

Boston Bar Journal

SUMMER 2010

A Publication of the Boston Bar Association

**Jury Selection in Progress.
Yes, You May Enter**

**SEC v. Tambone: What It Means to
“Make” a Statement To Investors**

**PAIR: A Unique Public/Private Collaboration
That Saves Lives**

Contracting in the Cloud: A Primer

**Advance Conflict Waivers:
Will They Work For You?**

Board of Editors



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



Manisha H. Bhatt
Greater Boston Legal Services



Madeleine Blake
Greenberg Traurig



Lisa S. Burton
WilmerHale



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



Michael A. Collora
Dwyer & Collora



Hon. Judith Fabricant
Massachusetts Superior Court



Hon. Mark V. Green
Massachusetts Appeals Court



Joseph Halpern
Blue Cross and Blue Shield of MA



Martin R. Healy
Goodwin Procter



J. Allen Holland
Lynch Brewer Hoffman & Fink



Kimberly Y. Jones
Athena Legal Strategies Group



Edmund C. Kenealy
Liberty Mutual Group



David A. Kluff
Foley Hoag



Andrea Studley Knowles
Sugarman, Rogers, Barshak & Cohen



Peter M. Lefkowitz
Oracle USA, Inc.



Michael K. Loucks



Constance L. Martin
LeClairRyan



Martha Ann Mazzone
Fidelity Investments FMR Corp



Mark F. Murphy
Wulsin Murphy



Timothy M. Murphy
Sunstein Kann Murphy & Timbers



Regina S. Rockefeller
Nixon Peabody



Kathleen Burdette Shields
U.S. Securities and Exchange
Commission



Damian W. Wilmot
Goodwin Procter



Hon. Gabrielle R. Wolohojian
Massachusetts Appeals Court



Richard Yurko
Yurko, Salvesen & Remz, P.C.

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.

Boston Bar Journal

Volume 54, Number 3
Summer 2010

Officers of the Boston Bar Association

President, John J. Regan
President-Elect, Donald R. Frederico
Vice President, Lisa C. Goodheart
Treasurer, Peter F. Zupcowska
Secretary, Damon P. Hart

Members of the Council

Lisa G. Arrowood	Richard N. Kimball	Michael D. Ricciuti
Jonathan Chiel	Grace H. Lee	Jennifer M. Rivera-Ulwick
Paul T. Dacier	James D. Masterman	Douglas B. Rosner
Bruce E. Falby	Wm. Shaw McDermott	Ingrid C. Schroffner
George P. Field	Maureen Mulligan	William F. Sinnott
Elizabeth S. Fries	Edward Notis-McConarty	Richard A. Toomey, Jr.
Randolph M. Gioia	Michelle N. O'Brien	Kathy B. Weinman
Christine Hughes	Maureen A. O'Rourke	
Kimberly Y. Jones	Laura S. Peabody	
Wayne M. Kennard	Mala M. Rafik	

Past Presidents

Edward J. Barshak	Joseph L. Kociubes	Rudolph F. Pierce
Joseph W. Bartlett	Renée M. Landers	Joel M. Reck
John G. Brooks	Edward P. Leibensperger	Richard W. Renehan
R.J. Cinquegrana	William F. Looney, Jr.	Lauren Stiller Rikleen
John J. Curtin, Jr.	Joan A. Lukey	Mary K. Ryan
Gene D. Dahmen	Hon. Sandra L. Lynch	Richard A. Soden
Anthony M. Doniger	James J. Marcellino	Raymond H. Young
Thomas E. Dwyer, Jr.	Hon. Margaret H. Marshall	Kathy B. Weinman
Hugh R. Jones, Jr.	Edward I. Masterman	
Michael B. Keating	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. ©2010 Boston Bar Association. All rights reserved.

Advertising inquiries:
Call (617) 742-0615.



