 (1902). But the Court decided to reexamine the issue in light of recent court decisions and a 2008 report by the National Research Council, entitled "Ballistic Imaging," which discussed recent challenges to the reliability and subjective nature of ballistic comparisons. *Id.* at pp. 836-837. It acknowledged recent rulings by judges in the United States District Court in Massachusetts upholding the admissibility of such expert testimony as sufficiently reliable under the standard imposed by the Supreme Court in *Daubert v. Merrill, Dow*, 509 U.S. 579 (1993), but noted these opinions limited the expert's testimony, in one case to "a reasonable



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degree of ballistics certainty,” see, *U.S. v. Monteiro*, 407 F.Supp.2d 351, 372 (D. Mass., 2006), and in another, to merely permitting expert observations, see *U.S. v. Green*, 405 F.Supp.2d 104, 124 (D. Mass. 2005).

In a comprehensive opinion, the Supreme Judicial Court reviewed the theory behind all ballistic evidence and found it convincing. Upon firing, a firearm imparts to a shell and casing certain unique characteristics called “toolmarks.” In addition, firearms themselves may also retain unique characteristics resulting from manufacture or use. The Court noted that some general characteristics of weapons are rarely disputed, such as an opinion as to the type of weapon used or the size of the projectile, and that such opinions are generally admissible. *Id.* at pp. 849-851. What is often contested, however, is whether the microscopic variations imparted by manufacture or use are sufficiently unique (or nearly so) that these markings on a bullet or shell can be matched by an expert to a weapon linked to a defendant. One problem is that some characteristics imparted in manufacture may result in the same toolmark on more than one weapon. Nevertheless, the Court concluded that testimony regarding a match could be introduced into evidence, subject to certain limitations.

It observed a trained and qualified expert can compare items found at the scene of a crime to a known weapon and give an opinion as to their match using a microscope. *Id.* at pp. 837-839. But said the Court, since the examiner uses both art (recognizing and matching a pattern) and science (uniqueness of toolmarks), the expert cannot opine to an absolute certainty. *Id.* at p. 849-850. Consequently, the opinion must be limited in scope, and that scope is “to a reasonable degree of ballistic certainty”. *Id.* at pp. 848-849.

The conclusion in *Heang* as to expert ballistics testimony is consistent with the Court’s decision last year in *Commonwealth v. Gambara*, 457 Mass. 715 (2010), as to expert fingerprint testimony. There, despite a National Science Report raising concerns about the reliability of such comparisons, the Court upheld fingerprint identification testimony, but prohibited experts from characterizing a match as “certain” or “infallible,” stating it can only be offered as an opinion *Id.* at p.729, fn. 22. It thus comes as no surprise that the Court in *Heang* permitted expert ballistics testimony, nor that it struck a middle ground between permitting a stronger opinion (“it is a 100% match”) or a

more severe limitations (“more likely than not”), concluding that this middle ground “more fully captures our current understanding of the scientific rigor underpinning forensic ballistics.” *Id.* at 850.

Furthermore, the Court announced additional guidelines “to ensure that expert forensics ballistics testimony appropriately assists the jury in finding the facts but does not mislead by reaching beyond its scientific grasp.” *Id.* at pp.846-850. The examiner’s work product (photos, charts, notes) must be provided to the defense (although the Court did not follow the *Monteiro* court’s requirement of a second examiner reviewing the work of the first). And before giving an opinion, the expert must initially explain the theories and methods of ballistics to the jury to give context. *Id.*

In addition, the *Heang* Court also upheld the admission of gunshot residue evidence, allowing an expert to opine that such residue was on a defendant’s clothing or other belongings, even though such an expert cannot identify the source or date of placement. This type of evidence, although far from conclusive, supported the Commonwealth’s contention that the defendant himself or a co-defendant was one of the armed men. *Id.* 851. See also a later case, *Commonwealth v. Marrero*, 459 Mass. 235 (2011), where the Court upheld admission of testimony that particles on a defendant’s jacket matched ammunition from a certain European company’s product, despite a claim that this was “voodoo science.”

