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Harnessing Legal Talent in the “City of Innovation”

By BBA President Carol Starkey

President’s Page

As lawyers, even while in pursuit of professional excellence, we also need support and intellectual nourishment outside of our firms or organizations - to be, and remain, successful in this competitive industry. And for me, those resources always have been found at the BBA. That is one of the reasons that makes me so proud that you have elected me become the 95th President of the Boston Bar Association.

In addition to the rich educational programming and the ability to develop a strong network, perhaps what is most exciting about this organization is its capacity to bring some of the brightest, most powerful people in the legal industry together, regardless of where they practice or how they identify themselves, in order to help solve problems affecting all of us.

Over my nearly three decades of practice and 16 years of involvement with the BBA, I have experienced how much we can do – as lawyers – when we step outside our own individual practice silos and work together on common issues in the profession.

Being a part of this Association – and having the opportunity over the years to both mentor and be mentored – has been so enriching for me. And it’s tremendously gratifying to be able give back to the BBA and the profession that has done so much for me.

But I think everyone has seen examples of how the practice of law has changed over the years. The legal profession itself is undergoing tremendous change, and much of that change is challenging.

There are plenty of industry statistics that tell us the ceiling for upward mobility is still too low for women and minorities; we have some law firms closing their doors, while others are merging into gigantic corporate structures at the cost of a shared collegiality or community in the office that gives so many of us joy in the profession.

But at the heart of all of this volatile change there is also opportunity: the opportunity for growth and collaborative development.

I’m really proud of the way the BBA has responded to some of these changes. Last year, during her term as President, Lisa Arrowood implemented the very successful Friday Fundamentals program. We will continue with these important programs in the year ahead.

But as we look forward, we cannot focus only on those lawyers who are just starting out, because the changes we are experiencing don’t just affect new lawyers; they affect us all. Even those who are at the peak of our practices grapple with them. From the demands of clients to the flood of new technology, the legal profession is being reshaped by the global economy, and some of us are in danger of being left behind unless we have a plan in place to adapt.

That's why my goal this year is to harness the expertise and talent of BBA members at large, from all different practice areas, to implement bigger and broader professional development programming: Programming that connects lawyers not only across practice areas, but also with a cross section of industry. And programming that explores common tools of innovation that can be accessible to all lawyers.

We're in the right place to do this. Boston has always been a city of innovation; we have been at the forefront of healthcare and education for decades, and now we're leading the nation in the technology, life sciences, and venture capital sectors as well, to the extent that global companies like GE are deciding that Boston is where they need to be.

These constantly-evolving industries bring new legal issues and challenges. It's essential that lawyers who practice in these fields stay connected with what's happening on the front lines.

That's why I'm thrilled to be leading the charge as the BBA develops a series of conferences – such as the BBA Life Sciences Conference on November 10th – which will explore the interplay between the life sciences sector and the law, and bring lawyers and industry together, from biotech startups to pharmaceutical companies.

We're planning this in other areas, too – like Venture Capital, Higher Education, and Privacy. This is one of the greatest strengths of the BBA: the ability to provide these unique opportunities for practitioners to meet and exchange ideas with industry leaders.

As a Bar Association, we can empower lawyers from all walks of life to be who they are, to innovate and do significant for their own practice, and for the profession at large. And the only way we can continue to do that now is if we are together, see the value in one another, and learn from one another. If we do that, we can turn some of these real challenges in our profession into real opportunities.

I hope you share my enthusiasm for all that's ahead, and I look forward to seeing all of you there along the way.

Mental Health Courts: Providing Access to Treatment, Restoration of Human Dignity and Recovery with Justice

By Hon. Kathleen Coffey

Voice of the Judiciary

A mental health court is a specialty court whose purpose is to serve mentally ill criminal offenders in the early stages of the criminal process by offering a diversionary program of treatment and strict supervision instead of arrest and detention. It is a collaborative effort between the criminal justice and the mental health treatment systems intended to improve the quality of life of individuals with severe mental illness by providing access to comprehensive services instead of incarceration and to improve public safety by reducing recidivism.

Although it is undisputed that mental illness rarely leads directly to criminal behavior, many mentally ill people find themselves in court facing criminal complaints when their behaviors become threatening, aggressive or dangerous to themselves or others. The use of substances such as alcohol and illegal drugs to self-medicate by the mentally ill populace further increases the likelihood of court involvement.

Experience shows that for individuals with severe mental illness, brief periods of custodial detention tend to exacerbate symptoms associated with depression, paranoia and anxiety. Often individuals have difficulty complying with standard reporting requirements imposed by probationary terms or conditions of release while awaiting trial. Those individuals can be disorganized and overwhelmed by the demands of daily living due to their mental illness. The end result often is a cycle of arrest, incarceration, release and re-arrest with little hope of recovery or successful integration into the community. National and state evidence reveals a disproportionate number of individuals with some form of mental illness within the justice system as compared with the general population.

The creation and development of mental health courts in the Commonwealth is due in large part to the vision of retired Judge Maurice Richardson coupled with a generous private grant from the Sidney Baer Foundation (<http://www.baerfoundation.com>). Judge Richardson recognized the cycle of court involvement for those suffering from a mental illness and the overriding need for a collaborative approach between the behavioral health system and courts to effectuate improved outcomes. The importance of the role of the Sidney Baer Foundation in combating mental health issues cannot be overstated. Sidney Baer was a member of a wealthy and prominent family from the Midwest. While studying at Yale University, Sidney suffered a nervous breakdown and was diagnosed with schizophrenia. He never graduated from Yale due to the challenges and obstacles that his mental illness presented. With the help and advice of his friend and personal lawyer, Attorney George Handran, he established the Sidney Baer Foundation for the purpose of alleviating the suffering and loss of opportunities endured by the mentally ill. In 2007, in concert with the Boston Medical Center, the Trial Court received initial funding from the Baer Foundation and established the first mental health court in the Commonwealth in the Boston Municipal Court. <http://www.baerfoundation.com/>

There are presently seven mental health courts operating in the Commonwealth. The Boston Municipal Court Department holds weekly sessions in the Central, Roxbury and West Roxbury

Court Divisions. The District Court Department operates mental health courts in Springfield, Cambridge, Plymouth and Quincy Courts.

Each court utilizes a team based and problem solving approach. The judge, probation officer, mental health clinician, prosecutor and defense attorney maintain their distinct roles, but work in a collaborative effort to monitor the individual participant's progress in adhering to the terms of probation, in securing and maintaining treatment and in achieving recovery.

Eligibility for participation differs to a small degree among the mental health courts in the Commonwealth. Some Courts will accept defendants pre-trial with untried open matters. Several courts require a post disposition probationary status. Participation is voluntary. The Judge has authority to return the case to the traditional court system when there is a breach by the defendant of the program's policies.

The process begins by a referral to the mental health court session. After consultation with a mental health clinician and the probation officer, eligibility is determined based upon the nature and circumstances of the offense, a psychiatric diagnosis, history of mental health treatment and the willingness of the participant to accept treatment and participate in the session. The clinician will then make a recommendation to the judge. Once accepted, each participant receives an individualized treatment plan. The participant is required to return to the court session regularly for a remedial review of the effectiveness of the participant's individualized treatment plan and an evaluation by the court of any obstacles and impediments that interfere with the participant's ability to receive and maintain mental health treatment. This 'holistic' approach is an important component to the session and it reinforces the message of the court to all participants that their lives have value and that the court is an invested partner in their recovery efforts.

CPCS Attorney David Shea, a public defender and mental health court practitioner maintains that, "Criminal cases often implicate serious collateral consequences-apart from potential incarceration-including housing, employment, education, and child custody problems....Many clients find this holistic approach novel to a courtroom setting and the result is a dynamic that often engenders a powerful motivator; hope."

Presently, there are over 200 defendants participating in mental health courts in the Commonwealth. 25 % are female and 75% are male. Over 60 % of the participants report a co-occurring substance use disorder and over 50% report a history of homelessness. The most common mental health diagnoses are bipolar, schizophrenia and schizoaffective disorder. The racial breakdown of participants is 47% white and 37% black. From June 2015 to June 2016, 40% of the participants successfully completed the mental health court program. The average length of participation in a mental health session is 9-12 months.

It is evident that the future of mental health courts in the Commonwealth will see increased participation due to the Trial Court's recognition of the importance of addressing the unique and specialized needs of the mentally ill. To that end, the Trial Court has engaged in a state wide 'Community Justice Project' to identify resources and programs that will divert individuals diagnosed with a mental illness or substance use disorder at key events or 'intercepts' from the justice system and direct them to behavioral health treatment. By acknowledging the benefits of treatment and rehabilitation in lieu of incarceration, the mental health courts extend a

compassionate alternative and instill a sense of hope in a vulnerable population.

The success of mental health courts can best be summed up by the words of a recent graduate from the West Roxbury Court's 'Recovery with Justice Program'. He told the court, "This program has broken the chains that kept pulling me back to jail. Thank you for giving me back my life. With the treatment you have helped me get, I now have hope that I will be able to work and be a part of my daughter's life and I will stay out of trouble."

