

# Boston Bar Journal

WINTER 2012

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# Boston Bar Journal

WINTER 2012

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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

### Our Sustainable Future and the Greening of the Profession

By Lisa C. Goodheart

Over its long history dating back to John Adams, the Boston Bar Association has earned an enviable reputation based on principled positions and important policy initiatives. In considering that history, I am impressed by the extent to which the BBA's initiatives reflect a clear recognition of our shared responsibility to build a strong and sustainable future. Our commitments to equal rights and access to justice can certainly be understood in those terms, as can our commitments to diversity and inclusion in the profession, to supporting new lawyers entering the profession, and to public service, pro bono work and community involvement. The BBA is a community with a great tradition of investing in the future of the things we value. This tradition has shaped our community in fundamental ways.

I was personally introduced to the BBA many years ago through the network of environmental lawyers in Boston. My opposing counsel in a large environmental insurance case, Mary Ryan (who later became a BBA President), invited me to attend a lunch meeting of the Environmental Litigation Committee. I went, had fun, learned some useful things and made some new connections. Starting with that introduction, I became more and more involved in the BBA over time. All of us who have benefited from this sort of mentoring should likewise make the effort to encourage other lawyers, including



those who are less experienced but offer new energy and different perspectives, to come on up to 16 Beacon Street and participate in the BBA. Doing so is an important personal investment in the future of our legal community and the continued vitality of our Association.

For environmental lawyers, of course, the concept of a sustainable future has a very specific connotation, of fairly recent vintage. These days, environmental sustainability is most urgently considered in light of the threat of climate change due to greenhouse gases, and the impacts of development activities on natural resources and ecosystems. But even for environmental lawyers, this is just one aspect of a more fundamental concept. As noted by the Climate Change, Sustainable Development, and Ecosystems Committee of the American Bar Association, “[s]ustainability’ is not only synonymous with green measures related to recycling, energy and climate change, but describes a broader concept of sustaining the long term well being of organizations through values-based management.”

At the BBA, our commitment to a sustainable future, broadly understood, has prompted us to consider environmental sustainability, in particular, in the context of our legal community. To help with that consideration, this year I have asked Ben Ericson of the Massachusetts Department of Environmental Protection and Michelle O’Brien of Mackie, Shea and O’Brien to lead a new BBA task force on environmental sustainability for lawyers. The BBA’s Environmental Sustainability Task Force has a specific charter to do three things. First, the Task Force will examine and gather useful information about the best practices for practicing law in an environmentally sustainable way across all kinds of workplace settings. Second, the Task Force will look for opportunities for lawyers to provide community service in ways that highlight and promote environmental sustainability. And finally, the Task Force will seek to identify and develop pro bono opportunities for lawyers who wish to provide services to clients engaged with environmental sustainability issues or challenges.

My hope is that the Task Force will enable the BBA to engage more deeply in the developing conversation about environmental sustainability in the practice of law. Forward-thinking organizations of all kinds are focusing on the environmental impacts of their operations and practices, and working to

make adjustments aimed at promoting environmental sustainability. As lawyers, all of us should make efforts, where we can, to ensure that the places where we practice – our firms, our courthouses, our businesses and other entities – are among these forward-thinking organizations. No change in the direction of environmental sustainability will be too small to matter, because the truly critical change will be the combined impact of a great many small changes.

I also hope to see the BBA play a leadership role in cultivating the “greening” of our profession as a widely-recognized hallmark of professional excellence and civic responsibility. The relationship between environmental sustainability and professional excellence within the legal community is still not immediately apparent to all, but it is increasingly becoming recognized and appreciated. I predict that a commitment to conducting our law practices in environmentally sustainable ways will come to be accepted, over time, as an essential component of what it means to practice law according to the highest standards of professional excellence, just as the commitments to client service, public service, pro bono work, diversity and inclusion and work-life balance have all gained wide recognition as important values and markers of excellence within our community.

I am grateful to the members of the BBA’s Environmental Sustainability Task Force for their willingness to advance the development of environmental sustainability within the legal community. I’m also excited to see how the work of the Task Force will unfold in the coming months. In a sense, this focus on the greening of the profession represents a new challenge. But from a broader perspective, it’s not new at all. After all, going all the way back to the days of John Adams, the BBA has always promoted the idea of a sustainable future. ■

## The Profession

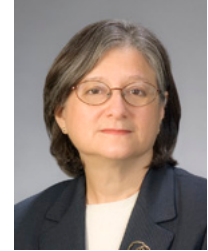
# Grantmaking in a Down Economy: Thoughts from the Boston Bar Foundation

By Elizabeth A. Ritvo and Joel B. Sherman

**W**hich nonprofit legal services organizations have the greatest impact on the communities they serve? Which address unmet or emerging needs? Which develop innovative programs? Which deliver legal services efficiently and effectively? The Boston Bar Foundation (“BBF”) and its Grants Committee weigh the answers to these critical questions when deciding which programs to fund during a particular grant cycle.

Following the economic downturn of 2008, the BBF, like many grantmakers, has struggled with the challenges created by the growing need for legal services at a time of shrinking funding revenues. Established in 1957 to promote justice by funding and promoting innovation in legal services, enhancing access to justice for the underserved, and supporting the bar’s public interest activities, the BBF primarily supports its grants with IOLTA funds and reserves, certain restricted gifts, and a portion of the net proceeds from the Adams Benefit, the BBF’s annual fundraising event.

Fiscal year 2007 represented a high point: the BBF received \$1.9 million in IOLTA monies, awarded \$1.7 million in IOLTA grants to 51 organizations and held IOLTA reserves in excess of \$875,000. With the steady decline of IOLTA revenues thereafter, the BBF in fiscal year 2011 received only \$600,000 in IOLTA monies, but was able to make \$687,000 in IOLTA grants to 25 organizations by spending down the balance of its IOLTA reserves. Even if IOLTA monies remain stable in fiscal year



Elizabeth A. Ritvo is a litigation partner in the Boston office of Brown Rudnick LLP and is co-chair of the Grants Committee of the Boston Bar Foundation.



Joel B. Sherman is Director of Goulston & Storrs, P.C. and is a Trustee, Executive Committee Member and Co-Chair of the Grants Committee of the Boston Bar Foundation.



2012, the BBF has no IOLTA reserves upon which to draw. In a four-year period, the BBF has suffered a loss of more than half of its IOLTA monies, has exhausted its IOLTA reserves, and, therefore, has some very tough choices to make during the next grants cycle.

In this economy, no grant applicant may assume that it will receive historic levels of funding or even that it will receive continuing support. Grant applications and post-grant performance reports are being more carefully scrutinized. What, then, may applicants do to increase their chance of being funded?

The BBF sets forth in its requests for proposals the deadlines and the level of detail required in a grant application. Grant applicants who ignore these requirements may imperil the success of their applications.

One issue the BBF Grants Committee evaluates is the need for the particular program for which funding is sought. A fundamental question for a grant applicant is whether it should request operating support or propose a new program. While recognizing the need for applicants to develop innovative approaches to serve critical legal needs in our community, the Grants Committee also considers whether a new program will overlap with established programs operated by other legal services organizations. Proposing a new program does not increase the likelihood of being funded. However, if the applicant has identified an unserved need or underserved community, it should demonstrate with specifics, and not generalities, why this program is necessary and how the program will serve those unmet needs.

Grant applicants should demonstrate that the programs proposed can be sustained and will grow over time. The long term viability of a program may seem questionable if all or a majority of funds for a proposal will come from one grantmaker, the BBF.

The grant application must provide, in understandable terms, a budget that reflects what the BBF will support and must include reliable financials. The credibility of a grant application and its applicant is diminished if the budget and financial statements do not add up.



The grant applicant also should demonstrate the capability of its organization to deliver generally and, on the proposal, specifically. It needs to identify clearly the services or deliverable it will provide and a standard by which the effectiveness of its program may be evaluated.

Once a grant has been awarded, the grantee cannot miss reporting deadlines set by the BBF. This reflects poorly on the efficiency and effectiveness of an organization and may adversely affect its ability to get future grants. Moreover, in its mid-cycle reports, the grantee must be able to demonstrate that it has delivered the services for which it received BBF funding.

The BBF continues to evaluate and re-evaluate how best to serve the changing needs of our community. Are there organizations that should collaborate more closely or consider merging? Efficiencies or innovations may result. Are there non-financial forms of support the BBF could provide, including development guidance, access to other potential funders, and programs on best practices that would benefit grant applicants and grantees? Other support may help grantees find new ways to stabilize and grow their organizations or better meet the needs of their constituents.

