

Boston Bar Journal

A Peer Reviewed Publication of the Boston Bar Association

Winter 2017
Volume 61, Number 1

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“We Bear a Responsibility to be Vigilant”

By BBA President Carol Starkey

President’s Page

I have always seen the practice of law as one of the most significant means of participating in our unique American democracy. As lawyers, we are accustomed, by training and practice, to embracing an adversarial role while still advancing a principled position.

Still, many of us in the bar could not help but be deeply troubled by the implications of some of the rhetoric in this year’s election campaign upon our long-held principles of American jurisprudence, including respect for the rule of law, due process, equal rights, and access to justice. Like so many of you, I have been angered and saddened to hear comments, and learn of events, that disrespect individuals who identify as minorities, or come from diverse backgrounds, beliefs and cultures. Such conduct erodes our Constitutional democracy, resulting in divisiveness, fear, and anxiety, all of which are felt acutely not only by adults, but perhaps most disturbingly, by our children as well.

In this context, I wanted to reach out to my colleagues at the bar to let you know that I believe the work of the Boston Bar Association, and its mission, have rarely been more relevant.

The BBA has a strong record of rising above division, finding common ground, and inspiring diverse groups to overcome disagreement to advance access to justice and excellence in the practice of law. We are – and will continue to be – a solutions-oriented convener that welcomes all stakeholders to exchange ideas and build relationships. But we also bear a responsibility, to one another and in the service of our communities, to be ever watchful and vigilant in ensuring that individual and due process rights remain valued and protected as bedrock principles in the implementation of our laws.

I write to our members now, to assure you that the BBA stands ready, willing and able to answer any necessary call to action resulting from this climate of uncertainty and ever changing events.

Over the past week, we have heard many expressions of concern, – both from our members and from local organizations with whom we partner. But we have also experienced a true sense of inspiration by the commendable desire of those same members and organizations to become actively engaged. We recognize that as lawyers, we are at our best when we are dealing with well-defined issues and actual cases and controversies. I want to state — unequivocally — that we remain committed to our work on the following fronts:

Immigration:

- The BBA is committed to protection of due process rights for all, as enumerated in the United States Constitution, with its Bill of Rights, and our Massachusetts Constitution, with its Declaration of Rights. Yet it is not enough for us to remain watchful. We will be empowering others to do the same through “Know Your Rights” programs in our communities and schools.
- We must remain cognizant of deportation as a potential collateral consequence of involvement with the justice system. Just this week, the SJC heard arguments on a case regarding the so-called Annie Dookhan defendants, in which the BBA filed an amicus

brief asking the Court to vacate all remaining convictions without prejudice. The risk that any of these individuals might face deportation proceedings on the basis of a conviction supported by tainted drug-lab evidence adds greatly to our argument for a “global remedy.”

Harassment, discrimination, and hate crimes:

- I share the concern of many of our members over the recent spike in acts of violence and intimidation against members of minority populations. Such actions must never be tolerated. We will continue to work with our partners at the **six local affinity bar associations** – and seek ways to engage with other, similar organizations – to defend individuals and groups that are under threat, and to educate people about their rights.

Access to justice:

- Our advocacy on behalf of access to justice for all residents will not waver. Join me on January 26th at **Walk to the Hill** as we once again make the case to the Governor and the Legislature, for a substantial increase in funding for civil legal aid, building on the BBA’s *Investing in Justice* task-force report. Providing all with access to justice is more important than ever.
- In addition, we are working with Attorney General Maura Healey and other legal services organizations to identify emerging legal needs in the community, particularly as they pertain to the increase in Hate Crimes and Immigration issues.

The BBA will continue to do everything we can to support the core values of meaningful access to justice and of diversity and inclusion that are at the heart of who we are as an organization of lawyers. Now is the time for all of us at the BBA to show Boston, the country, and the world that we can continue to advance respectful, innovative, and common-ground solutions to big challenges. But that must start at home with listening to one another and getting involved. I am proud and grateful to work with all of you, and I have no doubt that you will continue the great tradition in this Commonwealth during times of change or uncertainty, by rolling up your sleeves and asking the simple question, “How can I help?”

Carol A. Starkey is the president of the Boston Bar Association. She is a partner at Conn, Kavanaugh, Rosenthal, Peisch & Ford.

The New Transgender Anti-Discrimination Law and Guidance Issued by the Attorney General's Office and the MCAD

By Andrea Peraner-Sweet

Heads Up

On July 8, 2016, Governor Baker signed into law *An Act Relative to Transgender Anti-Discrimination*, St. 2016, c. 134 (the "Act"), expanding Massachusetts' protection against gender identity discrimination. Before the Act, the Transgender Equal Rights Act ("TERA"), St. 2011, c. 199, had prohibited gender identity discrimination in employment, housing, education, credit and lending. The Act now prohibits gender identity discrimination in places of public accommodation. G.L. c. 272, § 98, as amended by St. 2016, c. 134, § 3. It also requires places of public accommodation that lawfully segregate or separate access based on a person's sex to "grant all persons admission to, and the full enjoyment of, such places of public accommodation, *consistent with the person's gender identity.*" G.L. c. 272, § 92A, para. 2, as amended by St. 2016, c. 134, § 2 (emphasis added).

Guidance on the new law was issued on September 1, 2016, by the Attorney General's Office ("AGO") and the Massachusetts Commission Against Discrimination ("MCAD"). The MCAD issued clarified guidance on December 5, 2016, as discussed in more detail below. This article provides an overview of the AGO and MCAD guidance and recommended best practices.

Overview

Effective October 1, 2016, the Act amended G.L. c. 272, §§ 92A and 98 to include gender identity as an unlawful basis for discrimination in places of public accommodation. St. 2016, c. 134, § 5. A place of public accommodation is "any place whether licensed or unlicensed which is open to and accepts or solicits the patronage of the general public." G.L. c. 272, § 92A. The definition is broad: a place of public accommodation can be either public or private, can provide products or services (regardless of whether it charges for products, services, or admission), and can include retail stores, restaurants, hotels, theaters, museums, libraries, public facilities, and sports and health clubs. AGO Guidance, p. 2. After a lawsuit filed by four religious organizations (which has been voluntarily dismissed), the AGO removed an unqualified reference to "houses of worship" from its list of examples of places of public accommodation. The MCAD similarly clarified that although the Act would not apply to religious organizations if such application "would violate the organization's First Amendment rights," places of public worship may be subject to the public accommodations law if they engage in, or their facilities are used for, a "public, secular function." MCAD Guidance, p. 4.

Gender identity is defined as "a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth." G.L. c. 4, § 7, Fifty-ninth. A person's gender identity must be "sincerely held as part of the person's core identity." *Id.* It includes transgender, that is, "a person whose gender identity is different from that person's assigned birth sex." AGO Guidance, p. 1; MCAD Guidance, p. 6.

Examples of unlawful gender identity discrimination by places of public accommodation include: refusing or denying services; offering different or inferior services; advertising the refusal to accept business from or patronage of transgender or gender non-conforming

individuals; providing false information about the availability of products, goods or services, facilities or admission; and harassment or intimidation. AGO Guidance, p. 2; MCAD Guidance, pp. 4-5. Moreover, it is now a crime, punishable by fine and/or imprisonment, and subject to a private right of action, for any individual to “aid or incite another in making a distinction, discriminating against or restricting an individual from a place of public accommodation” based on gender identity. MCAD Guidance, p. 4.

Use of Sex-Segregated Facilities

By far, the law’s most controversial provision concerns the use of sex-segregated facilities (e.g., bathrooms). Although places of public accommodation need not eliminate sex-segregated facilities, they must now allow patrons to use the facility most consistent with their gender identity. G.L. c. 272, § 92A, para. 2, as amended by St. 2016, c. 134, § 2. A person should be presumed to be using the facility most consistent with their gender identity if the person is not engaged in any improper or unlawful conduct. AGO Guidance, pp. 2-3. A person should not be presumed to be using the wrong facility based solely upon the person’s appearance. *Id.*, p. 3. If a place of public accommodation has a legitimate concern (i.e., about potentially improper or unlawful conduct) as to whether a person is using the appropriate facility, a limited inquiry of the person is recommended through a “private and discrete conversation.” *Id.*, pp. 3-4. After confirming that the person is using the appropriate facility, the inquiry should end. *Id.*, p. 4.