Boston Bar
ASSOCIATION

Board of Editors

Manisha H. Bhatt
Madeleine Blake
Lisa S. Burton
David S. Clancy
Michael A. Collora
Hon. Judith Fabricant
Hon. Mark V. Green
Joseph Halpern
Martin R. Healy
J. Allen Holland
Kimberly Y. Jones
Edmund C. Kenealy
David A. Kluff
Andrea Studley Knowles
Peter M. Lefkowitz
Paul G. Lannon, Jr., Chair
Michael K. Loucks
Constance L. Martin
Martha Ann Mazzone
Mark F. Murphy
Timothy M. Murphy
Regina S. Rockefeller
Kathleen Burdette Shields
Damian W. Wilmot
Hon. Gabrielle R. Wolohojian

Contents

BBJ Editorial Policy

President's Page 2

Departments

Voice of the Judiciary 4

**Jury Selection in Progress. Yes,
You May Enter**
By Judge Janet L. Sanders

Case Focus 6

**SEC v. Tambone: What It Means to
"Make" a Statement To Investors**
By Ian Roffman

Pro Bono 8

**PAIR: A Unique Public/Private
Collaboration That Saves Lives**
By Kathy Henry

Practice Tips 9

Contracting in the Cloud: A Primer
By Peter M. Lefkowitz

Legal Analysis 12

**Advance Conflict Waivers: Will
They Work For You?**
By Mary Strother and Dyane O'Leary

By Jack Regan

Making Space



The Boston Bar Association (BBA) has long been committed to promoting diversity in the legal community, both with its own programs and in partnership with other bar associations, non-profits, and advocacy groups. A milestone in the BBA's efforts was the formation of the Diversity Task Force by former BBA president Jack Cinquegrana in 2006, and its assessment of the state of diversity in Boston's legal community. The Task Force made specific recommendations, a number of which are now being diligently implemented by the BBA's Diversity and Inclusion Section. Former BBA president Kathy Weinman created that Section so that the BBA's diversity efforts would have an institutional platform and a group of lawyers knowledgeable about and committed to promoting diversity.

Boston has a vibrant group of minority / affinity bar associations. Notably among them are the Massachusetts Black Lawyers Association; the Massachusetts Association of Hispanic Attorneys; the Asian American Lawyers Association of Massachusetts; the Massachusetts Black Women Attorneys; the Massachusetts Lesbian and Gay Bar Association; and the South Asian Bar Association of Greater Boston. The BBA has had regular contacts with these affinity bar associations on many issues, including public policy, proposed legislation, the Boston Public Schools, and programs for lawyers in transition in their careers – while also enjoying close working relationships with the Massachusetts Bar Association and the Women's Bar Association of Massachusetts.

Each of the affinity bar associations was invited to have its President or designee sit on the BBA's Diversity and Inclusion Section Steering Committee, so that the BBA could be informed about the interests and needs of affinity bar members, as the BBA went about formulating its own initiatives on diversity. This cross-membership has proved to be a wise decision, contributing greatly to the success of the Diversity and Inclusion Section.

The BBA held two networking events this year directed at affinity bar association leaders and members, with the goal of letting them get to know what was on the BBA's agenda and, significantly, what each affinity bar association was doing that might benefit other bar leaders in planning their programs. Chief Judge Mark Wolf of the U.S. District Court, and Chief Justice for Administration and Management Robert Muligan of the Massachusetts Trial Court, attended one of these events and spoke with affinity bar members about opportunities for interaction with their courts. The BBA has also supported the annual dinners and receptions that the affinity bar associations conduct, including having the BBA leadership and staff attend so that they can learn about how the work of the BBA and the affinity bar associations can be best coordinated.

What has emerged over time was the distinct sense that a major impediment to the affinity bar associations moving forward was the lack of a physical home for their administrative operations. Each of the above affinity bar associations has no permanent office. Their operations are run out of the offices, and sometimes briefcases, of their current President and other officers, who meet at various locations to plan activities and the agenda for their membership.