In these challenging times, where the demand for funding far exceeds the supply, the BBF, like other charities, has an affirmative obligation to ensure that scarce funds are awarded to those applicants with the greatest likelihood of success. During the coming grants cycle, the Grants Committee will be scrutinizing grant applications more thoroughly than ever before. The BBF's hope is and remains that, through its grants, the BBF will support the legal services programs that most effectively further its mission of promoting justice and serving the unserved and underserved in our community. ■

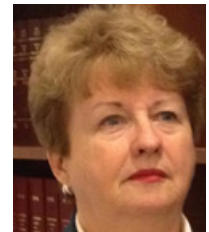
## Voice of the Judiciary

### A Crisis in the Delivery of Justice: Do Citizens Deserve Better?

By Judge Elaine M. Moriarty

Over 250,000 people appear in the Probate and Family Court every year. It is often the only involvement many residents of Massachusetts will have with the court system, with decisions having an immediate and direct impact on people's daily lives. It is the court where people come in order to divorce, to protect disabled or incapacitated loved ones, to probate the estate of loved ones who have died, and to adopt children. It is also the court where the most vulnerable come to receive protection from domestic violence, to obtain access to their children, and to obtain financial support to meet basic living expenses. Most come without the benefit of an attorney and often with limited or no English language proficiency.

I have been a Probate and Family Court Judge for twenty-two years. I began my career with the court as an Assistant Register in 1976, before entering private law practice. The judges of yesteryear never would recognize our system as it exists today, and in fact I have witnessed dramatic changes in it during my own tenure as a judge. While Probate and Family Court jurisdiction has expanded, the most significant change is the number of people who now represent themselves.



Elaine M. Moriarty is Associate Justice of Suffolk Probate and Family Court, Boston, MA and Co-Chair, Probate and Family Court Implementation Committee for the Uniform Probate Code. She has served as Chair of Subcommittee on Judicial Guidelines established by Massachusetts Supreme Judicial Court Steering Committee on Self Represented Litigants and served as Chair, Probate and Family Court Pro Se Committee.

The variety and complexity of the issues that face our society can readily be seen first-hand in my courtroom. During the course of a week, I have a contempt and motion day which has upwards of sixty cases scheduled on a given day; a Department of Revenue child support enforcement day which has more than one hundred cases assigned; a pre trial conference day; and two trial days.

Sadly, budget cuts over the past several years threaten our ability to meet our most fundamental obligation, as well as the most fundamental entitlement of citizens of the Commonwealth: timely justice.

Today I have to delay the start of my motion session because my clerk is needed to start another judge's session. (That judge will operate without any clerk during the remainder of the day). It is shortly after 9:00 a.m. when my clerk is available and I am able to take the bench. I have a packed courtroom with standing room only. A line of people still waits to check in with my clerk; as they do so, I send some to the probation department for dispute intervention to see if the case can be resolved by agreement, while others remain to await a hearing. My court officer is covering two other sessions, in addition to mine. However, when an altercation breaks out in the hallway, he must respond and is not available to help in any session until the altercation is resolved. This is of great concern to me. If there is a problem in my session during the court officer's absence, I am able to leave the bench into a secure corridor, but I worry about the safety of the staff, attorneys and litigants (who sometimes bring children) who remain in the courtroom.

The matters before me today involve allegations of domestic violence, establishment of paternity, development of a parenting plan for young children, establishing child support orders, and an emergency hearing on a guardianship for an elderly woman who had suffered a fall.

Of the sixty cases, more than 70% involve litigants who are self represented and who do not understand the system or what is expected of them. Their pleadings often are not in order, and they frequently seek relief that has not been raised in the pleadings. Despite the fact that we mail financial statement forms and other necessary paperwork to litigants to prepare, they very often come without

the paperwork completed. Often proper notice under court rules has not been given. This requires that the case be continued and rescheduled, which is upsetting to a litigant who anticipated a resolution today.

Many cases involve one or more parties who do not speak English. We often need interpreters for several different languages in one day. As I call a case that needs an interpreter, I learn that the interpreter has been called to another courtroom. The parties sit down, frustrated, as I tell them the case must wait. The demand for interpreters, like most other resources in the Trial Court, far exceeds the supply. When the interpreter arrives the hearing proceeds, but even then takes more time than a hearing conducted in English.

The constable brings in a case on a capias surrender, which is not on today's scheduled list. I sentence the defendant to jail for having willfully failed to pay child support when he had the ability to do so. Unfortunately, I must ask the defendant to wait for my court officer to return, before he can be removed to lock-up.

After hearing cases for almost four hours without a break, I look up and the courtroom seems nearly as full as it was when I began the morning. I have barely made a dent in the number of cases or people who remain.

The lunch recess comes well past one o'clock on this day (as on many others). My afternoon is much the same as the morning. I learn of several cases that have walked in as emergencies. One involves an emergency request to change custody and the police and Department of Children and Families are involved. The requesting party has little information about what happened. This requires a referral to the Probation Department to try to obtain some immediate information. This is made more complicated by the fact that there currently are five full time probation officers to handle the busy case loads for all sessions, down from fifteen probation officers just a few years ago.

At 4:00 p.m., many cases still remain. Many people have been waiting all day and have not yet been heard. I do not want to send them home without a hearing after waiting all this time. Some have taken a day off work. Many of those are in a relatively new job, earning less than in a previous position, and the occasion of their appearance in court is to seek modification of support obligations; they fear the prospect of reporting to their new employer that they will soon need to take another day off to return to court. Patience is now wearing thin and emotions remain high. They are frustrated, as am I, that the volume of cases to be heard is such that they must continue to wait. Thankfully, two of my colleagues offer to help me, so we finish the list at 5:30 p.m. However, such assistance generally is not available, given the demands on each of the other judges.

As I finish the session, I am drained. But the workday is not done. I still must decide and write decisions and orders on the ten cases I took under advisement today. This is in addition to deciding seven trials under advisement, four of which I have heard in the last two weeks alone, where a judgment and findings are due. I cannot be as timely as I would like in issuing decisions due to the demands of the burgeoning workload and the need to respond first to ever-present emergency matters.

Some of these cases present novel legal issues that require extensive research for which there is little or no time in the ordinary course of the day, given the press of ongoing matters. A few years ago, the Probate and Family Court had twenty-four law clerks to assist judges in researching decisions. We now have 4 ½ clerks to support the fifty-one judges authorized for the Probate and Family Court.

The work I do is demanding, challenging and rewarding, and I firmly believe that I make a difference in the lives of those who come before me. But the citizens of the Commonwealth deserve more timely justice. Sadly, this is simply not possible without the resources necessary to do the work. ■

## Case Focus

### ***Commonwealth v. Clarke: Padilla Ruled Retroactive in Massachusetts***

By Jesse M. Boodoo

Nearly two years since its release, the United States Supreme Court's decision in *Padilla v. Kentucky*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 1473 (2010), continues to generate interest in the increasingly intersecting worlds of criminal and immigration law. The landmark case established that an attorney provides ineffective assistance of counsel when she fails to inform a noncitizen client that a guilty plea carries a risk of deportation. While the prospective impact of *Padilla* was clear from day one, the retrospective effect was initially more difficult to gauge. Prior to the decision, virtually no jurisdiction held defense counsel ineffective for failing to warn a client about the deportation consequences of a plea. Could *Padilla* then really be used to attack past pleas negotiated under this widely-accepted and longstanding view of the law? The Supreme Court did not address whether *Padilla* should apply retroactively to pleas predating the decision, leaving lower courts to consider that question on their own as they faced a wave of post-conviction *Padilla* claims.

In *Commonwealth v. Clarke*, 460 Mass. 30 (2011), the Supreme Judicial Court offered the first Massachusetts appellate guidance on *Padilla*, and became the first high court in the country to hold that *Padilla* should be applied retroactively. On the facts before it, however, the SJC concluded that the defendant had failed to make a sufficient showing of prejudice to warrant a new trial. *Clarke* has attracted



Jesse M. Boodoo recently joined Ropes & Gray LLP as an associate practicing in the Litigation Department. He previously served as a law clerk to Justice Gabrielle R. Wolohojian of the Massachusetts Appeals Court.

much attention since its release, serving as both a flashpoint in the ongoing debate over *Padilla's* meaning and a crucial guide for practitioners litigating their own *Padilla* claims.

The events leading to the decision in *Clarke* began with the defendant pleading guilty, in 2005, to possession of a class B substance (crack cocaine) with intent to distribute. In 2009, the Department of Homeland Security notified the defendant that he was subject to deportation because of his conviction. This eventually prompted the defendant to file a motion for new trial based on *Padilla*. The defendant's plea counsel submitted an affidavit averring that she had been unaware that the defendant was not a citizen, and that she had no memory of discussing any immigration consequences of the plea. The defendant submitted his own affidavit stating that he was never told that his plea could result in deportation. A Superior Court judge denied the motion, and the SJC on its own initiative transferred the appeal to itself.

In an exhaustively researched opinion, the SJC took up the question of *Padilla's* retroactivity, an issue causing a deep split in courts across the country. Massachusetts, like most states, follows the federal framework for determining whether new constitutional rules are to be applied retroactively. Under that framework, an "old rule" — a rule dictated by established precedent — applies retroactively, but a "new rule" — a rule that imposes new obligations — applies only to pending cases. The SJC reasoned that *Padilla*, while novel in a sense, was ultimately an application of well-established principles regarding the effective assistance of counsel to new facts — in essence, an "old rule" in new garb. The SJC therefore held that *Padilla* should apply retroactively to guilty pleas entered after April 1, 1997, the point at which (according to the *Padilla* opinion) deportation became, as a matter of federal law, "intimately related to the criminal process" and "nearly an automatic result for a broad class of noncitizen offenders."