Improper or Unlawful Purpose

Gender identity cannot be asserted for an “improper or unlawful purpose.” G.L. c. 4, § 7, Fifty-ninth. Examples of such conduct include:

- loitering in a facility for the purpose of observing other patrons;
- harassment of employees or patrons;
- threats or violence;
- photographing or videotaping others without their permission; and
- violation of the law.

AGO Guidance, p. 5.

If a place of public accommodation has reasonable grounds to believe that a person is using the facility for an improper or unlawful purpose, it may take action consistent with its usual policies regarding removing persons who engage in improper conduct, including contacting law enforcement if warranted. *Id.*

Request for Proof of Gender Identity

Only in very limited circumstances is it permissible to request proof of gender identity. AGO Guidance, p. 4; MCAD Guidance, pp. 6-7. If a place of public accommodation, such as a health or sports club, regularly requires documentation of gender for all members, an individual’s gender identity may be documented by presenting “**any one**” of the following:

- (1) a driver’s license or any other government-issued identification;
- (2) a letter from a doctor, therapist or other healthcare provider;

- (3) a letter from a friend, clergy or family member regarding the individual’s routine conduct such as dress, grooming and the use of corresponding pronouns; or;
- (4) any other evidence that the gender identity is sincerely held as a part of the person’s core identity.”

AGO Guidance, p. 4 (emphasis in original); MCAD Guidance, pp. 6-7 (providing additional examples). A place of public accommodation cannot use a request for documentation to harass, intimidate, embarrass or otherwise discriminate. AGO Guidance, p. 4; MCAD Guidance, p. 6.

Best Practices

The Act’s major change is to ensure that places of public accommodations are accessible to all persons, consistent with their gender identity, and that employees of public facilities are properly trained in the Act’s provisions. Most businesses updated their anti-discrimination policies following enactment of the TERA; similar updates are warranted in light of the Act. The following adapts the best practice recommendations in the updated MCAD guidance for places of public accommodation:

- Update employment policies and training materials to include a statement that discrimination and harassment based on gender identity is prohibited;
- Prohibit derogatory comments or jokes about transgender people and promptly investigate and discipline persons who engage in prohibited conduct;
- Update business and personnel records, payroll records, email systems and all other administrative records to reflect the stated name and gender identity of employees, clients and vendors;
- Use appropriate names and pronouns corresponding to each person’s stated gender identification in communications;
- Avoid gender-specific dress codes and permit attire that is consistent with each person’s stated gender identity;
- Develop a written policy concerning procedures for when a person undergoes gender transition and which promotes the confidentiality of the person’s transition; and
- Develop a policy that provides access to any sex-segregated facility consistent with a person’s gender identity and train all staff on the policy.

The Act is not expected to usher in a new round of litigation, in light of the TERA’s prior enactment and the public accommodation law’s liberal construction by courts and the MCAD. *See e.g., Joyce v. Town of Dennis*, 705 F. Supp. 2d 74, 83 (D. Mass. 2010). But, all places of public accommodation should review their policies and procedures to ensure that they are in compliance with the new law.

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Pay Equity in Massachusetts: What Every Lawyer Needs to Know

By David Gabor

Legal Analysis

Two significant changes affecting pay equity are on the horizon for Massachusetts employers. The first is a new Massachusetts law, *An Act to Establish Pay Equity* (the “Act”), effective July 1, 2018. The Act rewrites section 105A of G. L. c.149 (“section 105A”), which prohibits discrimination based on an employee’s sex in the payment of wages. The second change is issuance of a revised Employer Information Report (“EEO-1”), effective March 31, 2018. The EEO-1 is a form that that private employers and federal contractors must file annually with the U.S. Equal Employment Opportunity Commission (“EEOC”) that provides company employment data by job category, race/ethnicity, and gender. The EEOC uses the data to examine employment patterns and assist its enforcement of anti-discrimination laws. Counsel can take a number of steps to prepare clients for the changes embodied in the Act and the revised EEO-1.

I. An Act to Establish Pay Equity

A. Basic Provisions.

Section 105A(c) as revised by the Act contains three basic requirements: (i) employers may not inquire about an applicant’s salary or benefits history before extending an employment offer that contains compensation terms; (ii) employers may not prohibit employees from talking to their co-workers about wages or benefits; and (iii) employers must pay women based on competitive market rates and not salary history. Those changes are premised on the theory that using salary history disadvantages those who have been the victim of past pay discrimination.

Section 105A(b) inserted by the Act provides an exception to the equal pay requirement if there is a legitimate business reason to pay a man more than a woman (e.g., a bona fide seniority system; a bona fide merit system; a bona fide system that measures productivity; geographic location; education, training or experience; or travel). Employers still should consider reviewing their pay systems for gender bias to ensure that exceptions, if applied, are not discriminatory.

Under new section 105A(d), an affirmative defense to claims of pay inequality is available to employers who perform a good faith self-evaluation of their pay practices that is reasonable in detail and scope at least once every three years. The employer must also be able to demonstrate reasonable progress in addressing any disparity identified during a self-evaluation. Corrective action may not, however, include lowering one individual’s salary to correct an identified disparity.

As with most employment statutes, the Act prohibits retaliation against a person who has engaged in a protected activity. Accordingly, employers must protect from retaliation employees who file complaints or participate in an investigation or litigation. Many practitioners believe that retaliation is the easiest form of discrimination to prove because it can often be demonstrated through timing. Retaliation can be established through a “but/for” test to determine whether an adverse action took place under the Act within a close temporal proximity to the protected activity.

B. Steps Clients Should Take.

Lawyers should encourage clients to begin compliance efforts by performing a self-audit to identify any instances of pay disparity. Depending on the results, clients may then revise their policies, processes, and written materials and online applications, and conduct appropriate training prior to the Act's effective date.

Self-audits require a careful review of compensation structures to identify pay disparities between positions that are similar in title or function and which involve "comparable work." An analysis of pay practices should be conducted even if there is no evidence of overt gender bias, because pay structures can unwittingly become misaligned over time.

Clients may need assistance to determine whether any disparity is unlawful, or the product of a legitimate business exception that is objective and reasonable. If a disparity is unlawful, corrective action must be taken promptly. If a legitimate reason for the disparity exists, it should be carefully vetted. A disparity based on merit or productivity should be validated using reliable metrics, and the findings should be carefully documented. An analysis of the business exceptions can not only be used to demonstrate compliance with the Act, but may provide an opportunity to identify and address other potential issues, such as other forms of employment discrimination.

The next challenge for lawyers and clients is determining appropriate corrective actions for pay disparities that do not qualify for legitimate business exceptions. Corrective actions must also demonstrate reasonable progress in eliminating pay inequities, including mechanisms to ensure that disparities do not arise in the future. Solid documentation of corrective action plans and progress in eliminating pay disparity is critical to demonstrating compliance with the Act.

In addition to conducting a self-audit and implementing corrective actions, employers should take prompt steps to review and revise other employment practices such as the recruitment of new employees. Employers can remove requests for salary information from on-line and written applications and instruct recruiters and hiring managers not to request salary information from applicants or during reference checks.

Lawyers should also advise their clients to review all employee materials (e.g., handbooks and manuals, offer letters, etc.) to eliminate language that might discourage employees from talking about pay or benefits with co-workers. Furthermore, these changes should be communicated to employees, and any required notices must be posted when they become available. Documenting such efforts also helps demonstrate good-faith compliance with the Act.