In conversations with the leadership of the affinity bar associations, it became clear to the BBA that if the affinity bars had a physical home, it would greatly assist them in increasing their membership and broadening their impact.

After much planning, the BBA was able in recent years to acquire and build out a substantial

area of meeting space on its second floor adjacent to 16 Beacon Street. This expansion opened up other office space at the BBA, which had been used for the BBA's own extensive operations.

The BBA proposed, and each of the above six affinity bar associations have now agreed, to have the BBA provide office space, free of charge, to the affinity bar associations for their administrative operations, and for the affinity bars to use other space at the BBA for meetings of their committees and membership. The BBA's location, near the State House, provides an ideal venue when there is a need for the affinity bar associations to deal with the Legislature or the Executive Branch of the Commonwealth.

The BBA Council, the BBA's governing body, recently voted to refurbish over the summer the now available office space, to bring it up to the same standards, including technology infrastructure, as the office space that was part of the BBA's recent build-out. Each of the affinity bar associations will "move in" in the fall of this year. Finally, they will have a home to carry out their important work, as lawyers of color increase at the bar of the Commonwealth.

The BBA is pleased that it and the affinity bar associations were able to work through the challenges of this project, taking it from a good idea to a reality. Making space is only one step on the road to a more diverse bar in Boston. But it is an important and tangible one. The BBA is proud to have played a part in providing a home for all of us to work together on diversity. ■

By Judge Janet L. Sanders



Janet L. Sanders has been a justice of the Superior Court since 2001. Between 1995 and 2001, she was a District Court judge, assigned first to Waltham and then to Concord as the Presiding Justice. She is currently the Regional Administrative Justice for Norfolk County and serves on the SJC's Professional Development Committee and the Superior Court's Education Committee. She is a graduate of Stanford University and Harvard Law School, and has practiced both civil and criminal law.

Jury Selection in Progress. Yes, You May Enter

In February this year, the Supreme Judicial Court decided *Commonwealth v. David Cohen*, 456 Mass. 94 (2010), which provided the most comprehensive definition to date of the breadth of the right to a public trial in criminal proceedings.

The principles that the case reaffirmed were hardly controversial: the First and Sixth Amendments require that all aspects of criminal trials must, as a general rule, remain open to the public. The Court was following precedent dating back a quarter of a century.

The decision has nevertheless generated discussion among the judiciary as to how to prevent abridgement of the rights the decision outlined. The case is also likely to generate a number of new trial motions in cases tried at a time when judges (or the court personnel working with them) were less sensitive to their obligations to keep the courtroom open.

The *Cohen* case involved a Stoughton police officer charged with attempted extortion and intimidation of a witness. The trial was of great local interest, sharply dividing the Town of Stoughton. Jury selection alone took five days.

Problems began on day one, when a well meaning court officer put on the courtroom entrance a sign stating: "Jury Selection in Progress. Do Not Enter." The presiding judge did not know about the sign for the first three days. But the damage had been done: those who saw the sign (including at least one reporter) were deterred from entering. Others were specifically informed by court personnel that they were excluded from the courtroom during impanelment.

On the fourth day of impanelment, Cohen's attorney pointed out the sign to the judge and also noted that at least one of Cohen's supporters that morning had been told to leave the courtroom. The judge ordered the sign removed but denied the motion for mistrial, reasoning that a section of the courtroom had been set aside for the defendant's family and that some members of the public were present, so that the courtroom could not be said to be closed. She also expressed concern with commingling prospective jurors and spectators, whose conversations could taint the panel.

The SJC ordered a new trial, holding that there was little difference between partial and complete closure of a courtroom for constitutional purposes. Quoting *Press Enterprise v. Superior Court*, 464 U.S. 501, 508 (1984), the SJC stated that the "sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known." If even a few people are excluded,

there must be a “substantial reason,” and the closure must be no broader than necessary, with due consideration of reasonable alternatives.

The SJC further held that a constitutional violation occurs even when people are excluded without the judge’s knowledge. Thus, the fact that the judge in *Cohen* did not know about the sign was held to be largely irrelevant.