That said, the SJC concluded that, given the facts of the case, the defendant in *Clarke* was not entitled to a new trial. To prevail on his claim, the defendant needed to show both his counsel's ineffectiveness and resultant prejudice. In a key passage for those dealing with their own *Padilla* claims, the SJC offered a detailed description of the minimum showing required to satisfy the prejudice



requirement: the defendant must (1) aver that “but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial”; and (2) prove “that a decision to reject the plea bargain would have been rational under the circumstances” by showing either (a) that there was a defense that he could have pursued; (b) that counsel could have negotiated a plea to different charges without deportation consequences; or (c) the presence of “special circumstances” indicating that the defendant would have placed particular emphasis on the potential for deportation in deciding whether to plead guilty. The defendant in *Clarke* fell short on both prongs, failing to aver that he would have insisted on going to trial, and failing to offer any non-speculative reason why he would have rationally gone to trial, given the overwhelming evidence against him.

Easy to miss in the SJC’s analysis is a critical footnote, at the end of the decision, addressing the significance of the statutory deportation warning provided by judges, G. L. c. 278, § 29D, and the “green sheet” plea form ordinarily bearing the defendant’s signed certification that he understands (among other things) the possibility of deportation resulting from a plea. In a number of early cases out of the District and Superior Courts, the Commonwealth successfully argued that the statutory warning and signed green sheet conclusively precluded a finding of prejudice. The SJC rejected that argument, reasoning that, while the green sheet and statutory warnings are relevant to the prejudice analysis, they are not “an adequate substitute for defense counsel’s professional obligation to advise her client of the likelihood of specific and dire immigration consequences.”

Since the decision in *Clarke*, a substantial number of other courts have weighed in on the question of *Padilla*’s retroactivity, many expressly adopting or criticizing the SJC’s reasoning. Conflicting decisions out of the Federal appeals courts (for example, the Third Circuit (finding *Padilla* retroactive) and the Seventh and Tenth Circuits (finding *Padilla* non-retroactive)) may lead to a definitive ruling from the Supreme Court in the near future. But for now, at least, for noncitizens who pled guilty without being advised of the potential deportation consequences, *Clarke* opens a critical avenue for vacating pleas and potentially forestalling deportation. ■

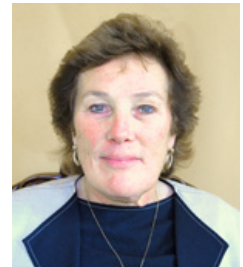
## Legal Analysis

### The Seal Of Approval: When is it Appropriate To Impound?

By Judge Linda E. Giles

The notion that court records should be open to the public was enshrined 370 years ago in the Massachusetts Body of Liberties, the first legal code of the colonists in New England and the precursor to our Constitution and General Laws: “Every inhabitant of the Country shall have free liberty to search and review any rolls, records or registers of any Court or office ...” Massachusetts Body of Liberties, art. 48 (1641). Thus, courts across the nation long have recognized a presumptive right of the public to inspect and copy court records and documents. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 599 (1978). See *F.T.C. v. Standard Financial Management Corp.*, 830 F.3d 404, 409 (1<sup>st</sup> Cir. 1987). The strong presumption of access aids the citizenry’s desire to keep a watchful eye on the workings of its government, *Nixon*, 435 U.S. at 598, and fosters the public’s desire to know whether public servants are carrying out their duties properly, *George W. Prescott Publ. Co. v. Register of Probate for Norfolk County*, 395, 274, 279 (1985); see *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502 (1<sup>st</sup> Cir. 1989).

“In Massachusetts, the right of public access to judicial records is governed by overlapping constitutional, statutory, and common-law rules.” *Commonwealth v. Silva*, 448 Mass. 701, 706 (2007). Records of judicial proceedings<sup>1</sup> are subject to the “general principle of publicity,” *New Bedford*



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*Standard-Times Pub. Co. v. Clerk of the Third Dist. Ct. of Bristol*, 377 Mass. 404, 410 (1979); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 539, 546 (1977); and laws denying access to judicial proceedings must “be strictly construed in favor of the general principle of publicity,” *Commonwealth v. Blondin*, 324 Mass. 564, 571 (1949). Court clerks are bound ethically to facilitate the public’s right of access. Code of Professional Responsibility for Clerks of the Court, S.J.C. Rule 3:12, Canon 3(A) (6). Furthermore, “public” means *everyone*, not just attorneys, Trial Court Administrative Directive No. 2-93, “Public Access to Court Records of Criminal Proceedings” (“Access to public records shall not be restricted to any class or group of persons”); accord, Trial Court Administrative Directive No. 1-84, “Public Access to Court Records, or non-commercial users, see, e.g., *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508 (10<sup>th</sup> Cir. 1994); *Speer v. Miller*, 15 F.3d 1007 (11<sup>th</sup> Cir. 1994); and the right of access includes the right to photocopy, *Nixon*, 435 U.S. at 597; *New Boston Garden Corp. v. Board of Assessors of Boston*, 24 Mass. App. Ct. 122, 125 (1987), and to make use of audio recordings and transcripts of court proceedings open to the public, Superior Court Standing Order 2-87(6); District Court Special Rule 211(A)(5)(a); *Republican Co. v. Appeals Court*, 442 Mass. 218, 223 n.8 (2004).

Because the media have no less a right to gain access to judicial records than any other member of the public, *The Boston Herald, Inc. v. Superior Court Dept. of the Trial Court*, 421 Mass. 502, 505 (1995), the right of access to certain court documents also is secured by the guarantee of freedom of the press under the First Amendment, which functions as an “effective check” on the judiciary, *Globe Newspaper Co.*, 868 F.2d at 502. “[O]nly in the most extreme situations, if at all, may a State court constitutionally forbid a newspaper (or anyone else) to report or comment on happenings ... which have been held in open court; and a similar rule would apply to court files otherwise unrestricted.” *Ottaway Newspapers*, 372 Mass. at 547-48. The United States Supreme Court has articulated a two-part test for determining whether a First Amendment right of access obtains in a particular criminal case: “[f]irst, the proceeding must have an historic tradition of openness, and second the public’s access must play ‘a significant positive role in the functioning of the particular process in question.’” *Newspapers of New England, Inc. v. Clerk-Magistrate of the Ware Div. of the Dist. Court*, 403 Mass. 628, 635 (1988), quoting *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986). The Supreme

Court has held that the First Amendment requires courts to consider on a case-by-case basis whether the denial of public and press access to the courtroom and, axiomatically, court records is warranted, especially in light of the strong presumption in favor of a public trial. *Globe Newspapers Co. v. Superior Court*, 457 U.S. 596 (1982). See *Commonwealth v. Baran*, 74 Mass. App. Ct. 256, 294 (2009). As the Court observed: “[T]he State’s justification in denying access [to the public] must be a weighty one. Where ... the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.” *Globe Newspaper Co.*, 457 U.S. at 606-07. See *Baran*, 74 Mass. App. Ct. at 294. In the only Supreme Court decision dealing with a constitutional right of access to court records in a non-criminal proceeding, however, the Court concluded that the release of the “Watergate tapes” played at trial was not required by the First Amendment right of freedom of the press. *Nixon*, 435 U.S. at 608-10. See *Newspapers of New England*, 403 Mass. at 636.

The Sixth Amendment also serves to guarantee criminal defendants the right to a public trial and, inherently, access to the records of that trial: “[T]here can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public.” *Waller v. Georgia*, 467 U.S. 39, 46 (1984). Public criminal trials ensure that prosecutors and judges perform their duties responsibly, encourage unknown witnesses to come forward, and discourage perjury. *Id.*

The principle of publicity of judicial records is not absolute, however. See *Ottaway Newspapers*, 372 Mass. at 548. First, there are a number of statutes that limit access to judicial proceedings and records, permit reasonable closure, and restrict the use of court records by the judiciary itself. *New Bedford Standard-Times Pub. Co.*, 377 Mass. at 410, 411. See *Ottaway Newspapers*, 372 Mass. at 549<sup>2</sup>. In addition, “a court possesses ‘inherent equitable power to impound its files in a case and to deny public inspection of them ... when justice so requires.’” *The Boston Herald, Inc. v. Sharpe*, 432 Mass. 593, 604 (2000), quoting *George W. Prescott Publ. Co.*, 395 Mass. at 277. “Impoundment” means “the act of keeping some or all of the papers, documents, or exhibits, or portions thereof,

in a case separate and unavailable for public inspection.” Rule 1, Uniform Rules on Impoundment Procedure<sup>3</sup>. Consistent with these tenets, the Uniform Rules on Impoundment Procedure were promulgated by the Supreme Judicial Court, effective January 1, 1988, for use in every Department of the Trial Court. Rule 1, Uniform Rules on Impoundment Procedure. See also S.J.C. Rule 1:15.