Conclusion

The immediate lesson from *Heang* is that experts should be carefully instructed in the limitations of the opinions they may give at trial. The broader lesson of the case, shown by its exhaustive survey of the state of scientific knowledge about ballistics (*Id.* at pp. 836-846), is that the Supreme Judicial Court is prepared to reexamine the entire field of forensic evidence in light of modern scientific standards. Counsel seeking to exclude forensic evidence should continue to use *Daubert-Lanigan* motions to ensure that the record reflects modern perceptions of the “science” underlying the proffered expert testimony. As the Court’s “current understanding” of the science changes, so too will its rulings on admissible evidence. ■

Deal Focus

Bridging the Value Gap: Sanofi-Aventis, Genzyme and Contingent Value Rights

By John Haggerty

Over the course of the past year, one of Massachusetts' leading biotechnology companies, Genzyme Corporation ("Genzyme"), engaged in a high profile takeover battle with Sanofi-Aventis ("Sanofi") that drew global attention. Sanofi, a global-healthcare company based in France and the fourth largest pharmaceutical company by prescription sales, set its sights on acquiring Genzyme and, undeterred by Genzyme's initial resistance, continued to press for a deal, to the point of launching an unsolicited tender offer. Early in this high-stakes drama, the parties reached a stand-off over their divergent views of the intrinsic value of Genzyme. Charged with protecting the best interests of the stockholders, the Genzyme board of directors was steadfast in its opposition to any deal that did not reflect its view of Genzyme's intrinsic value. In the end, the parties were able to bridge the value gap by using contingent value rights that focused on specific areas of disagreement.

A contingent value right, or CVR, is a right distributed to stockholders that entitles them to receive additional cash consideration at a future date upon the achievement of specified targets or milestones. While deal structures that provide sellers the right to contingent future payments are relatively common in private company acquisitions, they were historically used infrequently in public company acquisitions because of



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various business and legal hurdles. They are, however, becoming increasingly popular, especially in the life sciences sector. Any time a seller turns over its business to new owners, but has to depend on the new owners for future payments, the situation is ripe for disputes. Sellers push for “efforts covenants” obligating buyers to invest resources in achieving the milestones (e.g., “commercially reasonable efforts” or “diligent efforts”) and for audit rights, while buyers seek to maximize their operational flexibility in running their business post-closing and struggle with the added burdens of securities disclosure and fair value accounting under SFAS 141R, which requires that buyers mark to market quarterly their potential liability under the CVRs. Whether contingent value rights can be used successfully depends on the ability to fashion clear milestones that both bridge the parties’ differences and minimize the risk of future disputes. Pharmaceutical and biotechnology companies frequently provide an opportunity for clear milestones in which both buyer’s and seller’s interest align, such as FDA approval of a drug product candidate.

In the spring of 2010, Sanofi made its initial overture to Genzyme. Believing that the time was not right for a transaction that would provide its stockholders with adequate value, Genzyme postponed talks with the intent of focusing on its strategic plan. Undeterred, Sanofi delivered an unsolicited proposal on July 29, 2010 to acquire Genzyme in an all-cash deal for \$69.00 per share, which represented a 38.4% premium over the share price on July 1, 2010, when rumors of Sanofi pursuing a U.S. acquisition first surfaced.

The Genzyme board rejected Sanofi’s offer on August 11, 2010 on the basis that the offer did not appropriately value Genzyme’s business. Specifically, the Genzyme board pointed to two factors: the potential value of alemtuzumab (also known as Lemtrada), a drug for the treatment of multiple sclerosis, which Genzyme believed had blockbuster potential, and the effect of certain manufacturing problems with the drugs Fabrazyme and Cerezyme that had adversely impacted revenue but that the Board believed were in the process of being remedied.