What are the implications of this decision? First and foremost, judges have to be clear with court personnel that a courtroom is open unless there is an express judicial order to the contrary. Signs are not a good idea, particularly since it is easy to forget to take them down when the need for any temporary closure no longer exists.

Second, although insufficient space and the need to protect a jury panel from taint may be valid reasons for a temporary limitation on public attendance, a judge must consider all reasonable alternatives, such as moving to a larger courtroom, or dividing a jury panel in two. At the very least, a judge should make sure that court staff let people in as space becomes available.

Third, *Cohen* made clear that no aspect of criminal proceedings is exempt from the constitutional presumption of openness, causing judges to reexamine some of their practices. For example, before *Cohen*, judges typically prevented the public from coming and going during the charge. Although the SJC in *Commonwealth v. Dykens*, 438 Mass. 827, 835-836 (2003) held that this was permitted to prevent jurors from being distracted – and *Cohen* cited *Dykens* with approval – the *Cohen* decision also made it clear that the disruption caused by people entering or leaving the courtroom would not alone justify closing any other part of the trial. As a result, some judges have decided to abandon the custom of closing the courtroom for the charge.

Many judges have also reconsidered the practice of conducting individual voir dire at side bar, outside the public’s earshot. Although the SJC in *Cohen* suggested that the public’s ability to view the process without hearing may suffice, the First Amendment may entitle members of the press to insist on listening in. Particularly where there is public interest in the trial, a judge may be well advised to conduct individual voir dire so that everyone can hear what is said.

Certainly, there are occasions where the First and Sixth Amendments come into conflict, individual voir dire being a prime example. Defense counsel may want the proceeding closed, fearing that potential jurors will not otherwise be forthcoming on private but important subjects. The Sixth Amendment guarantees a fair trial, which might be compromised without frank answers. A defendant can waive his right to public proceedings, but cannot waive the public’s First Amendment right to be present.

That First Amendment right of access is not absolute, however. A judge can order closure when a prospective juror, forewarned about the questions that will be asked, specifically asks to discuss certain matters in private. This procedure requires a careful balancing of the competing interests at stake, and the adoption of a solution narrowly tailored to the problem, along with specific findings explaining the action taken. See *Commonwealth v. Jaynes*, 55 Mass. App. Ct. 301, 311-313 (2002).

Finally, what about those motions for new trial? Because a Sixth Amendment violation is a structural error, the defendant need not show that he suffered any prejudice from courtroom closure. However, he must have preserved the error, since his right to a public trial can be waived. Litigation of these motions may therefore center on the issue of waiver, if in fact closure of some portion of the proceedings occurred and the judge did not make adequate findings.

Although the defendant may not waive the public’s First Amendment right of access, a First Amendment violation alone would not be ground for a new trial. Rather, the remedy for such a denial, if not raised at the time, is to make a transcript of the closed proceedings available. See *Press Enterprise v. Superior Court*, 464 U.S. at 513. ■

FIND US ON



www.facebook.com/bostonbar

By Ian Roffman

SEC v. Tambone: What It Means to “Make” a Statement To Investors



Ian Roffman is a partner at Nutter McClennen & Fish. He focuses on securities and corporate litigation. Prior to joining Nutter, he was Senior Trial Counsel in the SEC's Boston office.

In *SEC v. Tambone*, 597 F.3d 436 (1st Cir. 2010), the First Circuit addressed a central question for securities law practitioners: what constitutes “making” a statement to investors such that a person may become primarily liable for securities fraud. Sitting *en banc* with two judges dissenting, the First Circuit recently held that a person has not made a fraudulent statement either (i) by using a fraudulent statement to sell securities or (ii) by *implying* to investors that he has fulfilled his duty to conduct a reasonable investigation of the accuracy and completeness of the statements. This holding forecloses a potential expansion of securities fraud liability in shareholder class actions and other private actions.