The Rules on Impoundment Procedure incorporated many of the rules in prior S.J.C. cases, including the requirement that an order of impoundment be entered only on a showing of “good cause.” *H. S. Gere & Sons, Inc. v. Frey*, 400 Mass. 326, 332 (1987). See Rule 7, Uniform Rules on Impoundment Procedure. “In determining the existence of ‘good cause’ for impoundment, the trial judge is required to balance the privacy interests at issue, against the competing ‘principle of publicity,’” *George W. Prescott Publ. Co.*, 395 Mass. at 278; see Podolski, *Impoundment v. Publicity*, 2 Mass. Fam. L.J. 54 (1984), based on the relevant facts and circumstances of each case, *Nixon*, 435 U.S. at 599. The protection of privacy interests and the avoidance of “annoyance, embarrassment [or] oppression” have been deemed to constitute sufficient good cause to justify impoundment. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 n.1, 36-7 (1984). Venirepersons in a high-profile trial, see *Commonwealth v. Jaynes*, 55 Mass. App. Ct. 301, 314 (2000); grand jury witnesses, see *In the Matter of Grand Juror Subpoena*, 411 Mass. 489, 498 n.10 (1997); jurors in a murder trial involving gang violence, see *Silva*, 448 Mass. at 708; divorce litigants, see *Adams v. Adams*, 459 Mass. 361, 362 n.1 (2011); and juveniles, see *News Group Boston, Inc. v. Commonwealth*, 409 Mass. 627, 634 (1991), for example, have been found to enjoy legitimate expectations of privacy. Against any such expectation of privacy, the court must weigh the public’s interest in learning “whether public servants are carrying out their duties in an efficient and law-abiding manner.” *George W. Prescott Publ. Co.*, 395 Mass. at 279, quoting *Attorney General v. Collector of Lynn*, 377 Mass. 151, 158 (1979). Another factor that the court should consider is whether the subject matter of publicity is of legitimate public concern. *Boston Herald v. Sharpe*, 432 Mass. at 611.

In view of the strong presumption of openness in judicial proceedings, however, “impoundment is always the exception to the rule,” *Republican Co.*, 442 Mass. at 223, and “will not be routinely granted,” *H. S. Gere & Sons*, 400 Mass. at 332. For this reason, an order of impoundment must comply with the

procedures and requirements set out in the Rules on Impoundment Procedure. *Id.* A request for impoundment must be made by written motion accompanied by a supporting affidavit. Rule 2, Uniform Rules on Impoundment Procedure. An order of impoundment may be made only upon written findings by the court; and the order shall state specifically what material is to be impounded and, where appropriate, how impoundment is to be implemented. Rule 8, Uniform Rules on Impoundment Procedure. See *Globe Newspaper Co.*, 457 U.S. at 510. Moreover, the court must tailor narrowly the scope of the impoundment order “so that it does not exceed the need for impoundment.” *Boston Herald v. Sharpe*, 432 Mass. at 605. The impoundment order remains an interlocutory order and carries no continuing presumption of validity. *Republican Co.*, 442 Mass. at 223-24.

## Conclusion

The common-law right of public access to judicial records is bedrock but not absolute. That right must yield to the court’s discretionary power to impound records for “good cause.” The balance of these competing rights underlies the Uniform Rules on Impoundment Procedure. Nevertheless, it must be remembered that public access to judicial records is favored and that impoundment remains the exception to the rule. In the words of the great Justice Louis Brandeis, “sunlight is said to be the best of disinfectants.” ■

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## Endnotes

1. Public records statutes, e.g., G. L. c. 4, § 7; G. L. c. 66, § 10; and G. L. c. 66A, do not apply to court records.
2. However, the restrictions found in the Criminal Offender Record Information (CORI) Act relative to the dissemination of criminal records is inapplicable to records maintained by a clerk’s office. G. L. c. 6, §§ 167-178B.
3. The term “impounded” should not be confused with the term “sealed,” which is applied to a document to which only the court has access, unless the court orders otherwise. *Pixley v. Commonwealth*, 453 Mass. 827, 836 n.11 (2009).

## Legal Analysis

# Compelling Arbitration In Massachusetts — Recent Developments

By John R. Snyder

The past few years have seen significant developments in the law governing enforcement of arbitration agreements in Massachusetts. This article reviews some particularly noteworthy decisions handed down in the past three years (through September 2011) concerning issues such as arbitrability of statutory claims, class actions and of claims brought by government actors, and “illusoriness.” One undercurrent in the Massachusetts cases is an apparent skepticism, if not hostility, toward predispute arbitration agreements, which stands in contrast to the U.S. Supreme Court’s recent pronouncements favoring and enabling arbitration agreements.

### 1. Statutory claims

#### A. Employment discrimination

In *Warfield v. Beth Israel Deaconess Medical Center, Inc.*, 454 Mass. 390 (2009), the Supreme Judicial Court (“SJC”) held that statutory employment discrimination claims are subject to arbitration only if the arbitration agreement states that they are, “in clear and unmistakable terms.” 454 Mass. at 398.

But wait — the Federal Arbitration Act (“FAA”) requires that arbitration agreements shall be enforced “save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2; see also the Massachusetts Arbitration Act, Mass. Gen. Laws ch. 251, § 2 (to the same effect).



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And, to the extent it applies, the FAA preempts contrary substantive state law — statutory and common law. While acknowledging that it has singled out statutory employment discrimination claims for “distinct treatment,” the SJC contends its holding is not preempted by the FAA because “[o]ur State law principles of contract interpretation make clear that considerations of public policy play an important role in the interpretation and enforcement of contracts,” and its decision is “[c]onsistent with the public policy against workplace discrimination reflected in G. L. c. 151B.” 454 Mass. at 397-98, 400 n.16. The Court further contends that “our rule of contract interpretation neither bars agreements to arbitrate employment discrimination disputes nor applies only to arbitration clauses,” but rather “states only that as a matter of the Commonwealth’s general law of contract, a private agreement that purports to waive or limit — whether in an arbitration clause or in some other contract provision — the employee’s otherwise available right to seek redress for employment discrimination through the remedial paths set out in c. 151B, must reflect that intent in unambiguous terms.” *Id.* at 400 and n.14.

The SJC found the “clear and unmistakable terms” standard was not satisfied by the arbitration provision before it because “there is nothing in the arbitration clause or elsewhere in the agreement stating that any claims of employment discrimination by Warfield are subject to arbitration.” *Id.* at 402. The Court then took up what should happen to the plaintiff’s common law claims while her statutory discrimination claims were being adjudicated in court. The Court decided that, because “Warfield’s common-law claims are so integrally connected to her c. 151B claims. . . . [and] the evidence that Warfield would introduce in support of her statutory claims is virtually identical to the evidence she would introduce to support her common-law claims,” “[a]ll of Warfield’s claims should therefore be resolved in one judicial proceeding.” *Id.* at 403-04. Thus, in effect, the SJC invalidated the parties’ arbitration agreement as to all — statutory and common law — causes of action. That result flies in the face of *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985), a venerable U.S. Supreme Court decision that instructs that, when a complaint contains both arbitrable and nonarbitrable claims, the FAA requires a court to “compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums.” This directive was recently reaffirmed by the Supreme Court in *KPMG LLP v. Cocchi*, 2011 WL 5299457 (Nov. 7, 2011) (per curiam).

## B. Wage Act

Justice Cowin in her *Warfield* dissent “wonder[ed] what type of claims will be singled out next for such treatment.” 454 Mass. at 406. Apparently not Massachusetts Wage Act claims, at least in the view of the Appeals Court. In *Dixon v. Perry & Slesnick, P.C.*, 75 Mass. App. Ct. 271 (2009), the Appeals Court held that Wage Act claims are covered by an arbitration provision encompassing “all disagreements and controversies arising with respect to this [employment] Agreement.” The Appeals Court distinguished *Warfield* on the basis that “Dixon’s claims arise directly from a term of the [employment] agreement, namely, Dixon’s rate of compensation.” *Id.* at 277. The Court also noted the SJC’s caution in *Warfield* that “[o]ur conclusion in this case should not be understood to suggest that parties entering into an employment (or any other) contract must specifically list every possible statutory claim that might arise or else the claim will not be covered by an otherwise ‘broad’ arbitration clause.” *Warfield*, 454 Mass. at 401 n.16.<sup>1</sup>

## 2. Class actions

In *Feeney v. Dell, Inc.*, 454 Mass. 192, 205-08 (2009), the SJC also invoked public policy, holding that an arbitration provision that had the effect of prohibiting participation in class actions is void as contrary to Massachusetts’s “strong public policy in favor of class actions for small value claims under” Mass. Gen. Laws ch. 93A. For the same reason, the Court held a Texas choice of law clause was not enforceable because under Texas law such class action prohibitions are allowed.