Training employees involved in the onboarding process about what they can and cannot ask during interviews is another critical compliance step. Such training can be coordinated with periodic equal employment opportunity and best practices training, and should be carefully documented.

Lawyers should also be aware that proposed corporate changes, such as a merger or acquisition, may warrant additional review in light of the Act. Suppose, for example, that when pay scales are reviewed prior to a merger, it becomes apparent that men at Company A are paid \$100,000 a year, and for the comparable job, women at Company B are paid \$60,000. The parties involved in the merger must decide if the merger still makes sense taking into consideration corrective actions that may be necessary to eliminate pay disparities. How, for example, will such corrective measures impact the potential profitability of the merger?

By encouraging clients to implement these changes now, lawyers can help ensure that clients are fully aware of the Act and fully compliant before the Act goes into effect.

II. Changes to the EEO-1

A. Summary of Revisions.

The revisions to the EEO-1 are designed to capture detailed data about employees and wages that will enable the EEOC to improve its analysis of, and address, pay disparities based on discrimination against members of protected classes. For example, the revised EEO-1 differentiates ten job categories and seven categories of “race/ethnicity.” Employers might consider using some of the analytical methods recommended above to examine employment practices with respect to protected classes.

The reporting requirements of the revised EEO-1 are extensive. Effective March 31, 2018, employers with 100 or more employees will need to provide summary pay data, including the total number of annual hours that full- and part-time employees work, in each of the twelve pay bands listed for each EEO-1 job category. Employers must also report the aggregate hours worked by all employees in each pay band. For 2018 filings, the 100-employee threshold is met if the employer has 100 or more full- or part-time employees during any pay period between October 1 and December 31, 2017.

Summary pay data required on the revised EEO-1 include the Form W-2 Box 1 earnings for all employees identified in the selected pay period, including employees who no longer work for the company at year’s end. Summary pay data do not include income earned at the end of 2017 but paid in 2018. Employees’ hours counted during a pay period must be reported as an aggregate value for each job category and pay band (i.e., the total hours worked during that year by all employees reported in that job category and pay band). For non-exempt employees, employers must count the actual hours worked. Exempt employees are credited with 40 hours per week for full-time employees or 20 hours per week for part-time employees. Exempt employees’ hours are multiplied by the number of weeks that they were employed during the year.

The filing deadline for the Form EEO-1 has changed from September 30th to March 31st. This change makes it possible to coordinate such mandated reporting with year-end income reporting.

B. Steps Clients Should Take.

Clients required to file the revised EEO-1 form should begin developing processes to collect the required data. Implementing such processes will require careful coordination between the human resources department, the human resource information system, and the payroll department (or payroll vendor). Such processes should be tested well ahead of the compliance date to ensure that information is captured accurately.

Lawyers should promptly begin to assist clients with analysis of the data that will be submitted on the revised EEO-1. Delaying that analysis could limit an employer’s ability to develop, implement, and document necessary corrective actions.

Employers can use 2016 Form W-2’s to create a mock EEO-1. Lawyers and their clients can then review the mock EEO-1 just as the EEOC would: to identify pay disparities that may lead to

an investigation and possibly litigation. To the extent the data suggests that a pay disparity exists, employers can compile evidence to demonstrate the legitimate reason(s) for the pay differential. Such evidence may include records of a seniority system, merit pay, or productivity-based compensation.

Employers should also consider applying some of the steps recommended above for compliance with the Act to an analysis of all protected classes identified on the revised EEO-1. Such an analysis may reveal the need to create new company policies, modify existing policies, provide training to management, and create programs to help develop job skills for employees in protected classes.

III. Conclusion

By encouraging employer clients to take the steps described in this article now, counsel can help ensure that potential issues of pay inequality are identified and corrected prior to the effective date of the changes implemented by the Act and the revised EEO-1. Such steps may also enable employers to identify and remediate other potential claims of discrimination before they become problematic.

David G. Gabor is a partner with The Wagner Law Group, PC. His practice focuses on employment law and human resources matters.

First Court Administrator Reflects on Five Years of ‘Collaborative Partnership’
By Court Administrator Harry Spence
Voice of the Judiciary (Guest Contributor)

In the last three and one-half years, Chief Justice Paula Carey and I have established that collaborative leadership of the Trial Court, a Massachusetts peculiarity, can work. Perhaps more important, the judges and staff of the Massachusetts Trial Court have convincingly demonstrated that they are anxious to modernize the judicial system. The result has been that together we in the Trial Court have accomplished considerable modernization of the system, and have set the stage for even more dramatic progress in coming years. I approach the end of my five-year term as Court Administrator with a great deal of confidence that the Trial Court will continue to improve the delivery of justice in future years, despite the near certainty that the competition for state resources will grow increasingly desperate in the foreseeable future.

It is important to recognize that prior to the reform legislation of 2011, there was little chance that the operations of the Trial Court could improve. Most important, Massachusetts had never granted to the Judicial Branch the most elementary condition of good management: the power to hold employees accountable for their performance. Until 2011, every employee of the Trial Court had lifetime tenure and could only be terminated “for cause”—violation of the law or “moral turpitude,” whatever that might mean. The Trial Court had 8000 employees in 2007 because if an employee performed his or her tasks poorly, the Court’s only option was to hire another employee to do the recalcitrant employee’s work.

In addition, the Massachusetts judicial leadership, unusually among their colleagues nationally, had rarely taken advantage of a statutory provision permitting the hiring of a court administrator. The Massachusetts judiciary had a court administrator, reporting to the Chief Justice for Administration and Management (CJAM), from 1978 to 1992. Since that time, no CJAM had elected to appoint a court administrator. This choice was extremely rare among judicial leadership nationally.

The reform legislation of 2011 profoundly changed all that. The new statute eliminated the “for cause” provision, providing instead that an employee of the Trial Court could be terminated so long as the termination was not “arbitrary or capricious.” Additionally, the hiring of a court administrator was no longer optional with the Trial Court leadership, but became a mandatory appointment of the Supreme Judicial Court. The Court Administrator was to partner with the renamed Chief Justice of the Trial Court in the leadership of the Trial Court.

It was obvious from the outset that the successful implementation of the new governance structure required above all that there be no daylight between the Chief Justice and the Court Administrator. That necessary condition was facilitated by the staggered appointments of the Court Administrator and the Chief Justice. With staggered appointments, the Supreme Judicial Court can confer with whichever of the two is an incumbent on the appointment of his or her partner. This greatly increases the likelihood that the requisite chemistry between the partners will prevail.

In theory, each of the two partners has a clearly defined domain: judicial policy for the Chief Justice and management and administration for the Court Administrator. In reality, of course, the great majority of issues confronting the leadership of the court are a complex tangle of judicial

policy and administration. The opportunities for territorial dispute are legion. Recognizing this, Chief Carey and I resolved upon a flexible joint leadership in almost all matters. In essence, neither of us would make a decision that the other wasn't fully supportive of—a resolve that could prove either liberating or paralyzing. In short order, it became clear that our shared values, our common posture towards risk, and, soon enough, our genuine friendship and pleasure in each other's collegiality assured that the resolve was liberating.

In fact, the relationship between the Chief Justice and the Court Administrator is simply a microcosm of the entire court system: the relationship requires constant negotiation about power and authority. That negotiation, which quickly became easy second nature to the two of us, is symptomatic of the entire system. For the allocation of power and authority in the system is so complex; so riddled with independent, statutory mandates, often held by persons with lifetime tenure; so fraught with vetoes; that progress in the system depends on the ability of its protagonists to deliberately and consistently put mission before ego and power in the thousand microtransactions that move the system. Never have I encountered an organization that requires such maturity and forbearance from so many actors.

And so the relationship between Chief Justice and Court Administrator models exactly the qualities that must be emulated throughout the system. It is the creation of a culture of collaboration and comity that is the primary work of the leadership team. The structure only works if all parties extend trust and respect to all others. For example, when I arrived at the Trial Court, I was struck by the constant reference to the “war between the clerks and the judges.” There is much evidence that the system has put that largely mythical conflict behind it. We need to move beyond all the old myths of internal conflict.