Appointed to the bench in 1993 by Governor William Weld, Judge Kathleen Coffey has been First Justice of the West Roxbury Court for the past nineteen years. She is the Director of Specialty Courts for the Boston Municipal Court Department. In 2007, she established the first Mental Health Court, and in 2010, the Homeless Court held at the Pine Street Inn.

Boston Veterans Treatment Court: A Team Dynamic

By Hon. Eleanor C. Sinnott

Voice of the Judiciary

Our country has been at war for almost 15 years. Deployments take a toll on soldiers and their families. Some get arrested because they suffer from Post-Traumatic Stress or traumatic brain injury and they self-medicate with alcohol and/or drugs. If those defendants are within the Boston Municipal Court Department (BMC) jurisdiction, the Boston Veterans Treatment Court (BVTC) may be an alternative to the regular court trial track.

I served as a Navy Intelligence Officer and had the honor of being attached to Special Operations Command, Korea (SOCKOR). My husband Richard Sinnott, a private attorney practicing in Boston, is a Lieutenant Colonel Judge Advocate in the Army Reserve. He deployed to Kuwait in 2003. My familiarity with military culture both by being a military officer and the spouse of a deployed soldier, and having worked with combat veterans, helps in my interactions with and understanding of veterans as the presiding judge of the BVTC.

Why do I say BVTC “may” be an alternative?

The BVTC focuses on high risk/high needs veterans facing serious charges where there is a nexus between their current problem and their military experience. Individual treatment plans are created for them and each veteran is assigned a mentor. Because the program is usually about 18 months of probation and involves intensive treatment and monitoring, it may not be appropriate for a veteran facing less serious charges.

Probation (which is often pretrial probation), consists of weekly court appearances that taper as the veteran progresses through five phases. Once a treatment plan is established, each week the veteran is tested for drugs and alcohol, must attend three Alcoholics Anonymous or Narcotics Anonymous meetings each week, meet weekly with a probation officer and have mentor contact.

How does a veteran get considered for the BVTC?

If a veteran is arraigned in the BMC Central Division, the case is automatically scheduled for the earliest Friday in the BVTC, for assessment of eligibility. If a veteran is arraigned in one of the other BMC divisions, the veteran’s attorney submits a referral and the case is scheduled for a status date in that same division 4 weeks later. During that time, the veteran is told to visit a BVTC session, given the participant handbook, and a clinical evaluation is scheduled to assess whether there is a nexus between their military service and current case and whether the BVTC can provide the appropriate treatment. (<http://www.mass.gov/courts/docs/specialty-courts/veterans-treatment-court-referral-form-boston.pdf>)

Because the BVTC session is a voluntary program, the veteran then has the option to opt in or go the normal trial track.

What are the benefits to the veteran?

For most defendants, their cases will resolve by dismissal. Suffolk District Attorney Daniel Conley supports such resolutions because, in his own words: *“Veterans are asked to fight and die in defense of their country. But many aren’t given the tools to readjust to peacetime lives. As a result, they’re at a much greater risk of unemployment, substance abuse, and untreated mental illness, which all contribute to increased contact with the criminal justice system. So with Veterans Court, our goal is to help defendants overcome those challenges rather than be overcome by them.”* Dismissals give them a better chance at employment and other opportunities. Most importantly, the veterans receive treatment monitoring and support in areas such as housing, employment, possible upgrades in military discharge status, and legal assistance in civil matters.

Who is on the treatment team and why should I trust that they would know what is best for the veteran?

Most team members have extensive military backgrounds and are committed to the BVTC mission: To provide veterans whose underlying service related challenges brought them into the justice system – with a tailored but flexible supervised treatment program that restores their dignity and pride and returns them to being law abiding, productive members of civilian society.

A unique and essential aspect of veterans courts is peer mentoring, described by Judge Robert Russell of New York, as the “secret sauce” for the success of veterans courts. Don Purington is the peer specialist/mentor coordinator for the BVTC and oversees mentoring for all five veterans courts in Massachusetts. Although he is the assigned mentor to several BVTC veterans, he is an unofficial mentor to them all.

Mr. Purington’s story is one of redemption. He is a combat veteran who served in the United States Marine Corps from 2005 – 2009 as a fire team leader and squad leader during combat operations in Iraq in 2006. Upon discharge, Mr. Purington was addicted to opiates and began breaking the law to obtain drugs. After detoxing in a jail cell, he was offered the opportunity for treatment and help putting his life back on track. He received inpatient treatment for more than a year and was able to move past his legal issues. A veteran served as a mentor to Mr. Purington, which started him on his path to working with veterans.

Mr. Purington connects with BVTC veterans by sharing his journey, which is a source of strength for them. As he explains: *“Some of the most comforting words to someone who is at rock bottom are ‘I understand what you are going through.’ Had I not gotten the mentor that I did and the opportunity to get the help I needed I would be either dead or in jail. It has been 6 years since I started my journey of sobriety and I will continue to use my mistakes to try and help others.”* A BVTC veteran described him as *“... the most inspirational and biggest positive influence of them all. He is truly like a big brother to me, blood or not. I sincerely love and appreciate this man for everything! ... I really hated disappointing him more than anyone.”*

The gateway to the BVTC is through probation officer Geri Jurczak (bvtc@jud.state.ma.us). After receiving the one page referral, the eligibility assessment begins. As part of that process,

the veterans are drug and alcohol tested and must abide by the program requirements. Ms. Jurczak conducts home visits and offers referrals to the veterans' families as needed. A veteran described his experience with Ms. Jurczak like this:

... I have been on probation once before and it made me feel as if I was being set-up for failure ... [Ms. Jurczak] was the complete opposite of what I believed a probation officer to be... She was there for me whenever I had struggles or problems. ... She was a huge part of my success and I owe her more than I can give. BVTC is very unorthodox compared to conventional courtrooms because they recognize the need to help veterans returning home from combat. It takes a very special person ... to work with combat veterans. ... I will forever be grateful for her help in bettering my life.

Suffolk Assistant District Attorney Brett Walker (brett.walker@state.ma.us) is assigned to the BVTC. A West Point graduate and a Ranger, who was awarded two Bronze Stars, ADA Walker has served for 12 years as a light infantry officer in the U.S. Army and the Massachusetts National Guard. An Army Major, he has deployed to Afghanistan and Iraq. He makes a habit of shaking hands with the defendants at each session.

Attorney Vanesa Velez of the Committee on Public Counsel Services (CPCS) regularly represents BVTC veterans (vvelez@publiccounsel.net). While providing zealous advocacy she understands the BVTC treatment approach.

Thomas Palladino, a licensed social worker, is the BVTC Veterans Justice Outreach Coordinator. He creates the treatment plans and is responsible for the initial assessments and continuing case management. The team meets weekly before the regular Friday session. Because the BVTC is a high risk, high needs court, Mr. Palladino frequently makes last minute changes to treatment plans. He has found immediate placement in detox or residential treatment programs when veterans have been in crisis.

All combat veterans can obtain VA benefits through the Boston Vet Center. Amy Bonneau, a Captain in the Massachusetts National Guard, who deployed to Kabul, Afghanistan in 2010, is a licensed social worker and works as a readjustment counselor at the Boston Vet Center.

John Quinn is a Veteran Outreach Coordinator for the Home Base Program (<http://homebase.org>) - a partnership with the Red Sox Foundation and Massachusetts General Hospital, which provides eligible veterans with world-class clinical care, fitness, wellness and family counseling. Mr. Quinn proudly served in the 101st Airborne Division, U.S. Army Military Police.

Paul Connor, a Captain in the Army National Guard, assists the BVTC with veterans who suffer a severe relapse. Early this year, Mr. Connor was asked by Sheriff Peter Koutoujian to implement the first Massachusetts correctional unit for incarcerated veterans or pretrial detainees. The Middlesex County Sheriff's Housing Unit for Military Veterans (HUMV) allows veterans to share experiences and offers programs tailored to them.

The final team member is Assistant Clerk Magistrate Christopher Phillips, who served in the Marine Corps from 1984 –1997 and is currently a judge advocate major in the Army Reserve.

Judge Eleanor C. Sinott is the presiding judge of the Boston Veterans Treatment Court.

Takeaways from *Fisher II* for University Admissions Policies
By Dean Richlin and Sarah Burg
Case Focus

In [*Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 \(2016\)](#) (“*Fisher II*”), the Supreme Court upheld the constitutionality of the University of Texas at Austin’s (“UT”) race-conscious admissions program. The 4-3 decision ended Abigail Fisher’s long-running equal protection challenge to UT’s policy. The decision surprised many observers after the Court’s earlier consideration of the case in [*Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 \(2013\)](#) (“*Fisher I*”), in which the Court had seemed to establish a more demanding, and perhaps insurmountable, standard of review.