But again — isn’t the SJC treading on arbitration rights guaranteed by the FAA? The SJC does not think so, again invoking the notion that, under Massachusetts principles of contract law, public policy plays an important role in the interpretation and enforcement of contracts, and noting that its decision is based on “our fundamental public policy in favor of preserving the ability of consumers and businesses to vindicate their rights under c. 93A.” *Id.* at 209-10.<sup>2</sup>

*Feeney*’s continued validity is in considerable doubt as a result of the U.S. Supreme Court’s recent decision in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011). *Concepcion* holds that the FAA preempts California case law deeming arbitration clauses containing class action waivers to be unconscionable

and therefore unenforceable. See D. Frederico and C. Ruprecht, “AT&T Mobility LLC v. Concepcion: Is Feeney Finis?”, *Boston Bar Journal*, Fall 2011, at 13-15 ([http://www.bostonbar.org/pub/bbj/bbj\\_online/bbj1112/fall2011/CaseFocus1.pdf](http://www.bostonbar.org/pub/bbj/bbj_online/bbj1112/fall2011/CaseFocus1.pdf)).

However, on remand in the *Feeney* case Superior Court Justice Wilkins did not see it that way. He declined to confirm an arbitration award issued pursuant to the arbitration provision prohibiting class arbitration that the SJC struck down. *Feeney v. Dell, Inc.*, 2011 WL 5127806 (Sept. 30, 2011). Judge Wilkins concluded that the SJC’s *Feeney* decision is not preempted by *Concepcion*, distinguishing Dell’s arbitration provision from AT&T’s, and opining that the former rendered arbitration of small individual claims “infeasible as a matter of fact.” *Id.* at \*8-9. Compare the post-*Concepcion* decisions in *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1212-13 (11th Cir. 2011) (Florida law invalidating class waivers “stands as an obstacle to the FAA’s objective of enforcing arbitration agreements according to their terms, and is preempted”), and *Litman v. Cellco Partnership*, 655 F.3d 225, 230-31 (3d Cir. Aug. 24, 2011) (“a state law that seeks to impose class arbitration despite a contractual agreement for individualized arbitration is inconsistent with, and therefore preempted by, the FAA, irrespective of whether class arbitration ‘is desirable for unrelated reasons’”(quoting *Concepcion*)).

In *Smith & Wollensky Restaurant Group, Inc. v. Passow*, 2011 WL 148302 (D. Mass. Jan. 18, 2011), USDC Judge Harrington upheld an arbitrator’s partial award finding that an arbitration provision permitted class claims. The provision covered “any claim that, in the absence of this Agreement, would be resolved in a court of law under applicable state and federal law,” and provided that the “[a]rbitrator may award any remedy and relief as a court could award on the same claim.” The Court found significant the arbitrator’s observation that “wage and hour claims like those in play here are frequently pursued as class or collective actions, and both the Claimants and S & W must be deemed to understand that.” *Id.* at \*1. See *Dixon v. Perry & Slesnick*, 75 Mass. App. Ct. at 276 n.7 (“it appears that class actions, which are permitted under the Wage Act, can be maintained in the arbitration forum”). See also *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010), in which the Supreme Court held that, if an arbitration agreement is silent as to class-wide arbitration, it is not permitted, absent local law authorizing

it or custom or usage in the industry dictating that class-wide arbitration was contemplated at the time of contracting.

### 3. Government agency seeking relief on behalf of individuals

In *Joulé Inc. v. Simmons*, 459 Mass. 88 (2011), former employee Simmons had filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”). The employer’s application to compel arbitration was denied. The SJC held that “nothing in [Simmon’s employment agreement’s arbitration provision] precludes the MCAD from proceeding with its investigation and resolution of Simmons’s discrimination complaint — including, if the evidence warrants, granting relief specific to Simmons.” *Id.* at 95, citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291-92, 296 (2002).

However, the SJC held, the Superior Court erred in denying the employer’s motion to compel arbitration and in staying further proceedings in the Superior Court pending the outcome of the MCAD proceeding: “there is no legal bar to having an arbitration and the MCAD proceeding continue concurrently, on parallel tracks.” 459 Mass. at 99. The SJC apparently did not find the concern for adjudication efficiency it voiced in *Warfield* to be as compelling in this context. The Court did observe that “it ‘goes without saying that the courts can and should preclude double recovery by an individual.’” *Id.* at 99 n.13, quoting *Waffle House*, 534 U.S. at 297.

Similarly, in *Commonwealth v. H&R Block, Inc.* (Mass. Super. Nov. 25, 2008 (unpublished; available on Loislaw)), then Superior Court Judge Gants held that the Massachusetts Attorney General was not bound by arbitration agreements in mortgage loan agreements, and therefore could proceed with her Chapter 93A and Chapter 151B action seeking relief for a class of borrowers with respect to alleged unfair and deceptive conduct and discrimination by subprime lenders.

### 4. “Illusoriness”

Unconscionability is sometimes asserted in opposition to applications to compel arbitration as a “ground[] as exist[s] at law or in equity for the revocation of any contract.” FAA § 2. The unconscionability standard under Massachusetts law has been stated by the SJC as follows: “the sum total of [the contract’s]

provisions drives too hard a bargain for a court of conscience to assist.” *Miller v. Cotter*, 448 Mass. 671, 679 (2007), quoting *Waters v. Min Ltd.*, 412 Mass. 64, 66 (1992).

The First Circuit has provided a new twist on unconscionability. *Awuah v. Coverall North America, Inc.*, 554 F.3d 7 (1st Cir. 2009), was an interlocutory appeal of Judge Young’s order referring to a magistrate judge the franchisee plaintiffs’ claim that an arbitration provision was unconscionable. The First Circuit disagreed with the District Court, holding that the language of the arbitration provision, in particular its incorporation of the rules of the American Arbitration Association, required that the unconscionability claim be decided by the arbitrator. (See the U.S. Supreme Court’s subsequent decision in *Rent-A-Center West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010), holding that the arbitrator must decide the threshold issue of arbitrability where the parties’ arbitration agreement explicitly delegates that role to the arbitrator.)

However, the First Circuit identified “illusoriness” as a distinct threshold issue, to be decided, not by the arbitrator, but by the District Court. The Court explained, “Our concern here is not with unconscionability — essentially a fairness issue ... — but more narrowly with whether the arbitration regime here is structured so as to *prevent* a litigant from having access to the arbitrator to resolve claims, including unconscionability defenses.” 554 F.3d at 13 (emphasis in original), citing *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 90-91 (2000) (in which this issue was identified but not decided). The First Circuit’s “illusoriness” concern arose from the franchisees’ assertion “that the amounts likely to be recovered by each of the individual franchisees may be modest, and that the costs of arbitration itself — independent of counsel fees, which can be contingent — would be overwhelming.” 554 F.3d at 12.

It could be argued that the distinction drawn by the First Circuit between unconscionability and “illusoriness” is contrived — both issues go to the “validity of the arbitration agreement,” which issue was explicitly reserved for the arbitrator by the arbitration provision language. Neither of the Court of Appeals decisions on which the *Awuah* decision relies support its conclusion that the “illusoriness” issue should be decided by the court. In any event, the “illusoriness” inquiry was not resolved on remand — Judge Young decided the claims as arbitrator with the parties’ consent. See June 15, 2011 Memorandum and Order, 2011 WL 2356893.

## 5. “Cumulative remedies” provisions

The First Circuit held that a so-called “cumulative remedies” provision does not undercut an arbitration agreement. In *PowerShare, Inc. v. Syntel, Inc.*, 597 F.3d 10, 15-18 (1st Cir. 2010), Magistrate Judge Dein had found the following sentence in an arbitration provision rendered arbitration optional: “Nothing in this clause shall prejudice Syntel or PowerShare’s right to seek injunctive relief or any other equitable/legal relief or remedies available under the law.” Judge Gertner upheld that ruling. The First Circuit reversed, holding that “the Agreement as a whole admits of only one reasonable interpretation: the parties are obliged to submit their disputes to arbitration,” and interpreting the clause as empowering the arbitrator to issue any relief a court could issue. See also *Laughton v. CGI Technologies and Solutions, Inc.*, 602 F. Supp. 2d 262 (D. Mass. 2009), coming to the same conclusion with respect to similar contract language.

## Conclusion

Perhaps the most striking aspect of recent Massachusetts jurisprudence on arbitration agreements is the stark disconnect with the U.S. Supreme Court’s recent facilitation and protection of arbitration. This contrast is manifested in *Warfield’s* “clear and unmistakable terms” requirement, in *Feeney’s* prohibition of class action waivers, and in *Awuah’s* “illusoriness” construct. This dissonance may not be resolved unless and until the Supreme Court is presented with opportunities to have the “last word” on the handiwork of Massachusetts courts on these issues. ■

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## Endnotes

1. In *Joulé Inc. v. Simmons*, 459 Mass. 88, 100 n.15 (2011), the SJC provided some guidance as to what would constitute the requisite “clear and unmistakable terms,” holding that the following arbitration provision language “makes it ‘clear and unmistakable’ ... that the arbitration provision applies to employment discrimination claims”: “disputes ... relating to my employment and/or termination of my employment (which includes without limitation, claims of discrimination, harassment, hostile work environment, retaliation, or other wrongful termination claims) ...”

2. Justice Cowin did not participate in this decision, which singled out another type of claim for distinct treatment based on public policy.