If the court system is to nurture a culture of genuine collaboration, it must constantly emphasize that the effective delivery of justice is a team activity, which requires that every actor in the system carry out his or her assigned task to the best of their abilities. That belief permeates the Judiciary today: the work of the custodian in a courthouse contributes as surely to the dignity of the proceedings as the work of a judge.

Forty thousand people in Massachusetts enter a courthouse every day, coming with their most acute fears, their fondest hopes, their most aggravated controversies, their most profound conflicts. That their thousands of conflicts and controversies get resolved day in and day out with so little crisis or public furor is nothing short of astonishing—and it is an extraordinary credit to our judges, our clerks and their staffs, our Probation Service, our security staff, and innumerable others who operate this system. I retire honored to have served with such persons and confident that they will continue to exercise the moral qualities necessary to the progress already evidenced in the work of the past four years.

Harry Spence, Massachusetts' first Court Administrator, oversees a \$630 million budget, 6,300 court staff and 100 court facilities, in concert with the Trial Court Chief Justice.

The SJC Affirms Expanded Access to Justice in DNA Testing Case
By Michael Ricciuti, Kathleen Parker and Patrick McCooe
Case Focus

On July 29, 2016, the Supreme Judicial Court decided *Commonwealth v. Wade*, 475 Mass. 54 (2016), which defined the reach of the DNA testing statute, General Laws Chapter 278A, enacted in 2012. *Wade* presented two key issues. First, could Wade obtain post-conviction DNA testing under Chapter 278A by demonstrating that the requested scientific/technical analysis had not yet been developed at the time of conviction without also proving the primary reason that DNA testing was not pursued at the time of trial? Second, by filing a request for DNA testing under Chapter 278A, did Wade waive the attorney-client privilege over his communications with trial counsel about DNA testing, thus permitting the judge hearing his Chapter 278A motion to require Wade’s trial lawyer to testify about those privileged communications? The SJC decided both issues in favor of Wade. In doing so, the SJC ensured that Chapter 278A would fulfill the legislature’s purpose of making DNA testing more readily available to those convicted of crimes who assert their innocence.

Background

In 1997, Robert Wade was convicted of felony-murder where the underlying felony was aggravated rape. Wade did not seek DNA testing at the time of trial. When the Legislature enacted Chapter 278A in 2012, Wade promptly filed a motion under the new law (the “278A motion”) seeking post-conviction DNA testing of some physical evidence introduced at his trial.

The Legislature promulgated Chapter 278A “to remedy the injustice of wrongful convictions of factually innocent persons by allowing access to analyses of biological material with newer forensic and scientific techniques.” *Wade*, 475 Mass. at 55. Chapter 278A allows a person who has been convicted of a crime and who claims that he or she is factually innocent of the offense to seek forensic or scientific testing, including DNA testing, of evidence or biological material. To succeed, the movant must show that (1) the requested analysis would be admissible in court, (2) the analysis has the potential to result in evidence material to the person’s identification as the perpetrator of the crime, and (3) the evidence or biological material has not been subjected to the requested analysis on account of one of five grounds outlined in Section 3(b)(5) of Chapter 278A. Those grounds are:

- (i) that the requested analysis had not been developed at the time of the conviction;
- (ii) that the results of the requested analysis were not admissible at the time of the conviction;
- (iii) that the movant and his or her trial attorney were not, and had no reason to be, aware of the existence of the evidence or biological material at the time of the underlying case or conviction;
- (iv) that the movant’s trial attorney was aware of the evidence, the results of the requested analysis were admissible at the time of trial, a reasonably effective attorney would have requested the analysis, and either the movant’s attorney failed to do so or the court denied the request; or

(v) that the evidence or biological material was unavailable at the time of the conviction.

Under Section 7(b) of Chapter 278A, the court “shall” allow the requested analysis if the movant shows, among other things, that DNA testing had not been performed “for any of the reasons” enumerated in Section 3(b)(5).

In an earlier appeal of an order denying Wade’s 278A motion at a preliminary stage of review (*Commonwealth v. Wade*, 467 Mass. 496 (2014)), the SJC concluded that Wade had adduced enough information in the motion to meet the law’s threshold requirements and remanded the case to the trial court for an evidentiary hearing to determine, among other things, whether Wade could establish one of the five Section 3(b)(5) grounds enumerated above. *Wade*, 475 Mass. at 57-58. In the proceedings on remand, which led to the 2016 SJC decision, Wade initially claimed that two of the Section 3(b)(5) grounds entitled him to DNA testing: first, the requested analysis had not been developed at the time of the conviction (the “undeveloped analysis” argument) and, second, Wade’s trial lawyer had not sought DNA testing and a reasonably effective lawyer would have done so (the “reasonably effective attorney” argument).

Before the hearing on remand, the Commonwealth moved for leave to examine Wade's trial counsel on the question of whether a "reasonably effective attorney" would have sought the requested testing at the time of trial. Wade opposed such testimony, asserting his attorney-client privilege. The trial court allowed the Commonwealth's motion. Wade petitioned for relief before a single justice, who determined that examination of Wade's trial counsel could proceed if trial counsel could testify "without revealing attorney-client communications."

At the hearing on the 278A motion, the Commonwealth examined Wade’s trial lawyer. Wade again objected on privilege grounds. When Wade’s privilege objection was overruled, Wade waived his claim under the reasonably effective attorney prong and proceeded solely on the undeveloped analysis argument. Despite Wade’s abandonment of the reasonably effective attorney argument, the Commonwealth questioned Wade’s trial counsel about privileged pre-trial conversations with Wade concerning the reason for not pursuing DNA testing, arguing that even when a movant like Wade seeks relief solely on the undeveloped analysis argument, the “actual reason that the evidence was not tested” must be adduced, which can be done through the questioning of trial counsel. *Wade*, 475 Mass. at 59.

The motion judge agreed with the Commonwealth and required Wade’s trial counsel to reveal the substance of his pre-trial conversations with Wade about the crime and the wisdom of seeking DNA testing. The judge denied Wade’s subsequent motion to strike the privileged testimony and ultimately relied on that testimony, in part, to reject Wade’s request for DNA testing. Even though the motion judge found that Wade was correct that the requested analysis had not been developed at the time of conviction, the court rejected the claim that this was enough to satisfy Section 7(b). Rather, the judge concluded that “the proper inquiry” under Section 7(b) is ““what was the primary “reason,” i.e., the primary cause, why the material was not previously subjected to the requested analysis.”” *Wade*, 475 Mass. at 59 (quoting the trial court). Although the motion judge found that Wade was correct that more sophisticated DNA tests were available in 2014 than were available at the time of trial, he concluded that the absence of such precise testing was not the “primary” reason Wade didn’t request a DNA test at that time.

Instead, despite the fact that Wade had abandoned his argument under the reasonably effective attorney prong, the motion judge concluded that the primary reason DNA testing was not sought at trial was because a reasonably effective attorney would not have sought the requested analysis under the circumstances and, thus, Wade had not satisfied this Section 3(b)(5) factor.

The Appeal

On appeal to the SJC, Wade argued that he had satisfied Chapter 278A's requirements and that the Superior Court had improperly intruded upon his privileged attorney-client communications. The BBA, which had advocated for the statute's passage, agreed and filed an amicus brief in support of these arguments.