Over the next few months, Sanofi continued to press for Genzyme to actively engage in acquisition negotiations and Genzyme continued to hold the line that the Sanofi bid undervalued the company. In early January 2011, the companies publicly announced that ongoing discussions between them now included potentially using CVRs to

address their differing views on the value of alemtuzumab — a break in the impasse that ultimately led to the parties signing a definitive merger agreement on February 16, 2011, which provided for a transaction in which each Genzyme share would be converted into \$74.00 of cash and one contingent value right, with a potential value of up to \$14.00 per share.

The contingent value rights in the Sanofi/Genzyme transaction set out specific milestones for triggering the payouts of additional value:

- \$1.00 upon receipt of FDA approval of Lemtrada for treatment of multiple sclerosis on or before March 31, 2014.
- \$2.00 if total Lemtrada sales over a specified period equal or exceed \$400 million.
- \$3.00 if global sales of Lemtrada equal or exceed \$1.8 billion during any four consecutive quarters (which increases to \$4.00 if FDA approval for Lemtrada is not approved by March 31, 2014 such that the first milestone is not achieved).
- \$4.00 if global sales of Lemtrada equal or exceed \$2.3 billion during any four consecutive quarters.
- \$3.00 if global sales of Lemtrada equal or exceed \$2.8 billion during any four consecutive quarters.
- \$1.00 if, on or before December 31, 2011, the following are produced and released for shipment: (1) at least 79,000 units of Fabrazyme, and (2) at least 734,600 units of Cerezyme.

In addition to the business risks, the use of CVRs in public company acquisitions raises securities law issues that Sanofi and Genzyme had to address. If they are transferable, contingent value rights generally qualify as “securities” for purposes of the Securities Act of 1933, as amended, and, therefore, must be issued pursuant to an effective registration statement. Registration under the Securities Exchange Act of 1934, as amended, may be required as well if there are more than 500 holders (Section 12(g) of Exchange Act) or if the CVRs are being listed on an

exchange. Exchanges have their own conditions to be met for listing CVRs. See Nasdaq Rule 5730(a) and NYSE Rule 703.18.

The Genzyme CVRs are freely transferable and listed on the Nasdaq Capital Market. Thus, stockholders may be able to obtain immediate liquidity instead of waiting to determine if the milestones are ultimately met, though they risk selling at a price heavily discounted to the ultimate value of the CVR. While Sanofi currently provides public disclosure in the United States, many private and foreign buyers will find ongoing disclosure burdens unacceptable, particularly if it requires disclosing the specific financial metrics for key products, and, therefore, these buyers will likely take measures such as restricting transferability to ensure their CVRs are not “securities”.

The Sanofi/Genzyme transaction represents a situation in which CVRs were successfully used to bring the parties to an agreement. Contingent value rights will not resolve every valuation gap between acquisition parties and will inevitably create substantial additional complexity. The keys to the CVRs in the Sanofi/Genzyme deal were the ability of the parties to use specific bright line milestones that both sides could readily identify as having been achieved or not and a willingness to work through the complexity. In the pharmaceutical and biotechnology sectors, the speculative nature of value that can swing drastically depending on FDA approval or the performance of a single drug makes CVRs particularly useful in structuring acquisitions. In fact, in the last two years, CVRs have been used in several deals in the sector, including Celgene Corporation/Abraxis Bioscience, Endo Pharmaceuticals/Indevus Pharmaceuticals, The Medicines Company/Targanta Therapeutics, and Clinical Data/Avalon Pharmaceutical. While only time will tell which side had a better handle on the ultimate value of Genzyme, one thing is clear: the Genzyme stockholders have an opportunity to participate in the future upside of their investment that they would not have had in a straightforward cash merger. ■

The Profession

Professional Ethics and Social Media

by Steven W. Kasten

Lawyers are embracing social and business networking media — [Facebook](#), [Twitter](#), [LinkedIn](#) and the like — as an essential part of their law practices and marketing efforts. Social media offers unprecedented opportunities for professional networking, profile enhancement and thought leadership. And incorporating one's professional life into the milieu of social networking is easy and natural.