Fisher II gives new hope to universities seeking to employ race-conscious admissions policies to promote diversity. The decision reaffirms the framework of [*Grutter v. Bollinger*, 539 U.S. 306 \(2003\)](#), without restating *Grutter*’s prediction that affirmative action would no longer be necessary in 25 years. *Fisher II* declares that universities are owed “considerable deference” in articulating diversity goals and, by accepting UT’s showing on race-neutral alternatives, suggests more leeway for universities to develop narrowly-tailored policies geared to their specific circumstances.

Legal Background

In 2003, the Supreme Court in *Grutter* applied “strict scrutiny” analysis to a race-conscious admissions policy, holding that diversity is a compelling governmental interest that can justify the narrowly-tailored use of race in public university admissions. 539 U.S. at 326-27. *Grutter* upheld an admissions policy that sought to admit a “critical mass” of minority students by considering race as one factor among many in a holistic, individualized process, when doing so was necessary to achieve the educational benefits of a diverse student body.

Fisher first challenged UT’s policy after being denied admission in 2008. Under UT’s policy, most freshmen are admitted using a percentage plan that guarantees admission to Texas high school students in approximately the top 10 percent of their class. The remaining freshmen are admitted through a holistic review process that combines each applicant’s SAT score and grades with her “Personal Achievement Index” comprising numerous other factors including race. UT’s policy was designed to comply with *Grutter*.

Fisher did not qualify under the percentage plan and challenged only the policy’s holistic review component, arguing that it overstepped *Grutter* or, alternatively, that *Grutter* should be overruled. The district court granted summary judgment in favor of UT, and the Fifth Circuit affirmed. In *Fisher I*, the Supreme Court reversed in favor of Fisher, holding that the Fifth Circuit had applied an incorrect legal standard by giving too much deference to UT in considering the narrow-tailoring requirement. *Fisher I*, 133 S. Ct. at 2420-21. The Court remanded to the Fifth Circuit to engage in a new, and apparently more rigorous, examination of UT’s admissions criteria to see whether it was consistent with *Grutter*, stating that the “reviewing court must ultimately be satisfied that *no workable race-neutral alternatives* would produce the educational benefits of diversity.” *Id.* at 2420 (emphasis added).

On remand, the Fifth Circuit upheld the policy, Fisher appealed again, and the Supreme Court granted certiorari.

The *Fisher II* Opinion

In *Fisher II*, the majority opinion articulated three controlling principles. 136 S. Ct. at 2207-08. First, the use of race must withstand strict scrutiny. Second, if the university chooses to “pursue the educational benefits of student body diversity,” and articulates “a reasoned, principled explanation” for that choice, its conclusion that diversity serves its educational goals is entitled to judicial deference. Third, the university nonetheless bears the burden of proving that “race-neutral alternatives that are both available and workable do not suffice,” a determination to which “no deference is owed.”

The Court concluded, among other things, that the record established that UT “articulated concrete and precise goals” that mirrored the compelling interest in diversity that the Court had previously approved in *Grutter*. *Id.* at 2211. The Court concluded that “a reasonable determination was made that the University had not yet attained its [diversity] goals.” *Id.* at 2212.

Notably, although the record in the case was extensive, the decision did not declare that any particular type of evidence was necessary to demonstrate narrow tailoring.

The Court rejected Fisher’s emphasis on the purportedly race-neutral percentage plan, explaining that percentage plans, “though facially neutral,” “are adopted with racially segregated neighborhoods and schools front and center stage.” *Id.* at 2213. The Court then stated that “to compel universities to admit students based on class rank alone is in deep tension with the goal of educational diversity as this Court’s cases have defined it.” *Id.* at 2213-14.

Justice Alito dissented, criticizing the Court’s deference to UT without requiring UT to articulate specific objectives, such as numerical metrics for critical mass. *Id.* at 2215-43. This, he argued, made the narrow-tailoring inquiry “impossible.” *Id.* at 2222.

Significance

The Court’s opinion includes several caveats, including the explicit statement that UT’s program is *sui generis*. *Id.* at 2208. This language may limit the opinion’s value for prospective guidance.

Nonetheless, *Fisher II* appears to soften *Fisher I*’s standard for race-conscious admissions policies. The decision importantly concedes that universities—rather than the courts—are best positioned to assess the benefits of diversity on their campuses and how to achieve those goals. The opinion thereby eschews the Fifth Circuit’s focus on critical mass and how specifically UT had to define metrics for critical mass.

Confirming *Grutter*

Fisher II confirms *Grutter*'s holding that a university's pursuit of diversity can constitute a compelling government interest. Consistent with *Grutter*, a university must carefully evaluate how the benefits of diversity relate to its specific mission and circumstances. A university must show that any available and workable race-neutral alternatives are "insufficient" to meet diversity goals and, if it adopts a race-conscious policy, must utilize an individualized, holistic review such as that of UT, where race is but a "factor of a factor of a factor." *Id.* at 2207.

Giving Universities Deference

In perhaps the most significant sentence for universities crafting admissions policies, the majority opinion states, "[c]onsiderable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission." *Id.* at 2214. The opinion thus recognizes that more than one policy might survive under this standard and that universities, like states, "can serve as 'laboratories for experimentation.'" *Id.* *Fisher II*'s reasoning implies that universities have some flexibility in the narrow-tailoring analysis to adopt policies tailored to their specific goals.

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A “New Way of Doing Business” Under the Public Records Law
By Jonathan M. Albano and Emma D. Hall
Legal Analysis

On June 3, 2016, Governor Baker signed into law [House Bill No. 4333, An Act to Improve Public Records \(St. 2016, c. 121\)](#) (the “Act”). Described by the Governor as a “[new way of doing business](#),” the Act is the first major overhaul of Massachusetts’ Public Records Law since 1973. The new law is intended to improve access to public records, address administrative challenges faced by records custodians (particularly municipalities) responding to expansive public records requests, and promote cooperation between requestors and custodians. Among the most significant new requirements, which will take effect on January 1, 2017, are:

- Custodians of public records must designate a “public records access officer.”
- Digital records are to be produced whenever available.
- New statutory deadlines for responses to requests.
- New limits on fees for producing records.
- Availability of attorney’s fees and punitive damages.

The new law also requires the Supervisor of Public Records of the Office of the Secretary of the Commonwealth to create forms, guidelines, and reference materials to assist public records requests and responses. [Act](#), § 7, inserting G.L. c. 66, § 1A. The Supervisor’s current regulations are being updated to reflect the new law. (See [Proposed 950 CMR 32.00](#)). This article summarizes several significant provisions of the new law.¹

Impetus for the New Public Records Law

The new Public Records Law was passed on the heels of a [report card by the Center of Public Integrity](#) that gave the Commonwealth a D+ for government accountability and transparency. The report found that “routine records, from agency emails to internal datasets, can take weeks or months to obtain from state agencies, at costs running from a few hundred dollars to the not-unheard-of multi-million-dollar bills sent to some requesters.” Critics also complained that the law does not apply to the courts or the legislature, and argued that the statutory exemptions for certain agency records hindered government oversight. Agencies and municipalities, in contrast, expressed concerns about overly burdensome records requests and insufficient personnel and technical support to manage the process efficiently. The new law focuses on administrative and procedural aspects, and leaves largely unchanged the categories of documents and entities subject to the law.

Requirements for Making a Public Records Request

Under the new law, records custodians must respond to a request only if:

- the request reasonably describes the public record sought;
- the public record is within the possession, custody or control of the agency or municipality that received the request; and
- the custodian receives payment of a reasonable fee as set forth in subsection (d).

[Act](#), § 10, amending [G.L. c. 66, § 10\(a\)](#).

Under the old law, a request could be in oral or written form. Written requests were recommended if there was substantial doubt as to whether the records requested were public, or if an appeal was contemplated. *See* [950 CMR 32.05\(3\)](#). The Supervisor’s proposed regulations expressly permit oral requests; the new law does not expressly address the issue. *See Proposed 950 CMR 32.07(1)(a)*; [Act](#), § 10, amending G.L. c. 66, § 10(a).

Duties of the Newly-Created Records Access Officer

The new law requires records custodians to designate one or more employees as a “records access officer,” to coordinate responses to and facilitate resolution of requests. *See* [Act](#), § 9, inserting G.L. c. 66, § 6A. The records access officer must help identify the documents requestors seek; prepare guidelines to enable informed requests about the availability of records; and document all requests, including the request and response dates, the time spent fulfilling each request, fees charged, and details of all appeals. The guidelines must be posted on the custodian’s website and must list the categories of public records that the custodian maintains. *Id.*

When responding to a public records request, a records access officer must help facilitate resolution of the request, including by:

- identifying any public records or categories of public records not within the agency or municipality’s control;
- identifying the agency or municipality that may have the requested records;
- identifying any records (or portions thereof) that the custodian intends to withhold, and providing the specific reasons for such withholding, including the specific exemption(s) relied upon;
- identifying any public records (or portions thereof) that the custodian intends to produce, and, if applicable, providing a detailed explanation of why additional time is required to produce the records; and
- suggesting a reasonable modification of the scope of the request or offer to assist the requestor to modify the scope of the request if doing so would enable the agency or municipality to produce records sought more efficiently and affordably.