## Legal Analysis

# The Massachusetts Supreme Judicial Court's Foreclosure Jurisprudence: A Review of 2011 and a Preview of 2012 and Beyond

By Joshua Ruby and April Kuehnhoff

In the years leading up to the current economic crisis, a boom in real estate prices, fueled in part by relaxed mortgage underwriting and predatory lending practices, left the real estate market vulnerable. Since then, falling home prices and unemployment have made it difficult for many homeowners to sell or refinance their homes. This confluence of factors led to a surge in foreclosures, which now take place at rates unseen since the Great Depression.

Simultaneously, changes in the mortgage industry have introduced new uncertainties into well-settled areas of law. Lenders used to retain most mortgage loans they originated, but today most securitize and sell them. In this process, loans are grouped or “pooled,” and investors buy securities backed by specific slices or “tranches” of each pool, entitling them to a portion of the revenue generated from the homeowners’ payments.<sup>1</sup> These practices mean that courts now hear foreclosure-related proceedings involving mortgages (the security interest in the home allowing home to be sold if loan is not repaid) divorced from promissory notes (the promise to pay the loan) and review operative legal documents without complete records of their long transaction histories.



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The views expressed are the authors’ and do not necessarily represent the views of their employers.



## The SJC's 2011 Foreclosure Decisions

Against the background of frequent foreclosures and complex legal challenges to them, the Massachusetts Supreme Judicial Court (SJC) issued four key foreclosure rulings in 2011. Two — *U.S. Bank, N.A. v. Ibanez*, 458 Mass. 637 (2011) and *Bevilacqua v. Rodriguez*, 460 Mass. 762 (2011) — involved the effect of defective foreclosure sales. Two — *Bank of N.Y. v. Bailey*, 460 Mass. 327 (2011) and *Fed. Nat'l Mortgage Ass'n v. Nunez*, 460 Mass. 511 (2011) — involved the availability of remedies for parties facing post-foreclosure eviction.

*Ibanez* critically examined the conduct of foreclosing entities that had noticed and conducted foreclosure sales before recording, or even receiving, an assignment of the mortgage containing the power of sale that authorized them to do so. 458 Mass. at 651. In *Ibanez*, the SJC affirmed the Land Court's decision to invalidate the two foreclosures at issue. The SJC held that only a *present* holder of a mortgage may exercise the statutory power of sale in a foreclosure auction. *Id.* at 648. Noticing and conducting a foreclosure sale without holding the mortgage violates the statutory power of sale; the resulting foreclosure sale is void. *Id.*

The SJC further concluded that a foreclosing entity cannot comply with the power of sale in G. L. c. 244, § 14 if it only possesses the relevant promissory note without the associated mortgage. *Id.* at 652-653. Possession of the promissory note entails an equitable right to an assignment of the associated mortgage, not the right to exercise the power of sale. *Id.* The SJC did not discuss the converse, i.e., whether a mortgage-holder that does not also hold the promissory note may exercise the power of sale.

*Ibanez* meant that the foreclosures of an unknown number of properties in Massachusetts were now void. The titles to these improperly foreclosed property are said to have "*Ibanez* defects." Some of these properties had been resold to third-party purchasers, and *Ibanez* did not address what would happen to them. In *Bevilacqua*, the SJC held that one potential remedy for affected subsequent purchasers, the "try title" <sup>2</sup> action defined by G.L. c. 240, §§ 1-5, is unavailable. 460 Mass. at 780.

In *Bevilacqua*, the property was originally owned by Rodriguez. U.S. Bank foreclosed upon Rodriguez' property and recorded a foreclosure deed before receiving or recording an assignment of the mortgage,

creating an *Ibanez* defect. Bevilacqua subsequently acquired the property from U.S. Bank. In April 2010, after the initial Land Court decision in *Ibanez*, Bevilacqua filed a try title action, alleging the *Ibanez* defect and naming Rodriguez as the potential claimant. Rodriguez defaulted, but a Land Court judge sua sponte dismissed the action.

The SJC affirmed. First, the SJC concluded that, because the foreclosure was “void” under *Ibanez*, Bevilacqua could not claim, based on such a defect, that a potential adverse claim to the property existed without fatally undermining his own status as a lawful holder. 460 Mass. at 772. The *Ibanez* defect meant that Bevilacqua could not be a lawful holder of the property as required by the try title statute — making the action unavailable. *Id.*

Second, the SJC assumed without deciding that an *Ibanez*-defective foreclosure and any subsequent transfer operates as an assignment of the associated mortgage and concluded that Bevilacqua had alleged a valid claim to the mortgage. *Id.* at 773-774. Such a valid claim would necessarily mean that the mortgage was still effective and Rodriguez still held equitable title and a right of redemption. *Id.* at 775-776. Bevilacqua’s resulting legal title would not be adverse to Rodriguez’s equitable title under the title theory of mortgages that applies in Massachusetts.<sup>3</sup> *Id.* Because the try title statute requires an “adverse claim,” the SJC concluded that Bevilacqua’s claim must fail. *Id.*

Finally, the SJC concluded that Bevilacqua had sufficient notice of potential title defects to preclude bona fide purchaser status. *Id.* at 778-779. The irregularity of the recorded documents, according to the SJC, prevented Bevilacqua from taking the property without notice of the *Ibanez* defect. *Id.*

Accordingly, Bevilacqua’s try title action against Rodriguez failed. However, the SJC expressly left open the possibility of Bevilacqua conducting another foreclosure sale, in compliance with the power of sale in G. L. c. 244, § 14, in order to remedy the *Ibanez* defect. *Id.* at 776 n.10. Amicus briefs listed other possible remedies for third-party buyers, such as: suing the foreclosing entity for rescission and damages; obtaining a release from the originally foreclosed-upon homeowner; foreclosing by entry in accordance with G.L. c. 244, §§ 1-2; or seeking relief from the title insurer. The SJC did not address these other potential remedies.

The remaining SJC foreclosure cases address defenses to post-foreclosure evictions. In *Bailey*, the SJC held that the Housing Court has jurisdiction to decide the validity of a foreclosure sale. Bank of New York (BNY) foreclosed upon Bailey's property. 460 Mass. at 330. When Bailey did not vacate the property upon request, BNY filed a summary process eviction action against him in Housing Court. *Id.* Bailey defended by challenging the validity of the foreclosure sale. *Id.* at 331. The Housing Court judge allowed summary judgment for BNY, holding that she had no jurisdiction to consider Bailey's defense. *Id.* at 328.

The SJC reversed. Noting the Housing Court's concurrent jurisdiction with the Superior, District, and Boston Municipal Courts over summary process actions, the long-standing rule that a summary process defendant may challenge his opponent's right to possession, and the interests of judicial economy, the SJC concluded that the Housing Court may properly decide the validity of a foreclosing entity's legal title in a summary process action. *Id.* at 333-334. *Bailey* requires that, where the issue is disputed, the plaintiff in a post-foreclosure summary process action "make a prima facie showing that it obtained a deed to the property at issue and that the deed and affidavit of sale, showing compliance with statutory foreclosure requirements, were recorded." *Id.* at 334. The SJC did not address how a defendant may challenge such a showing or whether a successful challenge to the validity of a foreclosing entity's legal title in summary process would allow former owners to attack the underlying foreclosure.

*Nunez* concerned protections, enacted in August 2010, for tenants in residential properties foreclosed upon by certain institutional lenders. G. L. c. 186A, inserted by St. 2010, c. 258. To evict tenants of such properties, the statute requires "just cause" and defines only six scenarios where an institutional lender would have "just cause" for eviction. G.L. c. 186A, § 1(a). Prior to the statute's enactment, the Federal National Mortgage Association (FNMA) gave Nunez required notice and filed a summary process action seeking his eviction. After the statute's enactment date, Nunez moved to dismiss, arguing that, without just cause to evict, FNMA could not maintain the summary process action. A judge of the Housing Court agreed and dismissed the case. 460 Mass. at 512-513.

In *Nunez*, the SJC affirmed. It held that the statute, while not retroactive in nature, protects tenants from any attempt to evict them, including pursuing an already-filed summary process action or enforcing a summary process judgment. *Id.* at 518-520. The SJC did not decide whether each separate “action” in the eviction process should be considered a separate violation of G. L. c. 186A, § 6, which requires a minimum fine of \$5,000.

What do these decisions mean for foreclosure practice? A foreclosing entity must obtain and execute all operative legal documents demonstrating its right to foreclose *prior* to the publication of notice of sale. If a defective foreclosure has already taken place, a putative owner may not use the try title statute to remedy the defect; a re-foreclosure may be available. Issues about the foreclosure process that were not litigated at the time of the foreclosure<sup>4</sup> may be raised as defenses in post-foreclosure eviction actions. These actions are typically tried in Housing and District Courts, venues where pro se litigants may more easily and inexpensively raise challenges to the foreclosure process than they could in Superior Court. Finally, institutional lenders-turned-owners seeking to evict tenants post-foreclosure must be sure to have “just cause” to do so or risk fines of \$5,000 or more per action in furtherance of the eviction.

### **Major Foreclosure Issues Still Outstanding in Massachusetts**

Many foreclosure-related issues remain unresolved in Massachusetts. Although the 2011 decisions are significant, issues the SJC is likely to decide in the coming months will affect the validity of many more foreclosed properties and subsequent transfers.