SEC Rule 10b-5 makes it illegal “to make any untrue statement of a material fact” in connection with the purchase or sale of securities. 17 C.F.R. § 240.10b-5(b). Although the SEC may charge defendants with using fraudulent statements made by others under Section 17(a)(2) of the Securities Act of 1933 or with secondary liability for aiding and abetting Rule 10b-5 violations, private plaintiffs cannot bring these claims. Private plaintiffs can only bring actions under Rule 10b-5 that allege primary liability for persons who “make” fraudulent statements.

Federal courts have developed two tests for determining what it means to “make” a statement under Rule 10b-5. Under the “bright-line” test, a defendant must have actually made a statement that was publicly attributed to him. *Wright v. Ernst & Young*, 152 F.3d 169, 174-175 (2nd Cir. 1998). Under the broader “substantial participation” test, the “substantial participation or intricate involvement in the preparation” of a statement is all that is required to establish that a defendant made a statement. *Howard v. Everex Systems, Inc.*, 228 F.3d 1057, 1061-62, n.5 (9th Cir. 2000). The First Circuit has not adopted either test.

Tambone involved statements concerning market timing in several mutual fund prospectuses. “Market timing” is the frequent buying and selling of mutual fund shares to exploit inefficiencies in fund pricing. Because market timing can harm other fund investors, fund companies commonly restrict or bar the practice. The prospectuses in *Tambone* expressly restricted or prohibited market timing. Although the funds’ sponsor was directly responsible for the prospectus statements, the SEC charged two executives of the funds’ underwriter with primary liability under Rule 10b-5, alleging that they distributed the prospectuses while allowing preferred customers to engage in market timing in the funds.

The SEC offered two theories. First, the SEC argued that the executives made false statements by using prospectuses to sell fund shares knowing that the statements were false. Second, the SEC argued that, as underwriters, the executives had a duty to conduct a reasonable investigation of the accuracy and completeness of the prospectuses. As a result, the executives made an “implied statement” that they fulfilled their duty when, in fact, they knew the prospectuses contained false statements about market timing.

Although the district court dismissed the complaint, a divided First Circuit panel reversed. Agreeing with the SEC, the panel held that the defendants’ role in the securities markets gave rise to a duty to investors such that they made an “implied statement” that they fulfilled their specific duties even though they did not make any actual statement.

On rehearing, the First Circuit rejected both of the SEC’s arguments and again dismissed primary liability claims under Rule 10b-5. Declining to adopt either the bright-line or substantial participation test, the court held that merely using or disseminating another’s false

statement would not satisfy either test. As a result, whether the First Circuit will adopt these tests or develop a new one remains an open question. Rejecting the implied statement theory, the court acknowledged that underwriters have a duty to reasonably investigate the accuracy and completeness of statements in a prospectus, but refused to hold that, as a result of this duty, an underwriter makes an implicit representation that statements in a prospectus are truthful and complete. The court reasoned that “implied statement” liability would impose on underwriters a “free-standing and unconditional duty to disclose.” Instead, the court reaffirmed long-standing precedent that nondisclosures are actionable only if the defendant has a duty to disclose arising from a fiduciary or other relationship that finds its basis outside the securities laws. A breach of the duty to investigate, without more, would not violate Rule 10b-5.

Although the court dismissed primary liability claims under Rule 10b-5, it reinstated the panel’s opinion permitting claims to go forward (i) under Section 17(a)(2) of the Securities Act and (ii) for aiding and abetting the fund sponsor’s violations of Rule 10b-5. The distinction between these claims can be meaningful. Shareholder class actions can have significant financial consequences for the parties. Without a private right of action, shareholders cannot sue underwriters or other securities industry participants who use or disseminate statements of others. In addition, SEC claims brought under Section 17(a)(2) are negligence-based and, even if the government is ultimately successful, carry potentially lesser penalties than Rule 10b-5 claims. ■

By Kathy Henry

PAIR: A Unique Public/Private Collaboration That Saves Lives



Kathy Henry is the Pro Bono Partner at Choate, Hall & Stewart LLP and a member of the PAIR Board. She can be reached at khenry@choate.com.