[Act](#), § 10, amending G.L. c. 66, § 10(b). Records are to be provided by electronic means when possible, unless the requestor is unable to receive or access the records in a usable electronic form. [Act](#), § 9, inserting G.L. c. 66, § 6A(d).

Agencies—but not municipalities—must provide on their websites searchable electronic copies of many public records such as agency decisions, annual reports, winning bids for public contracts, public meeting notices and minutes, and “information of significant interest that the agency deems appropriate to post.” [Act](#), § 14, inserting G.L. c. 66, § 19(b). These provisions, combined with the detailed record-keeping requirements imposed by the Act concerning the disposition of public records requests, *see* [Act](#), § 9, inserting G.L. c. 66, § 6A(e), are intended to improve the response process significantly.

New Deadlines for Responding to Public Records Requests

The Act establishes new deadlines within which custodians must respond to public records requests. The new deadlines attempt to balance the interest in timely disclosure of public records with the agencies and municipalities' administrative interests.

The old version of the Public Records Law contained two related, but not altogether harmonious, provisions concerning the response time for a public records request. Chapter 66, § 10(a) provided that a custodian "shall, at reasonable times and without unreasonable delay" permit the inspection and copying of public records, while § 10(b) specified that a custodian "shall, within ten [calendar] days following receipt of a request for inspection or copy of a public record, comply with such request." G.L. c. 66, § 10(b); [Secretary of the Commonwealth, Division of Public Records, *A Guide to the Massachusetts Public Records Law*, 1, 6 \(2013\)](#). The Supreme Judicial Court has interpreted these provisions to mean that custodians must always respond to public records requests "without unreasonable delay," and that producing a record within ten days is "presumptively reasonable." [Globe Newspaper Company v. Comm'r of Education](#), 439 Mass. 124, 130-31, 133 n.13 (2003). Thus, under the old version of the law, a delay beyond ten days could be "reasonable" if a custodian demonstrated that the "magnitude or difficulty of the request and the other responsibilities of the agency" prevented it from satisfying the ten-day deadline. *Id.* at 132 n.12.

The new law takes a different approach: it permits custodians more than ten days to respond to certain types of requests but limits the duration of permissible extensions of time to respond. Section 10(a), as amended, provides that a records access officer shall "at reasonable times and without unreasonable delay permit inspection or furnish a copy of any public record ... not later than 10 business days following the receipt of the request." [Act](#), § 10, amending G.L. c. 66, § 10(a). If the "magnitude or difficulty of the request, or the receipt of multiple requests from the same requestor" makes an agency unable to respond within the ten-day period, the custodian must identify a "reasonable timeframe" for compliance. The outer limits of an agency's response "shall not exceed 15 business days following the initial receipt of the request for public records," and a municipality's response "shall not exceed 25 business days" following the initial receipt of the public records request. [Id.](#), amending G.L. c. 66, § 10 (b)(vi).

Further extensions may be granted by the Supervisor of Public Records if the magnitude or difficulty of a request (or the receipt of multiple requests from the same requestor) unduly burdens the agency or municipality and prevents timely compliance. In such cases, the Supervisor may grant an agency a "single extension" not to exceed 20 business days and a municipality a "single extension" not to exceed 30 business days. [Act](#), § 10, amending G.L. c. 66, § 10(c).

The new law does not expressly address two questions likely to be faced by courts. The first is whether a custodian who has not produced documents within the maximum period allowed under the Act is entitled to prove, as under the current law, that there has been no "unreasonable delay" because of the scope of the request and the resources needed to achieve compliance. The answer to that question may turn on whether the specified durations of extensions of time permitted

under the Act, including the express reference to the Supervisor of Records' authority to grant just a "single extension," supplant potentially more permissive interpretations of the term "without unreasonable delay." See generally [Comm'r of Education](#), 439 Mass. at 130-31.

The second likely question concerns the use of public records requests by litigants who sue or are sued by the government. Unlike discovery requests, public records requests are not cabined by principles of relevance, nor are custodians permitted to consider a requestor's motivation in asking for a document. See [950 CMR 32.05 \(5\)](#). Public records requests by litigants who seek extra-judicial discovery might require courts to determine whether the deadlines established by the Act are subject to modification based on a case-specific application of the "without unreasonable delay" standard. The Supervisor's Proposed Regulations anticipate this issue by providing that a requestor's administrative appeal may be denied if "the public records in question are the subjects of disputes in active litigation, administrative hearings or mediation." [Proposed 950 CMR 32.09\(j\)\(1\)](#).

Permissible Charges for Public Records

A custodian may assess a reasonable fee for the production of a public record unless the records are freely available for public inspection or unless the custodian failed to respond to the request within the required ten business days. [Act](#), § 10, amending G.L. c. 66, §§ 10(d) and 10(e). The "reasonable fee" is limited to the actual cost of reproducing the record. *Id.*, § 10(d)(i). The actual cost of any storage device or material provided may be included as part of the fee, but the charge for standard black-and-white paper copies or printouts of records cannot exceed 5 cents per page for copies or printouts. *Id.* Formerly, records custodians could charge between 20 and 50 cents per page, depending on whether the copy was a photocopy, microfilm or microfiche, or computer printout. See [950 CMR 32.06\(a\), \(b\), \(d\)](#).

The new law also permits a custodian to charge for time in excess of four hours spent locating, retrieving, copying and, if necessary, redacting the records. The fee may be charged at an hourly rate equal to or less than the hourly rate attributed to the lowest paid employee who has the necessary skill to perform the tasks, not to exceed \$25 per hour. [Act](#), § 10, amending G.L. c. 66, § 10(d)(ii). Municipalities have additional leeway. Those with populations of less than 20,000 may charge for all such time, while those with populations of more than 20,000 may charge for time in excess of two hours. Agencies and municipalities may seek the Supervisor's approval to charge more than \$25 per hour if (a) the request is for a commercial purpose² or (b) the fee was necessary and reasonable to prudently perform the tasks and was not intended to prevent access to public records. *Id.*, amending G.L. c. 66, § 10(d)(iv).

The Recovery of Attorneys' Fees and Punitive Damages

The new law creates a presumption in favor of awarding attorneys' fees and costs if the requestor obtains relief either through judicial order or consent decree, or if the agency provides the documents after a complaint is filed against it. See [Act](#), § 10, inserting G.L. c. 66, § 10A(d)(2). There is no presumption in favor of attorneys' fees in cases where:

- the supervisor of records previously ruled in the custodian's favor;

- the custodian “reasonably relied upon a published opinion” by the attorney general or by an appellate court of the Commonwealth that was “based on substantially similar facts”;
- the request was “designed to harass or intimidate”; or
- the request was “not in the public interest and made for a commercial purpose unrelated to disseminating information to the public about actual or alleged government activity.”

Id.

Under the new law, the Superior Court also may assess punitive damages between \$1,000 and \$5,000 against a defendant custodian if the custodian did not act in good faith in failing to timely furnish a requested record. [Act](#), § 10, inserting G.L. c. 66, § 10A(d)(4). Any damages will be deposited into the Public Records Assistance Fund and may be used to provide grants to municipalities to foster best practices for increasing access to public records and facilitate compliance with the public records law. [Act](#), § 6, inserting G.L. c. 10, § 35D.

Conclusion

If the amendments achieve their intended purpose, the “new way of doing business” under the Public Records Law should improve communications between requestors and records custodians, increase the number of public records available online, establish enforceable timeframes for producing public records, impose cost controls to reduce excessive fees, and enhance enforcement efforts by allowing attorneys’ fees awards.

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¹Among the provisions of the Act not addressed by this article are (a) the creation of a special legislative commission to “examine the constitutionality and practicality of subjecting the general court, the executive office of the governor and the judicial branch to the public records law” and to issue a report by December 30, 2017, [Act](#), § 20(c); (b) a new exemption for personal emails of public employees, [Act](#), § 4, amending G.L. c. 4, § 7, cl. 26(o) and (p) and [Act](#), § 9, inserting G.L. c. 66, § 6A(c); and (c) a provision expressly applying the Public Records Law to the Massachusetts Bay Transportation Authority Retirement Board but granting the Board an exemption for trade secrets or commercial or financial information that relates to the investment of public trust or retirement funds, [Act](#), 14, inserting G.L. c. 66 §21.