As to Chapter 278A, Wade argued that the motion judge misread the statute and that the showing Wade had made – namely, that the requested analysis had not been developed at the time of the conviction – was enough by itself to satisfy the requirements of Section 3(b)(5). The trial judge erred, Wade argued, by requiring Wade to establish the primary cause for not pursuing testing at the time of trial. Because the sole issue was why the evidence had not been subjected to the analysis requested in the 268A motion (which did not exist at the time of trial), Wade argued that it was irrelevant why his counsel did not seek a prior form of DNA testing at the time of trial and whether not seeking such testing was a reasonably effective strategy. Furthermore, Wade had expressly abandoned his reasonably-effective attorney argument, making any inquiry of his trial counsel irrelevant. Wade asserted that the trial court's mistaken reading of Chapter 278A increased the burdens on a person seeking DNA testing under Chapter 278A on an undeveloped analysis claim by requiring a movant to place privileged communications with trial counsel at risk, thereby undercutting the legislative purpose to reduce the barriers to DNA testing. On the issue of privilege, Wade argued that requiring Wade's trial counsel to reveal highly confidential, attorney-client communications was a grave error, as there was no express or implied waiver of the privilege by Wade under the facts of this case and none required under Chapter 278A itself.

The SJC's Decision

The SJC agreed with both of Wade's core arguments.

The SJC found that the Legislature's goal in enacting Chapter 278A was "to remedy the injustice of wrongful convictions of factually innocent persons by allowing access to analyses of biological material with newer forensic and scientific techniques . . . [to] provide a more reliable basis for establishing a factually correct verdict than the evidence available at the time of the original conviction," that Wade's satisfaction of the undeveloped-analysis prong of Section 3(b)(5) alone was enough to merit relief under the statute and that the motion judge erred by requiring Wade to also show that this reason was the primary reason trial counsel did not seek DNA testing. *Wade*, 475 Mass. at 55.

The SJC found that a plain reading of Chapter 278A demonstrated that any one of the reasons enumerated in Section 3(b)(5) sufficed to satisfy the statute, as "[t]he language of the act plainly indicates the Legislature's intent to provide a moving party with a choice among several, distinct reasons advanced by the moving party to explain why the material had not been previously

subjected to the requested testing.” *Wade*, 475 Mass. at 61. As a result, there was no need for Wade to also show what a reasonably effective lawyer would have done.

The SJC also rejected the motion judge’s finding that a movant, in addition to proving one of the Section 3(b)(5) grounds, must also establish the "primary" or "actual" reason testing was not conducted at the time of the original prosecution. It found nothing in the act to suggest that the Legislature sought to impose such a burden on movants. The fact that the now-requested analysis did not exist at the time of Wade’s trial, alone, was enough to support Wade’s request. The SJC also noted that its 2014 *Wade* decision had foreclosed the argument that a party would be precluded from obtaining DNA testing under Chapter 278A if his or her trial counsel made a strategic choice not to seek DNA testing. Because even the reasonably effective attorney inquiry was objective, the actual reason a movant’s trial lawyer did not seek testing was irrelevant the analysis of any of the factors under Section 3(b)(5).

As to the privilege issue, the SJC rejected the Commonwealth’s contention that seeking a DNA test under Chapter 278A necessarily waives a movant’s attorney-client privilege with his or her trial counsel. Certainly, Wade’s reliance on a wholly objective ground – whether the requested DNA analysis existed at the time of his trial – did not put at issue any privileged attorney-client communications. Perhaps more significantly and as noted, the SJC found that even in cases where a party relies on the reasonably-effective-attorney prong, "that inquiry is also objective, and therefore does not require testimony or an affidavit from trial counsel." *Wade*, 475 Mass. at 65. Finally, and regardless of the Section 3(b)(5) prong relied on, the 278A movant is not required to establish the “real” or “primary” reason testing was not sought at the time of trial, and thus it is error to invade the privilege in pursuit of that inquiry. Because Wade had not effected an "at issue" waiver by filing his petition, the SJC concluded that the trial court should have allowed Wade’s motion to strike all privileged communications disclosed by trial counsel.

Conclusion

The SJC’s decision in *Wade* restored the goal of Chapter 278A – to make DNA testing more readily available to convicted persons than it had been. Further, its clear rejection of the claim that filing a 278A motion necessarily waives the attorney-client privilege with trial counsel eliminates a major impediment to convicted persons seeking relief under Chapter 278A and prevents an improper invasion into the privilege.

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Department of Labor Rule Shakes Up Retirement Industry
By Ralph Derbyshire and Jay Haines
Heads Up

The Department of Labor is amending a longstanding Employee Retirement Income Security Act (ERISA) regulation that defines fiduciary “investment advice.” Barring postponement by the new administration, the new rule will generally become effective on April 10, 2017, and will dramatically affect financial advisors and other service providers who provide assistance to ERISA plan sponsors, plan participants, and IRA customers with their investment decisions.

Expanding the Definition of “Investment Advice”

The rule, 29 C.F.R. § 2510.3-21, greatly expands the range of activities that constitute fiduciary investment advice under ERISA. Today, fiduciary duties attach to investment advice if the advice provider and the advice recipient have a mutual understanding that the advice “will serve as a primary basis for investment decisions.” The new rule eliminates this concept of “reliance” and instead treats as fiduciary investment advice any “communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action.” In addition, the new rule covers not only recommendations to buy and sell, but also recommendations about whether to hold a security or other property, take a distribution or rollover, manage assets or select an investment manager, and use a brokerage or fee-based advisory account.

These changes are important for two reasons. First, fiduciaries are subject to a “best interest of the investor” standard of care. A fiduciary must therefore make recommendations with the care, skill, diligence and prudence that a person experienced in such matters would use taking into account the investment objectives, risk tolerance, financial circumstances and needs of the investor. A fiduciary must also make recommendations without regard to the financial interests of the advice provider. Because the new rule’s broad definition of a “recommendation” potentially encompasses routine sales activity, it creates a major disruption for traditional commission-based advisors such as broker-dealers and insurance agents.

Second, fiduciaries are subject to ERISA’s prohibited-transaction rules, which apply to both employee benefit plans and IRAs. This means that a fiduciary may not provide investment advice if it would cause the fiduciary’s compensation to vary, unless a prohibited transaction exemption applies. In other words, an advisor who receives commissions—as well as any other provider compensated through a plan’s investments who might provide advice under the new definition, such as plan recordkeepers or third-party administrators—must either comply with an exemption or avoid providing fiduciary advice in the first place. Even an advisor who charges a flat fee must be careful when marketing its own advice services to a prospective customer, because its compensation will vary based on whether or not the customer hires it.

Dealing with the New Definition

The rule provides a few tools to navigate these new waters. The most prominent of these is a new, broad-based prohibited transaction exemption called the “Best Interest Contract,” or “BIC,” exemption. The BIC exemption is available for fiduciary advice to IRA customers, plan participants, and plan fiduciaries who hold, manage or control less than \$50 million in plan and

non-plan assets. The BIC exemption's conditions are extensive, but it principally requires that the advice be provided pursuant to an enforceable obligation to act in the retirement investor's best interest, either under ERISA or under a private contract with an IRA owner. Streamlined requirements apply where the advisor's and its affiliates' compensation is a fixed percentage of the advised assets or a set fee that does not vary with the investments recommended.

The rule also identifies a number of circumstances that, despite the rule's otherwise broad scope, will not be considered fiduciary advice. For example, the rule outlines specific types of investment education that are not considered advice. Other carve-outs exist for marketing investment platforms, making general communications to the public, certain communications among employees of an employer sponsoring a plan, and recommendations to plan fiduciaries who hold, manage or control at least \$50 million in plan and non-plan assets and who are capable of independently evaluating investment risks and recommendations. All of these carve-outs are subject to certain conditions and, in many cases, subject to certain disclosures to the recipient.

Consequences to Investors, Plan Sponsors and the Industry

Although the rule is intended to benefit retirement investors, it is likely to prove disruptive to the retirement industry. For example, the rule will now subject account rollover recommendations to a fiduciary standard, so many expect rollovers to IRAs to decline and the proportion of assets remaining in 401(k) and other employer plans to increase.