Victims of gang rape and sexual torture caught in the middle of warring tribes...a kidnapped child sex slave who fled her country nine months pregnant...men and women who have been tortured to suppress their political activism...child soldiers. These are the stories of the children, men and women who come to PAIR seeking political asylum, relief from detention, and redemption from lives both cruel and courageous. These are the immigrants among us in need of free legal representation. These are some of the most impressive people I have ever known. These are our clients.

The Political Asylum, Immigration Representation Project (PAIR) is a nationally recognized *pro bono* model that works to secure safety and freedom for low income asylum-seekers who have fled persecution from countries that cover the front pages: Uganda, Rwanda, Egypt, Liberia, Somalia, Iraq, Congo, Darfur, Guatemala — 90 countries in all. PAIR also promotes the rights of immigrants who are unjustly detained, many of whom languish in prison for the first time in their lives simply because they are out of immigration status.

Since its inception in 1989, PAIR has been the core provider of *pro bono* legal services to asylum-seekers and immigration detainees in Massachusetts, and has a jaw dropping 95% success rate in its asylum cases. The organization has provided direct legal services and consultations to more than 6,000 clients, and has trained and mentored over 1,250 volunteer lawyers in the Commonwealth. I am one of them.

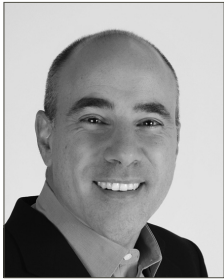
Over the past 10 years, I have represented a handful of clients on a *pro bono* basis through PAIR, as have over 30 Choate attorneys, paralegals, and summer associates last year alone. We have represented PAIR clients in asylum, detention and bond matters. We have advocated before administrative decision makers and litigated in immigration court. Without exception, the *pro bono* experience through PAIR has been remarkable. Attorneys report that their PAIR work is among their most interesting and rewarding professional experiences.

One junior associate, who represents a Ugandan woman who was raped and tortured as a means to suppress her political activity, had this to say about her PAIR work: “Representing my PAIR client has truly been life-changing. Professionally, as a junior associate, I have been able to expand my legal skills by taking a lead role in managing all aspects of the case — from the initial client interview to trial. Personally, my client’s resilience and unending optimism in the face of horrific atrocities continue to inspire me.”

One of my partners, who was lead trial counsel for a detained young man in removal proceedings back to Darfur, reports that his experience gave him “the opportunity to litigate a case that was as intellectually stimulating as it was emotionally satisfying. The legal issues involved in seeking to avoid this removal were as complex as any that I have encountered in my 11 years of trying high-stakes civil cases. PAIR provided expert advice on difficult issues. Fortunately, we were able to mount a successful strategy that culminated in the client gaining release in the United States. His words of gratitude — and the look on his face when he realized he was not being sent back to the horrors of Darfur — I will not soon forget.”

By Peter M. Lefkowitz

Contracting in the Cloud: A Primer



Peter M. Lefkowitz is the Chief Privacy Officer at Oracle Corporation. Mr. Lefkowitz is a member of the Boston Bar Journal Board of Editors.

Cloud computing has come down to earth. Email travels in the cloud; medical records are stored in the cloud; your phone can access maps and restaurant recommendations in the cloud. And businesses want to be in the cloud, lest they lose the opportunity to increase sales and lower costs, or be perceived as missing out on the next great internet phenomenon. The old computing archetype, where a business would only use computers and data storage located on its premises to assure control and efficiency, is being replaced rapidly by a paradigm where more and more of this activity is conducted off-site or in the internet “cloud.”