²“Commercial purpose” is defined as the “sale or resale of any portion of the public record or the use of information from the public record to advance the requestor's strategic business interests in a manner that the requestor can reasonably expect to make a profit, and shall not include gathering or reporting news or gathering information to promote citizen oversight or further the understanding of the operation or activities of government or for academic, scientific, journalistic or public research or education.” [Act](#), § 10, inserting G.L. c. 66, § 10(d)(ix)

Magazu and the Expansion of Agency Power

By Sandra E. Lundy

Legal Analysis

May a couple's childrearing practices, which are not illegal and are deeply rooted in their sincere religious convictions, disqualify them from becoming foster and pre-adoptive parents? In the closely watched case *Magazu v. Department of Children and Families*,¹ the Justices unanimously answered "yes." Here, I argue that while *Magazu* may have been correctly decided, the Court's analysis has troubling implications for the expansion of agency power.

Path to the SJC

Gregory and Melanie Magazu had two biological daughters but wanted a larger family. Concerns about Melanie's health led them to apply to become foster and pre-adoptive parents. The couple seemed ideally suited to foster and then adopt a child who was in the Department of Children and Families' ("DCF") care – until they revealed that they occasionally used physical punishment on their biological children. Believing as a matter of religious faith in the maxim "spare the rod, spoil the child," Greg or Melanie, on the few occasions when one of their daughters engaged in "a continuous pattern of disobedience," would spank the child on the buttocks by hand in the privacy of the girl's bedroom.²

DCF regulations prohibit the use of corporal punishment on a foster child.³ Accordingly, the Magazus were prepared to enter into a written agreement not to use corporal punishment on any foster child placed in their home and never to physically punish one of their biological children in the presence of the foster child. The couple would not, however, and for religious reasons *could* not, agree to forego physical discipline of their biological children. Citing their refusal, DCF denied the Magazus' application to become foster and pre-adoptive parents. The Magazus appealed. At the administrative hearing, DCF's witnesses testified that foster children typically have been subjected to abuse and neglect and could be re-traumatized by direct or indirect exposure to corporal discipline. DCF acknowledged that it had no written policy disqualifying parents who physically discipline their biological children from becoming foster parents, but maintained that such was its unwritten policy and practice. First the hearing officer, and then a Superior Court judge, affirmed DCF's denial of the Magazus' application. The Supreme Judicial Court transferred the case *sua sponte* from the Appeals Court.

The Decision

The Justices faced two questions of law. First, was DCF's decision arbitrary and capricious, based on an irrational interpretation of its statutory and regulatory authority, and/or ungrounded in substantial evidence, in violation of DCF's statutory and regulatory mandates? Second, by conditioning the couple's receipt of a government benefit on their renunciation of their religious practices, did DCF violate the Magazus' free exercise rights under the Federal and Massachusetts Constitutions?

The Justices dismissed both claims. The Court deferred--almost without scrutiny--to DCF's policy of not placing foster and preadoptive children in homes where parents physically discipline their children. Notwithstanding that the policy was "not . . . articulated in express terms," the Court held that "such a policy falls squarely within the parameters of the department's enabling legislation and companion regulations, and is rationally related to the department's objectives in the placement of foster children."⁴

The Court next applied the familiar "balancing test" of *Wisconsin v. Yoder*⁵ and *Attorney Gen. v. Desilets*⁶ to the constitutional claim. The Court concluded that DCF had substantially burdened the Magazus' practice of their sincere religious convictions by presenting them with an untenable choice: the couple

could become foster parents by abandoning their religiously-motivated practices, or they could continue their faith-based disciplinary practices and abandon any hope of becoming foster and pre-adoptive parents. Nonetheless, the Court held that the substantial burden on the Magazus' constitutional rights was outweighed by the State's "first and paramount duty," rooted in its ancient *parens patriae* authority, to protect children from actual or potential harm.⁷ The decision shut the door on the Magazus' hopes to foster and adopt children through DCF.

Judging By Unwritten Rules

It is easy to assume that *Magazu* was correctly decided. Both common sense and compassion argue for taking every precaution to protect emotionally fragile children from further harm. Nonetheless, the Court's reasoning is troubling on at least two fronts.

First, the Court extended unwarranted deference to DCF's "unwritten" policies and procedures. A fundamental objective of the Administrative Procedures Act, G. L. c. 30A, which governs DCF's actions, is to ensure the agency's objectivity, accountability, transparency, predictability, and uniformity in its application of policies and other practices.⁸ Permitting DCF, or any agency, to rely on unwritten rules severely limits judicial oversight of agency discretion. How does a court distinguish between a legitimate unwritten policy and *post hoc* rationalization? How is a court to know, for instance, when the unwritten rule was adopted, by whom, for what reason, and how it was communicated?

The Court's deference to DCF's unwritten policies rested on the thinnest of precedents. In both cases on which the Court relies, *Anusavice v. Board of Registration in Dentistry*⁹ and *Arthurs v. Board of Registration in Med.*,¹⁰ the agency's position on the unethical or criminal characteristics of the conduct at issue could readily have been foreseen from prior published agency decisions. Here, the Magazus' disqualifying conduct was legally permissible: within limits, one may spank one's child. *See, e.g., Commonwealth v. Dorvil; Cobble v. Department of Soc. Services.*¹¹ The Magazus had no notice that their lawful conduct would disqualify them to be foster parents.

Justice Cordy's concurrence, joined by Justices Botsford and Duffly, gives voice to this concern about unfettered deference to unwritten agency policy.¹² Justice Cordy begins by acknowledging two stark realities: the increasing need for good Massachusetts foster homes in light of DCF's growing caseload, and "the highly publicized tragedies of the last two years regarding children under the supervision of the department in foster homes," including a recent horrific case in the western region where the Magazus reside.¹³ He also reiterates the uncontested evidence demonstrating "that in every respect (but for one) [the Magazus] were ideal foster and preadoptive candidates."¹⁴ In light of the department's woeful record of investigating recent notorious cases of foster placements, where the warning signs of danger were writ large, Justice Cordy wrote that one is "left to wonder . . . whether the high standards and intensive assessment and scrutiny applied to the plaintiffs is the exception rather than the norm," or "whether the real problem in this case was not so much the department's concern for child safety, but rather a disagreement with the plaintiff's beliefs regarding the upbringing of their children."¹⁵ He queries whether, whatever the unwritten licensing standard actually is, it will be uniformly applied.¹⁶ If an agency may impose significant burdens on individuals based on unwritten policies, the concurrence suggests, meaningful judicial review of the conduct of State bureaucracies is all but eviscerated.

The Paternalistic State

A second reason for concern in *Magazu* is the Court's reliance in the *parens patriae* doctrine to justify burdening the Magazus' constitutional rights. The doctrine of *parens patriae* endows the State with inherent authority to protect the vulnerable, particularly children, from harm. *See, e.g., Petition of*

*Catholic Charitable Bureau of the Archdiocese of Boston, Inc., to Dispense with Consent to Adoption.*¹⁷ Massachusetts appellate courts have invoked the doctrine in countless child-related cases.

Parens patriae, however, like its kindred “best interests of the child” standard, is a doctrine increasingly criticized as inchoate and infantilizing.¹⁸ Recently, in *Guardianship of L.H.*,²⁰ a case involving substituted judgment for an incompetent adult, Judge Agnes (dissenting) implored courts to “be cautious and critical of signs of paternalism legitimized by the *parens patriae* doctrine, where State actors purport to have an absolute understanding of what is in the best interests of an individual, whose liberty, dignity and privacy are at issue, and whose voice is muted by the swift and overriding authority of court-appointed professionals.”²¹ Judge Agnes’ dissent is particularly cautionary for *Magazu*, where DCF presented no hard data on actual or prognostic harm, where the prospective foster parents pledged to abide by DCF regulations concerning the discipline of children placed in their care, and where their credentials were otherwise stellar.

Of course, the *Magazus* are not the only parents ensnared here by *parens patriae*. The decision summarily disqualifies *an entire class* of people whose religious convictions lead them to physically discipline their children from even becoming foster and preadoptive parents. Regardless of one’s views on the corporal punishment of children, the use of *parens patriae* in *Magazu* to preclude any foster child from finding love and care in a loving family invites speculation about just what the limits of *parens patriae*, if any, may possibly be.

Conclusion

Magazu closes the door to foster parentage to the *Magazus* and all those similarly situated. How widely it opens the door to bureaucratic over-reach will be tested in the line of cases that follow.

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¹ 473 Mass. 430 (2016).

² *Id.* at 433.

³ See 110 Code Mass. Regs. §§ 7.104 (1) (q) and 7.111(3).

⁴ 473 Mass at 440-441.

⁵ 406 U.S. 205 (1972).

⁶ 418 Mass. 316, 321-323 (1944).

⁷ 473 Mass at 445-446. See also 418 Mass at 321-323.

⁸ See, e.g., G. L. c. 30A, §§ 2-6.

⁹ 451 Mass. 786, 795 (2008).

¹⁰ 383 Mass. 299, 312-³¹³ (1981).

¹¹ 472 Mass. 1 (2015); 430 Mass. 385 (1999).

¹² 473 Mass. at 446-449 (Cordy, J., concurring).

¹³ *Id.* at 448.

¹⁴ *Id.* at 447..

¹⁵ *Id.* at 448.

¹⁶ *Id.* at 448-449.