The rule will also likely increase the use of low-cost investments that have minimal or no 12b-1 fees or revenue-sharing associated with them. Thus, an increasing proportion of retirement assets will likely be invested in collective investment trusts, index funds, and low- or no-revenue-sharing share classes of mutual funds. By the same token, high-cost and high-revenue-sharing investments, as well as proprietary investments of an advice provider, will likely receive a smaller share of retirement assets. Other products such as variable annuities may also diminish in popularity as the rule subjects them to increased requirements under the BIC exemption.

Pricing for advice services to retirement customers will also likely shift from variable or commission-based arrangements to fixed-fee-based arrangements. This is because variable compensation would trigger the need to comply with the BIC or another prohibited-transaction exemption, or will limit the advice provider to communications that fit within a carve-out under the rule. Registered investment advisors, who generally employ fixed-fee arrangements today, will likely be less affected than broker-dealers and other commission-based service providers. Similarly, fee-based managed account products, including so-called "robo-advisors," should see a boost in sales.

Plan sponsors will also need to consider how the new advice landscape may affect them. Many plan sponsors will need to determine whether and how to prudently select and monitor an advice provider both for recommendations on the plan lineup and for recommendations to plan participants. Sponsors may also need to evaluate the current plan lineups in light of the new rule and potentially change compensation arrangements with service providers. IRA owners may be faced with similar issues.

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Applying the Exclusionary Rule in the Face of Changing Law

By Eric Haskell

Legal Analysis

Massachusetts courts applying the state Constitution have declined to adopt wholesale the federally created “good faith” exception to the exclusionary rule, instead crafting their own approach to exclusionary rule exceptions. This article identifies one application of the federal “good faith” exception that is in harmony with Massachusetts’ approach: where a search complied with then-existing law when it was undertaken but, before the validity of the search is litigated, the law changes in a way that would retroactively make the search unlawful.

Although no Massachusetts court has definitively spoken to this issue, the question is likely to arise soon. This is because, as personal-communications and information technology continues to develop, courts are issuing decisions that change what had previously been the settled understanding of search-and-seizure law. Compare **18 U.S.C. § 2703(d)** (1986) (unless barred by state law, police may obtain order for non-content records concerning electronic communications if records are “relevant and material to an ongoing criminal investigation”) with ***Commonwealth v. Augustine*, 467 Mass. 230 (2014)** (*Augustine I*) (police must obtain warrant supported by probable cause to obtain certain cellular tower location records even though “neither the statute, 18 U.S.C. § 2703(d), nor our cases have previously suggested that police must obtain a search warrant”); compare ***Commonwealth v. Phifer*, 463 Mass. 790 (2012)** (permitting warrantless search of arrestee’s cellular telephone) with ***Riley v. California*, — U.S. —, 134 S. Ct. 2473 (2014)** (requiring warrant to search arrestee’s cellular telephone). Each such decision results in a class of searches that were valid when undertaken, but would be deemed invalid under the new law.

The Limits of the Exclusionary Remedy, the Federal “Good Faith” Exception, and Massachusetts’ Approach to Exclusionary Rule Exceptions

Both the federal and Massachusetts Constitutions prohibit unreasonable searches and seizures, but neither prescribes a remedy for one. See generally **U.S. Const. amend. IV**; **Mass. Const. pt. 1, art. XIV**. So, both federal and Massachusetts courts have developed the “exclusionary rule,” which provides generally that unlawfully obtained evidence must be suppressed from use in a criminal case.

Application of the exclusionary rule, however, comes at a cost: “It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence . . . [a]nd its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment.” ***Davis v. United States*, 564 U.S. 229, 237 (2011)**; ***People v. Defore*, 242 N.Y. 13, 21 (1926)** (Cardozo, C.J.) (famously questioning whether “[t]he criminal is to go free because the constable has blundered”). For that reason, both federal and Massachusetts courts have insisted that the exclusionary rule be applied only if the benefits of suppression outweigh the costs. E.g., ***Herring v. United States*, 555 U.S. 135, 140-141 (2009)**; ***Commonwealth v. Santiago*, 470 Mass. 574, 578 (2015)**.

Under federal law, this weighing of costs and benefits led to the development of the “good faith” exception, beginning with ***United States v. Leon*, 468 U.S. 897 (1984)**. In *Leon*, police executed

a search warrant that had been approved by a state court judge but, in the ensuing federal prosecution, the federal court held that the warrant was not supported by probable cause. The Supreme Court concluded that suppression was inappropriate because the officers executing the warrant had an objectively reasonable good-faith belief that the search was lawful. The Court reasoned that the only legitimate purpose of the exclusionary rule is to deter police from committing future unlawful searches, and that “[p]enalizing the officer for the magistrate’s error . . . cannot logically contribute to the deterrence of Fourth Amendment violations.” *Id.* at 921.

Massachusetts courts applying the state Constitution have declined to adopt *Leon*. See, e.g., *Commonwealth v. Valerio*, 449 Mass. 562, 568-569 (2007); *Commonwealth v. Pellegrini*, 405 Mass. 86, 91 n.6 (1990).¹ Moreover, in contrast with *Leon*, Massachusetts courts have defined the permissible purposes of the exclusionary rule more broadly than the U.S. Supreme Court has done. The Massachusetts exclusionary rule, like its federal counterpart, rests on a “foundation” and “primary purpose” of deterring future police misconduct. *Santiago*, 470 Mass. at 578; *Commonwealth v. Wilkerson*, 436 Mass. 137, 142 (2002). But Massachusetts law identifies a second purpose of the Massachusetts exclusionary rule that does not appear in federal doctrine: to “preserve judicial integrity by dissociating courts from unlawful conduct.” *Commonwealth v. Nelson*, 460 Mass. 564, 570-571 (2011); *Commonwealth v. Gomes*, 408 Mass. 43, 46 (1990) (applicability of exclusionary rule affected by extent to which violation undermines governing rule of law); *Commonwealth v. Perez*, 87 Mass. App. Ct. 278, 283 (2015) (same). Accordingly, the logic and reach of the federal “good faith” exception is different from Massachusetts’ approach to exclusionary rule exceptions.

Application of the Exclusionary Rule When a Search Complied with Then-Existing Law that Is Later Overturned

In the federal system, it was only a small step to extend *Leon*’s logic to a search that complied with then-existing law when it was undertaken, but that would retroactively be deemed unlawful based on a subsequent change in the law (either by statutory amendment or judicial decision). See *Illinois v. Krull*, 480 U.S. 340 (1987) (no suppression where warrantless administrative search was authorized by state statute, even though statute was later found unconstitutional); *Davis v. United States*, 564 U.S. 229 (2011) (no suppression where warrantless automobile search was authorized by Supreme Court precedent, even though that precedent was later overruled). In those decisions, the Supreme Court framed the issue as one of “good faith” under *Leon*. It also noted that the retroactivity of the new law does not mandate exclusion because retroactivity concerns whether a constitutional violation has occurred—not the remedy for any such violation. See *Davis*, 564 U.S. at 243-244 (“[T]he retroactive application of a new rule of substantive Fourth Amendment law *raises* the question whether a suppression remedy applies; it does not answer that question.”) (emphasis in original).

Massachusetts appellate courts have twice encountered such a situation, with equivocal results.

In *Commonwealth v. Miller*, 78 Mass. App. Ct. 860, 864-865 (2011), the Massachusetts Appeals Court, in dicta, explicitly endorsed an exception to the exclusionary rule where police officers comply with then-existing law. There, a State Trooper made a traffic stop because the words “Spirit of America” on the defendant’s license plate were obscured, a circumstance the Trooper believed to be prohibited by a Registry of Motor Vehicles regulation. The defendant

sought to suppress evidence obtained in the ensuing encounter, arguing that the regulation was invalid because it exceeded the scope of the RMV's rulemaking authority under the relevant statute and thus could not be used to justify the stop. The Appeals Court first observed that, even if the regulation were deemed invalid, the fruits of the stop would nevertheless be admissible: "[W]hen a police officer objectively and reasonably relies on an act of another government body (such as a legislative enactment or agency records) and the actions of that government body are later determined to be incorrect or invalid, evidence obtained by the otherwise proper actions of the police need not be suppressed." *Id.* at 864-865. The court went on, though, to determine that the defendant had not violated the regulation, and accordingly found the traffic stop to have been unjustified.