Yet no one really can say with precision where the cloud begins and ends. The cloud can be either web-based services or outsourcing more generally; the cloud can include data that moves from place to place as needed or any offsite data storage. This fuzziness has not been lost on the experts. While the chief technology officer of Hewlett Packard has extolled that “the cloud is the next generation of the internet,” Larry Ellison has observed pointedly that “we’ve redefined cloud computing to include everything that we already do. I can’t think of anything that isn’t cloud computing with all of these announcements.”

In the midst of this, clients are entering into cloud computing contracts with increased frequency and asking their attorneys to provide counsel that minimizes both regulatory and financial risk. To perform this work, attorneys need to understand what constitutes a cloud, what business and legal issues differentiate the parts of the cloud, and where to focus efforts when advising on cloud transactions. This article takes on the ambitious goal of laying that groundwork.

Step 1: Getting into the Cloud

The U.S. National Institute of Standards & Technology (NIST) defines cloud computing as “a model for enabling convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction....” In other words: The cloud involves the use of a service to store, transmit and process information and employs the internet as the

continued

PAIR, *continued*

The reason pro bono representation through PAIR works so well is that the PAIR staff screens cases thoroughly, conducts frequent legal trainings, and serves as valuable mentors on complex issues. Because we do not have our own immigration practice at the firm, we would not be able to represent asylees and detainees without PAIR’s expert guidance on some of the more complicated matters that we handle. In fact, I recently used PAIR as a model when we developed a collaboration with another organization on a different type of pro bono project. In my experience, PAIR is the

gold standard for these types of collaborations. The time commitment from volunteer attorneys can be as small as 15 hours for a bond hearing, and as large as hundreds of hours for an asylum trial. The stakes are high and the rewards are great.

Now more than ever, as the country considers ever more punitive immigrations laws, the people seeking refuge through PAIR need legal representation. I have every confidence that my brothers and sisters of the bar will provide. ■

By Mary Strother and Dyane O'Leary

Advance Conflict Waivers: Will They Work For You?



Mary B. Strother is Deputy General Counsel at WilmerHale, handling ethical issues and risk management. She is also a Special Counsel in the Litigation/Controversy Department of the firm.



Dyane O'Leary is a Senior Associate in the Litigation/Controversy Department at WilmerHale.

As law firms grow, so too do the number and variety of their clients and the potential for conflicts of interest between them. To simultaneously represent one client against the interests of another, consent must be obtained from both. Obtaining consent, however, is not always possible or practicable at the time of a new engagement. To address this problem, many firms now include advance waivers in their standard engagement letters. Typically, an advance waiver seeks the client's consent to the firm's *future* (i.e., after the waiver is signed) representation of existing or new clients in matters that are not substantially related to the firm's ongoing work for the first client, even if the interests of the other client are adverse.

By way of illustration, an advance waiver may read something like:

It is possible that some of our present or future clients will have matters adverse to you while we are representing you. We understand that you have no objection to our representations of parties with interests adverse to you, and that you waive any actual or potential conflict of interest as long as those engagements are not substantially related to our representation of you. We agree that your consent shall not apply in any instance where, as a result of our representation of you, we have obtained confidential information that, if known to such other client, could be used to your material disadvantage.

An advance waiver aids law firms by providing that a conflict will not preclude the representation of new clients in unrelated matters. An advance waiver may also benefit clients by ensuring that they will not lose their counsel of choice because the firm will not risk being precluded from undertaking future unrelated work. For example, in the absence of an advance waiver, a firm may

turn down an engagement to do real estate work for Company A because the firm would be precluded from representing another client sued by Company A in unrelated patent litigation. A firm, of course, may in some instances determine that even when a client has agreed in advance to waive a conflict, there are business or client relations reasons to decline to accept a substantially unrelated matter for another client that is adverse to the first client.