¹⁷ 392 Mass. 738, 740-741 (1984).

¹⁸ See, for example, Charlow, Awarding Custody: The Best Interests of the Child and Other Fictions, 5 *Yale L. and Pol’y Rev.* 267, 269-273 (1986), available at <http://digitalcommons.law.yale.edu/ylpr/vol5/iss2/3>.

²⁰ 84 Mass. App. Ct. 711 (2014),

²¹ *Id.* at 734.

Massachusetts Takes a “Wait and See” Approach to Rule 26 Discovery Rule Changes: Unlike Federal Rules, the Recent Amendment to Rule 26 of the Massachusetts Rules of Civil Procedure Addresses Protective Orders Only

**By Nathalie K. Salomon
Heads Up**

The Supreme Judicial Court (“SJC”) approved amendments to Mass. R. Civ. P. 26, effective July 1, 2016, but unlike the recent and substantial amendments to Fed. R. Civ. P. 26, the SJC’s amendments are confined to section 26(c), concerning protective orders. Although the SJC’s Standing Advisory Committee on the Massachusetts Rules of Civil and Appellate Procedure (the “Committee”) considered proposals based on recent amendments to the Federal Rules, which focused on limiting the burdens of discovery (<https://bostonbarjournal.com/2016/04/13/proportionality-emphasized-in-amendments-to-the-federal-rules-of-civil-procedure/>). The Committee ultimately did not recommend them. Instead, the Committee adopted a “wait and see” approach, and as a compromise, the Committee recommended, and the SJC adopted, the new language in Rule 26(c) which instructs a court to consider factors relating to the proportionality of discovery when determining whether to issue a protective order under Rule 26.

The New Massachusetts Rule 26(c)

Before the July 1, 2016 amendment, Rule 26(c) was largely a copy of its federal counterpart. The SJC has now added a new paragraph, not present in the federal rule, at the end of the first paragraph of Rule 26(c), identifying three factors that may be considered in determining whether a protective order limiting discovery is warranted “due to undue burden or expenses.” These factors are:

- (1) whether it is possible to obtain the information from some other source that is more convenient or less burdensome or expensive;
- (2) whether discovery sought is unreasonable, cumulative or duplicative; and
- (3) whether the likely burden or expense of the proposed discovery outweighs the likely benefit of its receipt, taking into account the parties’ relative access to the information, the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.

Rule 26(c) still states that the court has power to issue a protective order “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,” and the rule also still lists the kinds of orders that the court is authorized to issue (e.g., “that the discovery not be had,” or that it may occur “only on specified terms or conditions”) - but now the Rule sets forth substantive guidance to the courts and the parties concerning the appropriate circumstances for such orders.

The Reporter’s Note observed that the amendment “should not result in a significant change to Massachusetts practice because similar factors already exist to limit discovery of electronically

stored information under Rule 26(f)(4)(E),” with the exception of one factor that is omitted from the amendment of 26(c), namely “whether the party seeking discovery has had ample opportunity by discovery in the proceeding to obtain the information sought.” The Reporter’s Notes conclude that the addition of these factors to Rule 26(c) merely “confirms the existing authority of a trial judge in determining whether to grant a protective order.”

The Committee Considered, but Did Not Recommend, Changes to Mass. R. Civ. P. 26 that Would More Closely Track Its Federal Equivalent.

The limited scope of the Massachusetts 2016 amendment to Rule 26 is the result of a “compromise” between the Committee’s recommendation not to change the Massachusetts discovery rules at this juncture and commentators advocating for the adoption of the extensive changes recently made to Rule 26 of the Federal Rules of Civil Procedure.

The Committee considered, but ultimately rejected, three proposed changes to discovery rules based on the 2000 and 2015 amendments to Rule 26 of the Federal Rules of Civil Procedure. Each of those revisions would have impacted Rule 26(b), which is titled “Scope of Discovery.” As observed by the Reporter’s Note on the amendment, the intent of these proposed changes was “to address the burdens of discovery that have been the subject of significant debate across the country over the past few years.”

The first proposed change, drawn from the 2000 federal amendments, would have refined the scope of discovery under Rule 26(b) by removing language that discovery must be “relevant to the subject matter” and replacing it with language that discovery must be “relevant to the party’s claim or defense.”

The second proposed change to Rule 26(b), taken from the 2015 federal amendments, would have adopted the principle of proportionality by listing factors to consider in deciding whether a discovery request is “proportional to the needs of the case,” such as “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”

The third proposed change, drawn from the 2015 federal amendments, would have deleted language in Rule 26(b)(1) that information must be “reasonably calculated to lead to discovery of admissible evidence,” a confusing phrase which, as the Committee Note to the Federal Amendment explains, “has been used by some, incorrectly, to define the scope of discovery.”

Upon review of public comments, however, and to the dismay of some practitioners as shown in the Massachusetts Lawyers Weekly’s June 20, 2016 story titled “Unfortunate delay in amending state discovery rules,” the Standing Advisory Committee ultimately recommended not to adopt the three proposed changes to Rule 26(b). Some comments took the position that the changes are not needed. As suggested in the Reporter’s Note, the Committee was particularly receptive to the concern that the consequences of imposing the federal changes to Massachusetts courts are unknown (“The principal objection to the amendments by the Standing Advisory Committee was based on the perception by many Committee members of drawbacks and unintended

consequences of imposing the federal changes on the Massachusetts trial courts, as well as the newness of the federal changes”). Consequently, the Committee favored a “wait and see” approach, advising the SJC not to revise the discovery rules at this time. As a “compromise,” the Standing Advisory Committee prepared draft language for the SJC’s consideration alluding to the principle of proportionality but limited to the narrow issue of granting protective orders in discovery disputes under Rule 26(c). The SJC approved the draft amending Rule 26(c) as described above and left untouched the remaining portions of the discovery rules.

For a further discussion of the amendment to Rule 26(c), readers are directed to the Reporter’s Note (<http://www.mass.gov/courts/docs/sjc/rule-changes/rule-change-rule-26-mass-rules-civil-procedure-reporters-notes-may-2016.pdf>).

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Motions to Unseal in Class Actions: Balancing the Public Interest in Access to Judicial Records Against a Party's Interest in Secrecy

By Ian McLoughlin

Legal Analysis

Class actions often involve matters of significant public interest, such as price-fixing or dangerous product defects. At the same time, class actions routinely involve confidential and sensitive business information. Courts are increasingly grappling with the question of when confidential documents that become part of the judicial record should be sealed¹ and when they should be made publicly available. The issue has arisen in a number of recent high profile class actions, including the case against Donald Trump involving Trump University and the case against Target regarding its massive data security breach. This article provides an overview of the legal standard for sealing judicial documents and examples of how it is applied in class actions.

The Right of Public Access

The law has for many years recognized both common law and First Amendment rights of public access to judicial records, in both criminal and civil cases, in order to assist the public in monitoring the functioning of the courts, so as to encourage quality, honesty, and respect for the legal system.²

Under the common law, the public has historically had a right to inspect and copy public records, including judicial records. There is a “strong presumption” in favor of openness as to such records. Whether a document is subject to this right depends on whether it is considered a “judicial” document, which in turn depends on whether it was filed with the court and made a material part of the court’s adjudicatory proceedings.³

The “weight to be given the presumption of access” turns on where a document falls along “a continuum from matters that directly affect an adjudication to matters that” do not. Where documents play an important role in determining litigants’ substantive rights, the weight accorded to the presumption of access is strong. Where documents play only a negligible role in determining the parties’ substantive rights, the weight of the presumption is weak.⁴

The common law right of public access is not absolute and may be rebutted. The burden of overcoming the presumption of access rests on the party seeking to seal documents. That burden is heavy; only the most compelling reasons justify non-disclosure. Examples of compelling reasons include where a court record could be used to “gratify private spite or promote public scandal, to circulate libelous statements, or as sources of business information that might harm a litigant’s competitive standing.”⁵

The trial court must balance the competing interests of the public and the party seeking to keep records secret. On one side of the balance, the greater the public interest in the litigation, the greater the showing necessary to overcome the presumption of access. In class actions, the standard for denying public access is applied with “particular strictness.” In a class action before the Third Circuit Court of Appeals, the Court stated as follows:

The right of public access is particularly compelling here, because many members of the “public” are also plaintiffs in the class action. Accordingly, all the reasons... for the right of access to public records apply with even greater force here. Protecting the access right in class actions “promotes [class members’] confidence” in the administration of the case. Additionally, the right of access diminishes the possibility that “injustice, incompetence, perjury, [or] fraud” will be perpetrated against those class members who have some stake in the case but are not at the forefront of the litigation. Finally, openness of class actions provides class members with a more complete understanding of the class action process and a better perception of its fairness.⁶

On the other side of the balance, when articulating “compelling reasons” for non-disclosure, the proponent of sealing should provide detailed justifications for sealing, on a document by document basis:

In order to override the common law right of access, the party seeking the closure of a hearing or the sealing of part of the judicial record bears the burden of showing that the material is the kind of information that courts will protect and that disclosure will work a clearly defined and serious injury to the party seeking closure. In delineating the injury to be prevented, specificity is essential. Broad allegations of harm, bereft of specific examples or articulated reasoning, are insufficient.⁷

The scope of the First Amendment right of access is more limited than the common law right. Documents are subject to the First Amendment right only if: (1) the class of documents sought has historically been open to the public; and (2) access to the documents plays a significant role in the functioning of the particular process in question.⁸ Perhaps because of the more limited scope of the First Amendment right, most of the attempts to gain access to information instead focus on the common law right.