On the other hand, in *Augustine I*, **467 Mass. at 254**, the SJC implicitly rejected an exception where police officers comply with then-existing law. There, the court held for the first time that a search warrant was required to obtain certain cellular tower location records, notwithstanding that a federal statute (with which the police had complied in their investigation) required a lesser showing. The SJC remanded the case for determination whether probable cause to support a warrant would have existed, observing that suppression "should be allowed" if probable cause were lacking. *Id.* at 256.² The court made that observation, however, without analyzing or articulating a holding as to the applicability of the exclusionary rule, even though that issue had been briefed by the parties.

How will the Massachusetts appellate courts rule in a case that squarely presents the issue of whether the exclusionary rule applies when a search complied with then-existing law, even if that search would retroactively be deemed unlawful? This author believes that Massachusetts' broad view of the purposes of the exclusionary rule supports an exception where police officers comply with then-existing law.

Deterrence of future police misconduct—the exclusionary rule's primary purpose under Massachusetts law and sole purpose under federal law—does not support suppression of evidence obtained through a search that complied with then-existing law, even if later changes would retroactively make the search unlawful. *See, e.g., Davis*, 564 U.S. at 241 ("About all that exclusion would deter in this case is conscientious police work."); *Wilkerson*, 436 Mass. at 142 (where officer "did nothing wrong, there is no unlawful conduct for exclusion of the evidence to deter"). But, while a lack of deterrent value may be *necessary* to support an exception to the exclusionary rule, it is not *sufficient* under Massachusetts law. It can be said with equal force that suppression of the fruits of a *Leon*-type search (i.e., one authorized by a facially valid, but actually insufficient, warrant) serves no deterrent purpose—yet the Massachusetts courts have declined to apply an exception for a *Leon*-type search. So a lack of deterrent value cannot alone be determinative.

Massachusetts law, unlike federal law, recognizes a second purpose of the exclusionary rule: the interest in dissociating the courts from unlawful conduct and not undermining the governing rule of law. This second purpose supports suppression of a *Leon*-type search authorized by a facially valid (but actually insufficient) warrant: No law authorizes such a search and, when the warrant is reviewed through adversarial litigation, it will be deemed contrary to governing law.

This second purpose, however, does not support suppression where a search complied with then-existing law. As the SJC has previously observed, it does no violence to judicial integrity to

admit evidence that was “properly obtained” under the law that governed the search. *See Commonwealth v. Brown*, **456 Mass. 708, 715 (2010)** (“judicial integrity . . . is hardly threatened when evidence properly obtained under Federal law, in a federally run investigation, is admitted as evidence in State courts,” even though that evidence was obtained in manner that would have been impermissible under Massachusetts law). To the contrary, it may well harm the governing rule of law and diminish public confidence in the justice system to exclude such evidence based solely on the fortuitous timing of an intervening change in the law.

Thus, even though the federal rubric of “good faith” is inapposite for the reasons described earlier, this author believes that Massachusetts’ approach to the exclusionary rule independently supports an exception where police officers comply with then-existing law, regardless of subsequent changes to the law.

¹ In some cases involving arrests wrongly made on the basis of mistaken information chargeable solely to the police, Massachusetts courts have inquired into whether the search-and-seizure violation is “substantial and prejudicial” in determining whether to suppress evidence seized in the encounter. *See generally Commonwealth v. Maingrette*, **86 Mass. App. Ct. 691, 697-698 (2014)** and cases cited therein. Application of this test, however, appears to be limited to such cases. *Id.*

² On remand, a Superior Court judge found that there was no probable cause and ordered suppression of the records. On the Commonwealth’s interlocutory appeal from that order, the SJC reversed the finding of no probable cause. *Commonwealth v. Augustine*, **472 Mass. 448 (2015)**(*Augustine II*).

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The Defend Trade Secrets Act of 2016 and Its Coexistence with Massachusetts Law
By Stephen Y. Chow
Legal Analysis

The Defend Trade Secrets Act of 2016 (“DTSA”) creates a federal private right of action for misappropriation of trade secrets — hitherto the province of state unfair competition law. It now provides original federal court jurisdiction for these questions, as for infringement of other “intellectual property” such as patents, copyrights and federally-registered trademarks. However, the jurisdiction is not exclusive, and the DTSA does not preempt state trade secret law, raising questions about the coexistence of the DTSA and Massachusetts law governing trade secrets. This Article explains salient aspects of the DTSA and differences from Massachusetts law that may be considered in asserting either or both.

I. Highlights of the DTSA

The DTSA has four important aspects:

- The DTSA allows “owners” to sue for “misappropriation”¹ of “trade secrets” that are “related to a product or service used in, or intended for use in, interstate or foreign commerce.” 18 U.S.C. § 1836(b)(1). For purposes of the DTSA, a trade secret is “all forms and types of financial, business, scientific, technical, economic, or engineering information . . . if—(A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.” 18 U.S.C. § 1839(3).
- Courts may issue *ex parte* orders of “the seizure of property necessary to prevent the propagation or dissemination of the trade secret.” 18 U.S.C. § 1836(b)(2).
- Courts may issue injunctions to prevent “actual or threatened misappropriation,” provided that the order does not:

“(I) prevent a person from entering into an employment relationship, and . . . conditions placed on such employment shall be based on evidence of threatened misappropriation and not merely on the information the person knows; or

“(II) otherwise conflict with an applicable State law prohibiting restraints on the practice of a lawful profession, trade, or business.” 18 U.S.C. § 1836(b)(3)(A)(i).

- “Whistleblowers” are given immunity from federal or state trade secret suits for confidential disclosures made to government or the courts “solely for the purpose of reporting or investigating a suspected violation of law,” without otherwise preempting existing state law remedies for misappropriation of trade secrets. 18 U.S.C. §§ 1833, 1838.

II. What Is “Misappropriation” of “Trade Secrets”?

Massachusetts has not enacted the UTSA (enacted by 47 other states), which is the basis for the DTSA’s definition of “misappropriation” (*see* note 1). Instead, M.G.L. c. 93, § 42, provides:

Whoever embezzles, steals or unlawfully takes, carries away, conceals, or copies, or by fraud or by deception obtains, from any person or corporation, with intent to convert to his own use, any trade secret, regardless of value, shall be liable in tort. . . .

(Emphasis added.) “Trade secret” is defined in M.G.L. c. 266, § 30(4), as

anything tangible or intangible or electronically kept or stored, which constitutes, represents, evidences or records a secret scientific, technical, merchandising, production or management information, design, process, procedure, formula, invention or improvement.

(Emphasis added.)

In the decade following enactment of those provisions, the Supreme Judicial Court embraced Section 757 of the 1939 Restatement of Torts and its principles for defining “trade secrets” in its comment *b*. Today, Massachusetts courts apply Section 757 as equivalent to those two statutory provisions.²

Massachusetts federal district courts have tested for trade secret “misappropriation” by asking if the defendant “used improper means, in breach of a confidential relationship, to acquire and use that trade secret.”³ However, as shown in the following table setting forth its text and that of the DTSA for comparison (emphases added), Section 757 recognizes some misappropriations that do not require acquisition by improper means.⁴ The DTSA adds a distinct misappropriation of acquisition by “improper means” **without** requiring “use.”