One such unanswered question, whether Massachusetts law requires a foreclosing entity to hold both the note and the mortgage in order to foreclose, is at the heart of *Eaton v. Fed. Nat'l Mortgage Ass'n*, SJC-11041, which was argued before the SJC in October 2011. As in *Bailey*, *Eaton* arose from a former owner's post-foreclosure eviction. *Eaton* defended by arguing that the foreclosing entity, Green Tree Servicing, LLC (Green Tree), did not have authority to enforce the note through foreclosure proceedings because it did not hold the note. The Housing Court stayed the eviction while *Eaton* sought relief in

Superior Court. The present SJC case stems from Green Tree's interlocutory appeal of Superior Court Judge McIntyre's order granting Eaton a preliminary injunction barring her eviction.

In the preliminary injunction decision, Judge McIntyre concluded: (1) Massachusetts common law requires that the foreclosing entity hold both the note and the mortgage in order to foreclose; (2) G. L. c. 244, § 14 does not displace this common law requirement; and (3) sound public policy supports this rule. *Eaton v. Fed. Nat'l Mortgage Ass'n*, No. 11-1382 (Mass. Super. June 17, 2011). In contrast, recent Massachusetts federal court decisions have held the opposite. See, e.g., *In re Huggins*, 357 B.R. 180, 183 (Bankr. D. Mass. 2006). Because the process of securitization routinely separates ownership of the note and mortgage, the SJC's decision in *Eaton* will have broad implications in the Massachusetts housing market, potentially invalidating thousands or even tens of thousands of completed foreclosures around the state.

The separation of mortgage and note is also at the heart of questions about Mortgage Electronic Registration Systems, Inc. (MERS). MERS is frequently named as mortgagee (or nominee for the lender, or both simultaneously) in a mortgage; even when it is not, many lenders assign mortgages to MERS as part of the securitization process. MERS then retains the mortgage security interest while the note, which entitles the holder to the stream of mortgage payments, is sold. MERS claims that this system allows its users to transfer and track ownership while avoiding the need to record assignments.

To date, no Massachusetts appellate court has addressed the role of MERS in the foreclosure process. However, *Eaton* and two Appeals Court cases, *Lyons v. Mortgage Elec. Reg. Sys., Inc.*, 11-P-560, and *Galiastro v. Mortgage Elec. Reg. Sys., Inc.*, 11-P-312, currently raise questions about MERS' standing to foreclose under G. L. c. 244, § 14 because of its status as nominee for the lender. In *Lyons*, the Land Court held that MERS had such standing. *Lyons v. Mortgage Elec. Reg. Sys., Inc.*, No. 09 MISC 416377, 2011 WL 61186 (Mass. Land Ct. Jan. 4, 2011). Neither the lower court decision in *Eaton* nor the one in *Galiastro* addressed MERS.

Other new questions might arise if the Massachusetts Legislature passes new foreclosure-related legislation. The Legislature previously passed St. 2010, c. 258, discussed *supra* in relation to *Nunez*.

A variety of foreclosure-related bills have been sponsored in the 2011-2012 session. Some would reform the process of foreclosing in Massachusetts by mandating pre-foreclosure mediation (see, e.g., S.673), converting Massachusetts to a judicial foreclosure state (see, e.g., S.676), or mandating certain loan modifications (see, e.g., S.868). Echoing issues raised in *Eaton*, some bills focus on the role of the note holder in the foreclosure process to ensure that the note holder authorizes the foreclosure (see, e.g., S.771) or to require that the foreclosing entity hold both the note and the mortgage (see, e.g., S.684). Other proposals provide relief to buyers who purchased properties with *Ibanez* or other title defects (see, e.g., S.830) or to certain bona fide purchasers at foreclosure sales (see, e.g., S.684). Bills have also been proposed that would protect former owners from certain post-foreclosure evictions (see, e.g., S.767). Any new legislation would, of course, change Massachusetts foreclosure law and likely raise new questions for the courts to decide.

## Conclusion

In 2011, the SJC resolved many pressing questions posed by the occurrence of so many complex, potentially-defective foreclosures. But as foreclosures continue in staggering numbers across the Commonwealth, contemporary mortgage industry practices mean that many will raise novel legal issues. The Legislature is also active in this area, and many current bills, if enacted, would raise new questions for the courts to answer. The SJC's 2011 foreclosure decisions will likely be only the beginning of a series of dramatic changes in Massachusetts foreclosure law. ■

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## Endnotes

- 1 For more detail on securitization, see, e.g., Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 Yale J. on Reg. 1 (2011).
- 2 The "try title" action permits a property holder who believes his title may be in question to name the potential adverse claimant in a lawsuit and compel him to try his claim to the property. If the potential adverse claimant defaults, he loses his claim. If the claimant appears, the parties try the disputed title.
- 3 Under Massachusetts title theory, a mortgage grants legal title to the mortgagee while the mortgagor retains equitable title. When the debt is repaid, legal title is transferred to the mortgagor. See, e.g., *Ibanez*, 458 Mass. at 649.
- 4 Because Massachusetts is a non-judicial foreclosure state, the burden is on homeowners facing foreclosure to bring any legal challenges in Superior Court.

## Practice Tips

# Impoundment Procedures in the Massachusetts Appellate Courts: An Introduction

by Joseph Stanton

**I**mpoundment is governed by a labyrinth of statutes, court rules, standing orders, and court orders, which make it difficult for the practitioner and the courts to identify, properly file, and withhold from public inspection the information that must be withheld. To confuse matters further, these authorities use different terms and phrases to designate the material that must be withheld, including “impounded,” “withheld from public inspection,” “not available for public inspection,” “confidential,” and “sealed.” Parties and the courts must be vigilant if they wish to preserve the confidentiality of impounded material while a case is on appeal. Briefs and appendices filed in the appellate courts are stored in electronic form and material in public cases is available on the internet and through commercial databases. Thus, it is critical that parties adhere to their responsibilities to ensure the nondisclosure of protected information.

### Overview:

Although the terms “sealed” and “impounded” are closely related, and frequently used interchangeably, they are meaningfully different. The Uniform Rules on Impoundment Procedure, Mass. Trial Court Rules VIII, define “impoundment” to “mean the act of keeping some or all of the papers,



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documents, or exhibits, or portions thereof, in a case separate and unavailable for public inspection. It shall also be deemed to include the act of keeping dockets, indices, and other records unavailable for public inspection.” Put more simply, “impoundment” prevents the public, but not the parties, from gaining access to the material. By contrast, “sealing” prevents not only the public, but the parties and their counsel from gaining access to the material; only appropriate court personnel can access sealed information, unless limited disclosure is otherwise ordered. Regardless of the terminology used, parties must be aware of and comply with the applicable rules regarding the proper filing of the information in any appeal.

Appellate level impoundment procedures are governed by Rule 1:15 of the Rules of the Supreme Judicial Court (“S.J.C. Rule 1:15”) and the Massachusetts Rules of Appellate Procedure. The rules apply regardless of whether the appeal is made to a single justice or to the full court or panel. All information impounded in the trial court will remain impounded in the appellate courts, unless otherwise ordered, *provided* the parties follow the required procedures. It is important to stress that the clerks of the appellate courts are under no duty to review the contents of filings for the purpose of identifying impounded information. Therefore, parties must comply with Rules 16(d), 16(m), 18(a), and 18(g) of the Massachusetts Rules of Appellate Procedure if they wish to keep the information confidential. These rules require that:

- the parties refrain from disclosing impounded material, unless necessary.
- the disclosing party, when disclosure is necessary, file and serve a written notice of the disclosure or filing of such information.
- the cover of briefs, record appendices, and other filings containing impounded material clearly indicate its inclusion (e.g., “Impounded” or “Contains references to impounded material”).

- in cases where only certain portions of the record need to be impounded, parties file a separate record appendix volume containing only that material, its cover labeled as containing impounded material.
- the parties use a pseudonym or initials if a party's name is confidential or impounded; in practice, a pseudonym or initials can be used, including for family members and relatives whose familial relationship would otherwise reveal the protected name.
- a copy of any order of impoundment be included in the record appendix.
- the parties not disclose impounded material at oral argument unless necessary and, in such instances, notify the clerk in advance and, in appropriate cases, make such disclosures in a manner which protects the confidential information.

### **Some Practical Tips:**

As noted at the start of this article, there are many statutes, rules, and standing orders that govern whether particular types of material or information need to be impounded. It is beyond the scope of this article to set out all of those various authorities, and parties must conduct their own research to determine what materials in any particular case might need to be impounded. That said, the Appeal Court's website, <http://www.mass.gov/courts/appealscourt/>, is a useful initial resource to consult. It contains a list of information subject to impoundment, with reference to the applicable statutes, court rules, and standing orders. The list is not an exhaustive compilation, and the precise scope of each topic is stated in the applicable source.