Before trying to take advantage of the benefits of advance waivers, firms and practitioners should be aware of the applicable ethical rules. Advance waivers fall within Rule 1.7 of the ABA Model Rules of Professional Conduct, which addresses conflicts of interest involving current clients. In 2002, the ABA directly addressed the issue of advance waivers by adding a comprehensive comment, stating that “consent to future conflict” would depend upon “the extent to which the client reasonably understands the material risks that the waiver entails.” ABA Model Rule. 1.7, Comment 22, Consent to Future Conflict. In 2005, the ABA further broadened its support in Formal Opinion 05-436, in which it recognized the likely validity of an “open-ended” advance waiver (as opposed to a specific description of the potential conflict) obtained from a sophisticated and/or independently represented client.

Although Mass. Rule of Professional Conduct 1.7 is nearly identical to Model Rule 1.7, it does not include the requirement that the client’s consent be in writing, nor does it include the ABA comment directed to advance waivers. Nor is there any other formal endorsement of advance waivers in Massachusetts. The Office of Bar Counsel has noted that “advance waivers of confidentiality or conflicts are difficult to obtain by informed consent,” <http://www.mass.gov/obcbo/prospective.htm>., which suggests that advance waivers might be viewed with skepticism if they lack suitable disclosures and detail.

To help maximize the likelihood that an advance waiver will be accepted as valid in Massachusetts courts, firms should:

- Explicitly *exclude* from the advance waiver matters that substantially relate to the current work for the client, and describe narrowly and precisely the scope of work encompassed in the present engagement.
- Avoid boilerplate “blanket” waiver language in a generic engagement letter. Try to identify the subject matter that future representations would likely involve (as opposed to seeking an advance waiver for a conflict “in any area in which the firm practices”). When possible, identify the potential opposing party (or types of clients with whom a conflict could arise) and the nature of the likely subjects of future adverse matters.
- Consider carefully the sophistication of the client and encourage the client to consult with in-house or other counsel.
- Discuss the waiver and its consequences with the client, and memorialize the discussion in writing. Include in the discussion the scope and reasons for the advance waiver, and its advantages and disadvantages.
- Ensure that the person with whom the advance waiver is being discussed understands its scope and consequences and has the authority to bind the client.

Given the growing number of firms providing legal services in a wide variety of practice areas, advance waivers will become an even more essential and standard practice. When properly drafted, and fully and candidly explained, they will provide important benefits to firms and their clients. ■



Boston Bar

ASSOCIATION

16 Beacon Street
Boston, MA 02108

Non Profit Org.
U.S. Postage
PAID
Boston, MA
Permit No. 57557

The 2010 Boston Bar Association Summer Jobs Program Is Giving a Diverse Group of 46 Juniors and Seniors from the Boston Public Schools a Chance to Think About Becoming Lawyers.

A Special Thank You to Those Making This Possible:

Barron & Stadfeld	Mintz, Levin, Cohn, Ferris, Glovsky and Popeo
Boston Bar Association	Nutter McClennen & Fish
Bingham McCutchen	Partners HealthCare, Office of the General Counsel
Burns & Levinson	Proskauer Rose
Choate Hall & Stewart	Ropes & Gray
Chu Ring & Hazel	Seyfarth Shaw
City of Boston Law Department	Sherin and Lodgen
Conn Kavanaugh Rosenthal Peisch & Ford	Suffolk DA's Office
DLA Piper (US) – Boston Office	Suffolk University Law School
Donnelly, Conroy & Gelhaar	Sugarman, Rogers, Barshak & Cohen
Donovan Hatem	Sunstein Kann Murphy & Timbers
Dwyer & Collora	Todd & Weld
Edwards Angell Palmer & Dodge	United States Bankruptcy Court*
Executive Office of Health and Human Services*	United States District Court**
Ferriter Scobbo & Rodophele	Verrill Dana
Fish & Richardson	Wilmer Cutler Pickering Hale and Dorr
Foley Hoag	
Goodwin Procter	
Harvard Pilgrim Healthcare	*Funded through Boston Bar Foundation M. Ellen Carpenter Fund
Hinckley, Allen & Snyder	**Funded through Boston Bar Foundation Austin Jones Fund
Holland & Knight	