Parties will sometimes try to bypass the public’s right of access by invoking stipulated protective orders entered under Federal Rule of Civil Procedure 26. But there is a material difference between such protective orders and orders to seal judicial records. The former relate to discovery between the parties, whereas the latter concern material that has been placed in the court record. A party cannot file documents under seal simply because they were originally produced pursuant to a Rule 26 protective order.⁹

Motions to Unseal in Recent Class Actions

Several courts have recently decided motions to unseal in a series of widely publicized class actions. In *Shane*, for example, the Sixth Circuit Court of Appeals reversed a district court’s orders sealing materials and approving a settlement in a class action against Blue Cross Blue Shield alleging it engaged in price-fixing to the detriment of millions of Michigan citizens.¹⁰ Prior to the settlement, the parties filed various materials under seal in connection with the plaintiffs’ motion for class certification, including a detailed expert report valuing the class’s claims. The parties thereafter reached a settlement and the district court approved it, but the class certification materials remained under seal, even after various objectors to the settlement sought access.

The Sixth Circuit reversed the sealing order and vacated the order approving the settlement, reasoning that the sealed materials were critical to the class's ability to evaluate the settlement, and that the parties' asserted bases for sealing were "brief, perfunctory, and patently inadequate." The Sixth Circuit faulted the parties and the district court for conflating "the standards for entering a protective order with the vastly more demanding standards for sealing off judicial records from public view." The Sixth Circuit also rejected Blue Cross' concern about disclosing "competitively-sensitive financial and negotiating information" because "information about a practice since outlawed by the Michigan Legislature is not entitled to protection as a legitimate trade secret."

Similarly, in *Center for Auto Safety*, a class action against Chrysler alleging defects in certain of its vehicles, the Ninth Circuit Court of Appeals vacated a district court order refusing to unseal documents.¹¹ The plaintiffs had moved for a preliminary injunction to require Chrysler to notify the proposed class of the alleged risks its vehicles posed, and the parties had filed confidential discovery documents concerning that motion under seal. The Center for Auto Safety moved to intervene and to unseal the documents, which the district court denied, relying upon language from prior Ninth Circuit rulings that had suggested that while "compelling reasons" were required to seal materials in connection with "dispositive motions," a less stringent "good cause" standard applied for "non-dispositive" motions such as one seeking a preliminary injunction.

The Ninth Circuit rejected "the apparent simplicity of the district court's binary approach," explaining that the proper inquiry was whether the underlying motion was more than tangentially related to the merits of the case, "in which case the "compelling reasons" standard applied. A motion for preliminary injunction, "which frequently requires the court to address the merits of the case" and "which often includes the presentation of substantial evidence" will often "reflect the need for public access." Because the district court had applied the wrong standard, the Ninth Circuit vacated its order and remanded the case so that the district court could apply the appropriate, "compelling reasons" standard.

Along the same lines, in the class action against Donald Trump involving Trump University, the Southern District of California granted a motion by the Washington Post to intervene and unseal various exhibits the parties had filed in connection with the plaintiff's motion for class certification, including materials that allegedly evidenced a deceptive advertising campaign by Trump that had defrauded thousands of consumers.¹² The court applied the "compelling reasons" standard, determining that a motion for class certification is "more than tangentially related to the merits," and then balanced the competing interests of the public and Trump.

The court rejected Trump's argument that certain documents contained trade secrets, because some of those documents had already been posted online by Politico. With respect to the other documents, the court rejected Trump's "blanket assertion as to why the disputed materials constitute[d] trade secrets." Trump had argued that this information retained commercial value even though Trump University had stopped enrolling new students in 2010 because Trump University might someday enroll students again. The court rejected that argument as "wholly speculative." It held that the Post had "made a strong argument that the public interest in understanding the judicial process is heightened" given that Trump had become "the front-runner

for the Republican nomination in the 2016 presidential race” and had himself “placed the integrity of these court proceedings at issue.”

Similarly, in a class action against Target arising out of a breach of the company’s data, a federal district court in Minnesota granted the plaintiffs’ motion to unseal their memorandum of law in support of their motion for class certification.¹³ The court rejected Target’s argument that disclosure would risk another data breach, ruling that Target had failed to demonstrate how statements about Target’s alleged negligent conduct prior to and during the data breach in 2013 constituted a disclosure of confidential material about its information security procedures in 2015. The court also held that Target’s concern that disclosure would result in adverse publicity did not warrant sealing the memorandum in question.

Although courts frequently unseal judicial documents, they do not always do so. For example, in a class action against General Motors arising out of alleged defects in the ignition switches on its vehicles, the Southern District of New York sealed a number of documents concerning a discovery motion because it had not considered them in its ruling.¹⁴ Furthermore, in a securities class action against State Street Corporation and affiliated entities, the United States district court in Massachusetts denied a motion to unseal documents filed in connection with summary judgment motions where the defendants submitted two declarations establishing “the sensitive and confidential nature of the information and... a particularized showing of the presence of commercial harm.”¹⁵ Similarly, in a class action against Google alleging that it had violated consumers’ privacy rights in connection with its operation of Gmail, the Northern District of California largely denied a motion to unseal materials filed in connection with the plaintiffs’ motion for class certification.¹⁶ After conducting a detailed document by document analysis, the court permitted Google to seal most of the materials because they related to specific descriptions of either (1) how Gmail operates, the disclosure of which could cause competitive harm to Google; or (2) how users’ interactions with the Gmail system affect how messages are transmitted, the disclosure of which could lead to a breach in security of that system.

Motions to unseal judicial records are frequently brought in class actions. Those moving to unseal are most likely to succeed where the case presents a matter of significant public interest and the documents are closely related to the merits. Those opposing such motions are most likely to succeed where the documents are not important to the court’s adjudication of the merits or where the documents are confidential and their disclosure would cause a substantial injury to a party. Parties looking to keep records sealed must make a compelling, specific argument for sealing – for each document they wish to keep out of the public eye.

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¹ While this article and the federal courts use the term “sealed” to refer to a situation in which the parties and the Court may view documents, but the public may not, it should also be noted that Massachusetts state courts use the term “impoundment” to refer to that situation, and use the word “sealed” to refer to a situation in which *only* the

Court, and not the parties or public, may view documents. *See, e.g., Pixley v. Commonwealth*, 453 Mass. 827, 836 n.12 (2009).

² *See, e.g., Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 506-10 (1984); *Ctr. For Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092, 1096 (9th Cir. 2016); *In re Cendant Corp.*, 260 F.3d 183, 198 n. 13 (3d Cir. 2001); *In re Policy Mgmt. Sys. Corp.*, No. 94-2254, 1995 U.S. App. LEXIS 25900 at *7 (4th Cir. Sept. 13, 1995); *In re Continental Illinois Sec. Litigation*, 732 F.2d 1302, 1308-09 (7th Cir. 1984).

³ *See, e.g., Nixon v. Warner Communications Inc.*, 435 U.S. 589, 597 (1978); *Shane Grp., Inc. v. Blue Cross Blue Shield*, No. 15-1544, 2016 U.S. App. LEXIS 10264 at *6-7 (6th Cir. June 7, 2016); *Ctr. For Auto Safety*, 809 F.3d at 1096; *Cendant*, 260 F. 3d at 192; *In re Policy Mgmt.*, 1995 U.S. App. LEXIS 25900 at *7.

⁴ *United States v. Amodeo*, 71 F.3d 1044, 1049-50 (2d Cir. 1995).

⁵ *Ctr. For Auto Safety*, 809 F.3d at 1097 (internal citations and quotations omitted); *Shane*, 2016 U.S. App. LEXIS 10264 at *6-7; *Cendant*, 260 F. 3d at 194.

⁶ *Cendant*, 260 F.3d at 193 (internal citations removed). *See also Shane*, 2016 U.S. App. LEXIS 10264 at *7; *Ctr. For Auto Safety*, 809 F.3d at 1096-97.

⁷ *Cendant*, 260 F. 3d at 194. *See also Shane*, 2016 U.S. App. LEXIS 10264 at *7; *In re Midland Nat'l Life Ins. Co Annuity Sales Practices Litig. v. Allianz Life Ins. Co. of N. Am.*, 686 F.3d 1115, 1119 (9th Cir. 2012).