Unlike trial court practice, it is rarely necessary to file a motion to impound in the appellate courts, except for original entries or actions filed in the Supreme Judicial Court. As noted above, if the information sought to be impounded was earlier impounded in the trial court, it will remain impounded in

the appellate court if counsel follows the proper procedures. Thus, no motion is necessary in the appellate court. However, when a party seeks to impound material on appeal that was not impounded below, then a “motion to impound” must be filed, accompanied by an affidavit showing good cause for the impoundment. Note that it makes little sense to seek to impound material in the appellate court record that is public in the trial court’s record. In those circumstances, a motion to impound should first be made in the trial court.

A trial court order impounding or refusing to impound material is subject to review by a single justice of the Appeals Court. To seek review, the appealing party must file an entry fee, a petition for review, memorandum of law, certificate of service, and copies of the relevant documents filed in the trial court. Where the trial court has denied a motion to impound material, the appealing party may file a motion to file the subject information under seal, or file a motion requesting to file the information when so ordered by the single justice. If the single justice later denies the petition, the material will be public unless otherwise ordered.

In certain instances, the protection of material as privileged or confidential can be waived and the material may be properly introduced as evidence in a trial court proceeding. See Mass. G. Evid. § 523. On appeal, such information is no longer protected and categorized as impounded.

When a party files impounded material without complying with the applicable rules and filing procedures, any counsel to the case may file a motion to strike the document.

### **Protecting Personal Identifying Data:**

In addition to the rules governing impoundment, lawyers must be aware of the Supreme Judicial Court’s Interim Guidelines for the Protection of Personal Identifying Data. The guidelines require all attorneys and persons who file any document in a court of the Commonwealth to refrain from using personal identifying data elements in documents they file with the court. Personal identifying data

elements include: social security numbers; taxpayer identification numbers; credit card or other financial account numbers; driver's license numbers, state-issued identification card or passport numbers; and a mother's maiden name. These items should be limited in their use, and when they are included, the numbers should be limited to the last four digits and only the first initial of the maiden name should be used. The interim guidelines contain exemptions, including for instance, when the information in the document is specifically required by law, court rule, standing order, court form, or court order; the filer reasonably believes that the complete information is needed to resolve an issue before the court or to establish the identity of a person before the court; or the document is the official record of an agency adjudicatory proceeding or another court proceeding. However, the filer should exercise particular caution before including, based on a belief of necessity, any complete data element in an appellate court filing. If a filer includes any complete data element in a "public" filing in an appellate court, the filer should simultaneously file one additional, unbound copy of the filing, with such data element redacted or complete data omitted according to the guidelines, clearly marked "Limited Personal Identifying Data" on the cover and without including any addendum or appendix.

### **A Closing Thought:**

Maintaining the confidentiality of information designated as such by the Legislature and courts is of utmost importance to the citizens of the Commonwealth, particularly as filings in all courts become available on the internet and via commercial databases. Parties are obligated to identify and adhere to the applicable rules and procedures when filing such information in the appellate courts. It is hoped that this introduction will provide a helpful roadmap for parties when preparing their filings. ■

## Heads Up

### The Massachusetts Uniform Trust Code

By Raymond H. Young and Leiha Macauley

**A**s the Boston Bar Journal went to press, the Massachusetts Uniform Trust Code (“MUTC”) was pending in the legislature. The MUTC will be a comprehensive codification of trust law that consolidates and clarifies existing trust law, simplifies the administrative process for routine trust matters, and modernizes the laws governing Massachusetts trusts.

The MUTC will likely be effective at the time it is signed into law. The MUTC will apply to pre-existing trust instruments and to any proceedings in court pending on, or commenced after, its effective date, regardless of the date of the death of the decedent, unless the court finds the former procedure or law should apply in a particular matter.

#### Significant Changes for Trustees, Beneficiaries and Practitioners

- The MUTC provides default rules, most of which may be modified by the settlor in the instrument.
- The MUTC repeals most of the Massachusetts Uniform Probate Code (“MUPC”) provisions applying to trusts, primarily found in Article VII of the MUPC.
- The MUTC does not replace the Massachusetts common law of trusts except where the common law is specifically modified by the MUTC.



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## **The Court's Role**

Unless ordered by the court, many testamentary trusts will no longer be subject to ongoing court supervision.

A non-judicial dispute settlement among interested parties is permissible, such as interpretation of trust terms, approval of accountings, trustee resignation or appointment and change of the trust's situs, so long as a court could have approved such settlement.

## **A Trust's Creation**

The requirement of an identifiable definite beneficiary may now be met if the beneficiary can be ascertained presently or in the future within any applicable rule against perpetuities, and a power in a trustee to select a beneficiary from an indefinite class is likewise valid.

The existing Massachusetts Pet Trust statute is repealed and replaced with very similar pet trust provisions.

Purpose trusts (non-charitable trusts without an identifiable beneficiary) are now authorized.

## **Virtual Representation**

Provided there is no conflict of interest, virtual representation is available for notice and consent in non-judicial settlements and judicial proceedings, likely reducing the need for guardians ad litem.

A guardian may represent and bind a protected person or ward, and a parent may represent and bind the parent's minor or unborn child if a conservator or guardian for the child has not been appointed, to the extent there is no conflict of interest.

To facilitate virtual representation, the court may appoint a guardian ad litem to bind the interests of unrepresented persons, and the guardian ad litem may consider benefits accruing to the living members of the individual's family instead of advocating solely for the person represented.

## **Trust Modification**

A court may now modify dispositive provisions of a non-charitable trust in the case of unanticipated circumstances or impracticality.

A trustee may terminate a trust with a value of less than \$200,000 if administrative costs do not warrant continuation of the trust. A court may terminate a trust of any value, or order a change in trustee, if it determines the administrative costs support such an order.

Reformation of testamentary trusts and inter vivos trusts is permitted to correct mistakes of fact or law, even if the trust is unambiguous, subject to a heightened proof standard of clear and convincing evidence.

At long last, trust division or combination is permissible without court action, whether for tax reasons or administrative convenience.

Consistent with current Massachusetts practice, a non-charitable irrevocable trust may be terminated or modified with consent of all the beneficiaries and with court approval, so long as the modification or termination is not inconsistent with a material purpose of the trust.

Broadening current Massachusetts law, a trust now may be modified or terminated even if the modification or termination is inconsistent with a material purpose of the trust if the beneficiaries, the settlor and the court consent. If all beneficiaries do not consent, the court may still approve the proposed modification or termination if the court is satisfied that the interests of non-consenting beneficiaries are protected.

The MUTC does not include the Uniform Code provision allowing trust termination upon beneficiary agreement, nor may an agent assent to modification or termination on behalf of an incompetent settlor.

## **Creditor Rights and Spendthrift Provisions**

The court may now consider equitable principles and limit the creditor/assignee relief as is appropriate under the circumstances, e.g., the needs of the beneficiary.

Effective only for instruments executed after the MUTC effective date, a spendthrift provision is valid only if it prohibits both voluntary and involuntary transfers.

To the extent the probate estate is insufficient, and subject to the settlor's right to direct the source from which liabilities will be paid, creditor recovery is permitted from the assets of a trust revocable at the date of death for claims of the settlor's creditors, funeral expenses and statutory allowances.

A creditor may reach an overdue mandatory distribution, including a termination distribution, if the trustee has not made the distribution within a reasonable time after the designated distribution date.

### **Changes for Trustees**

Within 30 days of accepting a trustee appointment, or when the trust becomes irrevocable, the trustee must notify all qualified beneficiaries (actual or permissible income or principal distributees, and those who would be actual or permissible income or principal distributees if the trust terminated on that date) of the trustee's name and address.

A trustee is required to provide annual accountings to all qualified beneficiaries who have not waived their right to receive statements, as well as any other beneficiary who makes a request.

Unless the trustee knows of a pending judicial proceeding contesting the validity of the trust or has been notified of a possible judicial contest which is in fact commenced within 60 days after the notification, a beneficiary of what turns out to be an invalid trust is obliged to return any distribution received.

Reversing the current presumption, trustees of non-charitable trusts created after the MUTC effective date may now act by majority.

Broadening the beneficiaries' power of removal, if the qualified beneficiaries unanimously agree to removal or there has been a substantial change of circumstances, the court is authorized to remove the



trustee if satisfied that (1) removal serves the best interests of all the beneficiaries, (2) removal is not inconsistent with a material purpose of the trust, and (3) a suitable co-trustee or successor trustee is available.

New tax savings provisions, including a default ascertainable standard for trustee distributions to the trustee personally, and a prohibition on trustee discretionary distributions to satisfy a trustee obligation of support.

### **Beneficiary Claims**

A beneficiary has six months after receiving a final account or statement showing the trust termination or termination of the trustee's appointment to commence a breach of trust claim. Such receipt by a minor beneficiary's parent will likewise bar a claim commencing more than six months after receipt.

A person has only one year from the settlor's death to contest the validity of a trust revocable during settlor's life or, if sooner, 60 days after the trustee has sent the person a copy of the trust instrument and notice informing the person of the trust's existence, the trustee's name and address, and the time allowed for commencing the proceeding.

On full or partial trust termination, the trustee may send the beneficiaries a proposal for distribution. The right of any beneficiary to object is precluded unless acted on within 30 days. ■