Nevertheless, professional ethics rules apply to the use of social media, just as they do to other on-line activities by attorneys. As has been widely reported in the press, lawyers have been subject to disciplinary review for improperly publicizing cases, criticizing judges, and divulging confidential client information, all through social media. In one instance, a Texas attorney and judge “friended” each other, which led to the judge learning through Facebook postings that the attorney had lied about her reasons for requesting a continuance.

It appears that many of these lawyers simply failed to use common sense, so the lessons to be drawn from these anecdotes are limited. But there are a range of interesting social media-related professional responsibility issues discussed with increasing frequency among bar associations and regulatory bodies. The American Bar Association Ethics 20/20 Commission is now in the process of examining whether to provide formal guidance and/or to recommend changes to the ABA Model Rules of Professional Conduct to address lawyers' use of social media as client development



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tools. Its [September 2010 “call for comments”](#) has elicited thoughtful and conflicting commentary from law bloggers, the law firm marketing industry, and law-related enterprises offering various commercial opportunities to lawyers through social media. As this discussion plays out, it is worthwhile considering how the Massachusetts Rules of Professional Conduct relate to the use of social media for the marketing of legal services.

Social Network Profiles and Recommendations Must Comply With Rule 7.1

There are now more than 17,500 registered LinkedIn users whose profiles identify them as an attorney in Greater Boston. Each profile can include basic information, such as educational background, degrees, honors and awards, a law firm name, prior employment and practice descriptions.

Lawyers posting such profiles are communicating about their services, and must comply with [Rule 7.1](#), which provides that “[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services.” A communication is false or misleading if it contains a material misrepresentation of fact “or omits a fact necessary to make the statement considered as a whole not materially misleading.” Statements comparing a lawyer’s services with another lawyer’s services, and statements creating unjustified expectations about the results a lawyer can achieve, are especially suspect. Lawyers should also be mindful to comply with [Rule 7.4](#), restricting claims of specialization.

Many networking sites allow clients and colleagues to “recommend” a lawyer, and encourage subscribers to request such recommendations, which then appear on the lawyer’s profile page. While the Massachusetts Rules do not prohibit a lawyer from requesting a recommendation or publishing testimonials, the lawyer [cannot pay anything of value for the recommendation](#) and, as the [South Carolina Bar Association recently concurred](#), is responsible for ensuring that the content of the recommendation comports with [Rule 7.1](#). Lawyers therefore should be especially careful to review the content of recommendations on social media sites, and decline or delete them as appropriate, especially where the profile pages provide no effective way to add fair context and/or disclaimers to reduce any potentially misleading aspect of the testimonials.

Social Network Profiles as Advertising

Until there is authority to the contrary, lawyers should consider information disseminated through social media, such as a LinkedIn profile, as “advertising” governed by [Rule 7.2](#). One could certainly articulate an argument that lawyers participate in social media for reasons unrelated to marketing, and therefore that such information should not be considered advertising. But it is difficult to see how an on-line professional profile maintained by a lawyer can be distinguished by the public from a lawyer’s web-site or home page which, according to Comment 3A to Rule 7.2, “would generally be considered advertising subject to [MRPC 7.2] ... ” In [Ethics Opinion 98-2](#), the MBA Ethics Committee, addressing whether an internet-based bar directory was a lawyer referral service, assumed that the content on member home pages that were linked to the directory was advertising, and as such the content must be retained for at least two years under Rule 7.2(b). Bar association ethics committees in Arizona, Alabama, and Illinois have agreed, and in 2010, the [Texas Bar Association’s Advertising Committee issued an interpretive comment](#) that “[l]anding pages such as those on Facebook, Twitter, LinkedIn, etc. where the landing page is generally available to the public are advertisements” which must be filed with the bar unless “access is limited to existing clients and personal friends.”