⁸ *See, e.g., Press-Enter. Co.* 104 S. Ct. at 823-24; *Cendant*, 260 F.3d at 198 n. 13; *Policy Mgmt.*, 1995 U.S. App. LEXIS 25900 at *7; *Glass Dimensions, Inc. v. State St. Corp.*, No. 10-10588-FDS, 2013 U.S. Dist. LEXIS 170190 at *6 (D. Mass. Dec. 3, 2013).

⁹ *Shane*, 2016 U.S. App. LEXIS 10264 at *6; *Baxter Int'l v. Abbot Labs*, 297 F.3d 544, 545-47 (7th Cir. 2002).

¹⁰ *Shane*, 2016 U.S. App. LEXIS 10264.

¹¹ *Ctr. For Auto Safety*, 809 F.3d at 1094-96, 1099-1103.

¹² *Cohen v. Trump*, No. 13-cv-2519-GPC-WVG, Order (S.D. Cal. May 27, 2016).

¹³ *In re: Target Corporation Customer Data Breach Litig.*, Case No. 14-md-2522, Order (D. Minn. Aug. 13, 2015).

¹⁴ *In re General Motors Ignition Switch Litig.*, 14-md-2543, Orders (S.D.N.Y. July 2 and Dec. 2, 2015).

¹⁵ *Glass Dimensions*, 2013 U.S. Dist. LEXIS 170190.

¹⁶ *In re Google Inc. Gmail Litig.*, No. 13-md-2430, Order (N.D. Cal. August 6, 2014).

**Beyond Arbitration and Mediation:
Designing the Dispute Resolution Process to Fit the Situation
By Michael Zeytoonian
The Profession**

We live in a specialized world, one in which access to information is so overwhelming that there literally is “an app for that” to satisfy even the most specific and narrow of needs.

Yet, until recently, the legal profession’s response to the increasingly tailored needs of our clients has been to give them all the tried and true traditions of the law. Got a dispute? Let’s file a lawsuit with the courts and travel down the litigation road. Got a complex, sophisticated business dispute? Let’s go to arbitration with an arbitrator who is experienced in business disputes. Don’t want to risk a jury deciding your case and spend thousands of more dollars on a trial? Let’s go to mediation. Because...this is how we do it. This is how we’ve been doing it for decades.

The information revolution has moved too quickly and our clients have become too savvy to be content with the legal profession’s limited amount of choices or one size fits all approach. There is a time and a place for litigation, for arbitration, and for late in the dispute process mediation. But most of the time, our clients need an approach to resolving their disputes that is tailored to their needs, specific circumstances, and unique situations. Today’s lawyers and neutrals can best serve our clients by being responsive to the specificity of their needs and interests. That includes not only resolving a dispute but also how we go about resolving it.

New England Patriots coach Bill Belichick often talks about playing “situational football.” In other words, the game plan is designed differently for each game and depends on the situation each opposing team presents. The Patriots will never use the same game plan against the Broncos as they used for the Jets just because it worked. The Patriots win because they understand that a great result begins with a carefully designed and tailored approach.

Every dispute is different. Every client has a different bandwidth of factors which need to be considered. These may include how quickly the client needs to resolve the matter; how much can be spent on it; how important are the relationships of those involved; how much control does the client want to have over the process and the result; how risk averse is he/she; how important is confidentiality; what kind of expertise is needed; what are the important interests that are behind a stated position; and how productively can the parties work together in a non-adversarial setting, with or without a human go-between.

If the field of dispute resolution (DR) is going to be relevant, it has to be agile and responsive to the situation that is presented to us. No longer can litigation be the default and a couple of other processes be “alternatives.” In fact, no one process can be the default position and be presented to clients as the Cadillac of dispute resolution processes. It is time for the “A” (alternative) to be dropped from “ADR” (alternative dispute resolution), something that the Massachusetts Bar Association has just formally recognized in changing its former ADR Committee to its new DR Section. No process is an alternative; rather, every process is an alternative, and there are alternatives within the alternatives.

Within these DR processes, there is an explosion of variations and new roles emerging. For example, distinctions are often made between “facilitative” style mediation and “evaluative” mediation. In the latter, the mediator is called upon to help the parties assess how strong or weak their respective positions are, and to provide insight on the potential damages. A new trend emerging, called Planned Early Negotiation (PEN), draws a distinction between mediation which is done instead of litigation, or very early on in the litigation process, and that which is done later, often on the eve of trial. When done early, there may be some kind of information exchange so that the parties, lawyers and the mediator have enough factual information for well-informed and productive negotiations. Conciliation is another DR process with a much shorter time frame – often an hour or two – and has often been referred to as “mediation on steroids.” Conciliation largely focuses on the advantages of reaching a negotiated agreement as compared with the pitfalls of the alternative of going to trial.

New approaches have been developing even in the well-established field of arbitration. Arbitration has increasingly become a more complicated process and often includes many elements of litigation. As a result, many parties are opting for more streamlined models of arbitration with limits on discovery and motion practice. Some even use a more simplified version like “baseball arbitration,” in which the parties submit their respective written proposals for a settlement to the arbitrator, who then chooses the one he/she believes to be more appropriate and reasonable. And within baseball arbitration, there is both the version just described, known as “daytime” baseball arbitration, and “nighttime” baseball arbitration, in which the parties submitted proposals are not disclosed to the arbitrator until after the arbitrator renders a decision. The proposal that is closest to the arbitrator’s decision is then chosen to be the final resolution. In other cases, arbitrators may visit the site that is at the heart of a dispute and may limit or expand the degree of information exchange, the scope of submissions and the nature of a hearing.

Collaborative law, a structured negotiation process, grew out of the need to remove or minimize the adversarial elements of litigation. Collaborative law is a PEN process designed to intentionally pursue resolution by agreement through the collaboration of lawyers, clients and experts. It is similar to the more established role of settlement counsel. Lawyers that are hired as settlement counsel have the singular and limited purpose of negotiating with the other side on behalf of the client, as distinct from litigation counsel. A dispute would then proceed on two tracks; settlement counsel would be focused on pursuing settlement negotiations only, while litigation counsel would be handling the litigation aspects of the dispute.

Similar to the role of settlement counsel, the focused legal representation of clients by collaborative lawyers is limited to the collaborative process, where achieving the desired resolution is the lawyer’s only role. Collaborative law requires the open and voluntary exchange of all relevant information as a basic tenet. As such, “discovery” is both streamlined and profound. Collaborative lawyers and their clients may utilize neutral facilitators, case evaluators, or other neutral experts to provide parties with the expertise needed on the relevant factual and legal issues when there is a colorable claim and a valid defense. By its very nature, collaborative law is responsive to the circumstances of the dispute, allowing for flexibility and creativity in crafting solutions. That very nature allows collaborative lawyers to use variations while remaining consistent with the process’s basic protocols and principles.

Hybrids like “med-arb” or collaborative law with a baseball arbitration style closure option are also emerging, each with a different adaptation of process. What is clear is that there is no longer just one model of any of these processes. They will be called upon to be responsive to the situation each dispute presents.

These changes will require lawyers and neutrals to make more detailed assessments of each situation and the parties involved. Based on that assessment, we can then make a recommendation as to choosing and sometimes designing the right approach. This can present somewhat of a dilemma. Many lawyers and neutrals have a preferred DR process, one that we are more comfortable with, have the most experience in or in which we have been trained. Just like a surgeon excels at surgery and that is what the surgeon wants to do, litigators want to litigate; arbitrators want to arbitrate; mediators want to mediate; collaborative lawyers want to use collaborative law; and so on. So when the client comes into our office, there’s a natural bias, as well as a financial incentive, toward wanting to lead the client to what we do.

But if we are true to doing a thorough assessment of the client, his/her situation and all the factors of the dispute that is presented to us, and are going to make a good recommendation about the approach for this unique situation, we may have to refer the person to some other process and someone else that is the right fit for that client.

In the same way that a lawyer specializing in one area of practice would not try to represent the client in an area outside of his/her practice, a lawyer whose focus is settlement counsel or collaborative counsel is probably not the right lawyer for litigation, and vice versa. As there are specialties in areas of practice, today there are specialties in types of process. The training and expertise for a litigator is different than that of a settlement counselor, just as the process of collaborative law is different from arbitration. In her groundbreaking book, *The New Lawyer: How Settlement is Transforming the Practice of Law*, Law Professor Julie Macfarlane eloquently dissects the differences between adversarial advocacy and the newly emerging “conflict resolution advocacy.”

There is a role and a place for every kind of process on the DR spectrum, from litigation and arbitration on one end to preventive contract drafting and proactive ombudsman work on the other end. As the needs and demands of our clients get more specific and more sophisticated, those of us who represent our clients either as litigation, settlement or collaborative counsel, as well as those of us who serve as DR neutrals, must be responsive. The times call on us to be flexible and agile, to be ready and able to design approaches according to the needs and the situations presented to us. As legal counsel and neutrals, it is up to us to guide parties in the right direction in order to help them achieve their best outcomes.

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