Accordingly, Massachusetts lawyers should keep a record of the content of and changes to their professional profiles, and of promotional communications distributed through social media.

Blogging, Tweeting, and Chat Rooms

Social media such as Twitter, blogs and chat rooms provide opportunities for lawyers to communicate about legal issues with each other, and with non-lawyers. They also pose professional ethics risks, albeit ones which appear to be manageable.

Solicitation. [Rule 7.3](#) requires that written solicitations of prospective clients (which include e-mail) be retained for two years, and that solicitations “in person or by personal communication,” including by “electronic device,” are altogether prohibited. Comments to Rules 7.2 and 7.3 suggest that posting to chatrooms, newsgroups or electronic bulletin boards might constitute a permissible written solicitation

or even a prohibited “in person” solicitation. A recent [Ethics Opinion of the Philadelphia Bar Association](#), however, opined that chat room solicitation should never be considered “in person” because participants understand that they may disengage.

A lawyer who simply posts general commentary about a legal issue on-line, and who invites prospective clients to access the discussion, should not be viewed to be soliciting, as long as his or her comments are not accompanied by any recommendation or invitation to retain the lawyer. Such activity is analogous to giving a legal education seminar, motivated in part by the hope of business generation, which the [MBA Ethics Committee has opined](#) does not constitute “solicitation” governed by Rule 7.3.

Unwanted Clients and Conflicts. Commentators have also warned that social media interactions may place lawyers at risk of being disqualified from a case based on contact with unintended “prospective clients.” The [MBA has opined](#) that in the absence of an effective disclaimer, a lawyer who receives confidential information in an unsolicited e-mail transmitted through his firm’s website is subject to a duty of confidentiality that may disqualify the firm from representing clients with adverse interests.

In the context of law firm web sites and e-mail, well-placed warnings and disclaimers to control the flow of information can substantially reduce or eliminate those risks. However, since social media may not permit the same level of functional control, the risk of unintended conflicts may be greater. Where the social medium is of a public nature (e.g., an open chat room), it is unlikely to create any reasonable expectation of privacy that would give rise to a serious claim of confidentiality. Nevertheless, as a precaution, lawyers should consider utilizing whatever automated reply features are offered by social media sites, such as LinkedIn’s “Contact Settings” which permit a user to send a standard message to those who are sending “InMail,” to make the appropriate disclaimer.

Actually *answering* legal questions through social media raises different issues, and may well give rise to attorney-client relationships as well as unauthorized practice of law issues depending on the location of the requester and the legal problem being described. As the [D.C. Bar Ethics Commission has suggested](#),

lawyers who are not intentionally seeking to form an attorney-client relationship, should avoid giving legal advice, as distinguished from more general information about the law, on blogs and other on-line legal forums.

The Responsibility of Lawyers and Law Firm Management

Lawyers must keep in mind that the professional information they post or claim on social and professional media sites must be truthful and fair, and in many cases will likely be subject to regulation as advertising. Because [Rule 5.1](#) requires partners in law firms to “make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct,” law firms should be developing policies regarding the use of social media, including but not limited to the issues discussed herein. While the proper extent and formality of such policies will depend on the size of the firm and its particular circumstances, the topics of such policies may include:

- Conforming social media profiles to practice descriptions on firm web-sites;
- Providing Standard disclaimers for use on specific social media sites;
- Policies for requesting and retaining social media profile recommendations and “specialty” information;
- Recommended privacy settings for Facebook and other social media;
- Conforming blog and Twitter use to Rule 7.1;
- Ethical use of social media to gather case information;
- Whether it is appropriate for attorneys to “friend” or link to the profiles of judges before whom they practice, a question about which states such as Florida, New York and Kentucky have come to different conclusions;
- Cautions against posting on any social media information regarding clients, including information subject to [Rule 1.6](#). ■