1939 Restatement § 757	DTSA, as codified in 18 U.S.C. § 1839(3)
	the term ‘misappropriation’ means— (A) <u>acquisition</u> of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; <u>or</u>
One who <u>discloses or uses</u> another’s trade secret, without a privilege to do so, is liable to the other <u>if</u>	(B) <u>disclosure or use</u> of a trade secret of another without express or implied consent by a person who—
(a) he discovered the secret by <u>improper means, or</u>	(i) used <u>improper means</u> to acquire knowledge of the trade secret;
	(ii) at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was—
(b) his <u>disclosure or use constitutes a breach of confidence</u> reposed in him by	(II) acquired under circumstances giving rise to a <u>duty to maintain</u> the <u>secrecy</u> of the trade

<p>the other in disclosing the secret to him, or</p>	<p>secret <u>or limit</u> the <u>use</u> of the trade secret; or</p>
<p>(c) he learned the secret from a third person with notice of the facts that it was a secret and that the third person discovered it by <u>improper means</u> <u>or</u> that the third person’s disclosure of it was otherwise a <u>breach of his duty</u> to the other, or</p>	<p>(I) derived from or through a person who had used <u>improper means</u> to acquire the trade secret;</p> <p>(III) derived from or through a person who owed a <u>duty</u> to the person seeking relief to <u>maintain the secrecy</u> of the trade secret <u>or limit</u> the <u>use</u> of the trade secret; or</p>
<p>(d) he learned the secret with <u>notice</u> of the facts that it was a <u>secret</u> and that its disclosure was made to him by <u>mistake</u>.</p>	<p>(iii) before a material change of the position of the person, knew or had reason to know that—</p> <p>(I) the trade secret was a trade <u>secret</u>; and</p> <p>(II) knowledge of the trade secret had been acquired by accident or <u>mistake</u>;</p>
<p>1939 Restatement § 757 cmt. B</p>	<p>DTSA, as codified in 18 U.S.C. § 1839(3)</p>
<p>A trade secret may consist of any formula, pattern, device or compilation of information <u>which is used in one’s business</u>, and which gives him an <u>opportunity to obtain an advantage over competitors who do not know or use it</u>. . . . [I]t is not simply information as to single or ephemeral events in the conduct of the business. . . . A trade secret <u>is a process or device for continuous use</u> in the operation of the business. . . . Some factors to be considered in determining whether given information is one’s trade secret are: . . .</p> <p>(5) the amount of <u>effort or money</u> expended by him in developing the information;</p>	<p>the term “trade secret” means all forms and types of <u>financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if—</u></p>
<p>(3) the extent of <u>measures</u> taken by him to guard the secrecy of the information;</p>	<p>(A) the owner thereof has taken <u>reasonable measures to keep</u> such information <u>secret</u>; and</p>

(1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; . . . (4) the value of the information to him and to his competitors; . . . and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others

(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information

As the table above shows the DTSA does not maintain a continuous-use requirement.⁵ (Some Massachusetts decisions have applied that requirement of continuous use to dismiss misappropriation claims that did not allege current use by the plaintiff, even where the plaintiff alleged it had been put out of business by the misappropriation.⁶) Notwithstanding that difference, both comment *b* and the DTSA focus on reasonable protection of non-public information of economic value.

The DTSA, more clearly than Massachusetts law, protects information that is not currently used by the “owner,” as well as information acquired by improper means, but not currently used by the defendant.

III. Remedies for Misappropriation

Another significant difference between Massachusetts trade secret law and the DTSA is the remedies that are available.

Under Massachusetts law, a trade secret plaintiff may recover its direct damages (primarily lost profits) — potentially doubled under M.G.L. c. 93, § 42 — but not restitution (value to the defendant) or reasonable royalties (unless lost profits cannot be shown).⁷ It is uncertain if injunctions may be granted against inchoate use of trade secrets. (*See* note 3.)

In contrast, under federal law, a trade secret plaintiff may now recover in more ways than under Massachusetts law:

First, it may recover a non-duplicative combination of direct damages and unjust enrichment (restitution) or, alternatively, reasonable royalties. *See* 18 U.S.C. § 1836(b). Any of those remedies may be trebled, and the court may award attorney’s fees as well.

Second, it can get an injunction. Under the DTSA, except for employee protection, a court may enter an injunction “to prevent any actual or threatened misappropriation.” 18 U.S.C. § 1836(b)(3).

Third, it can get *ex parte* seizure of the misappropriated property. For this remedy, found in 18 U.S.C. § 1836(b)(2), a plaintiff must produce a verified application, among other things, specifying the property and its location and showing why other procedures (such as an *ex parte* temporary restraining order under Fed. R. Civ. P. 65) are inadequate. *Ex parte* seizure under section 1836(b)(2) is permitted “only in extraordinary circumstances” and only after the court considers protections for third parties and the target party, including a post-seizure hearing

and wrongful seizure remedies. As such, it seems unlikely that the provision will be applied often.

IV. Employee Protection

The DTSA includes two significant protections for employees, who make up a large proportion of the defendants in trade secret cases (*see* note 4).

First, “to protect employee mobility,” the limitations quoted in section 1 prevent DTSA injunctions from (1) applying the “inevitable disclosure doctrine” (which bases a noncompetition injunction on the notion that a former employee will “inevitably” misuse his or her former employer’s trade secrets in new competitive position benefiting from those secrets) or (2) interfering with state laws limiting the enforceability of non-competition agreements and similar limits on employment (such as California’s broad prohibition on noncompetition agreements).⁸ Massachusetts courts are divided on the applicability of the inevitable disclosure doctrine.⁹ Concurrent assertion of the DTSA, which clearly rejects the doctrine, should not affect application under Massachusetts law, except perhaps tipping against such application by focusing on definitions of “trade secrets” that do not clearly include mental information that might be inevitably used,¹⁰ compared to the broader definition at UTSA § 1(4).

Second, whistleblowers received immunity for disclosures to the government of “a suspected violation of law.” Title 18 U.S.C. § 1833(b)(3)-(4) requires “notice of the immunity [be given] . . . in any contract or agreement with an employee that governs the use of a trade secret or other confidential information,” including “any individual performing work as a contractor or consultant for an employer.” If that notice is not given, the employer cannot receive treble damages or attorney’s fees in a DTSA action. Employers should therefore provide the notice, even if by cross-reference to a policy document (which federal law permits).

V. Conclusion

The DTSA does not alter how to protect proprietary information in Massachusetts — reasonable measures are still required — but, importantly, does provide clearer protection for proprietary information not currently used and against threatened wrongful use. It also provides the possibility of *ex parte* seizure and greater potential in damages.

Moreover, with a broad jurisdictional grant without a threshold amount, claims under the DTSA provide easy access to federal court and the broad interstate discovery in federal-court proceedings. Claims under the DTSA may also be asserted in state court, but some of the federal-court procedures, such as *ex parte* seizure, may require adaptation.

¹ The DTSA definition of “misappropriation” drew from the definition used in the 1979/85 Uniform Trade Secrets Act (“UTSA”), available at http://www.uniformlaws.org/shared/docs/trade%20secrets/utsa_final_85.pdf (visited Jan. 10, 2017). Compare 18 U.S.C. § 1839(5), with UTSA § 1(2) (“misappropriation”); compare also 18 U.S.C. § 1839(6), with UTSA § 1(1) (“improper means”). However, the DTSA term is applied to a “trade secret” and “owner” as defined by the Economic Espionage Act of 1996, 18 U.S.C § 1839(3) and (4), which are more consonant with the criminal targets of that statute, *id.* §§ 1831 and 1832, than with the civil unfair competition targets of the UTSA (which eschewed the concept of an “owner” and applies to more general “information” than the EEA “types”).

² E.g., *Jet Spray Cooler, Inc. v. Crampton*, 361 Mass. 835, 840 (1972) (citing Restatement (First) of Torts § 757 cmt. b (Am. Law Inst. 1939)). See *Incase Inc. v. Timex Corp.*, 488 F.3d 46, 52 n.10 (1st Cir. 2007) (“The statutory and common-law claims may be essentially equivalent.”).

³ E.g., *Infinity Fluids, Corp. v. General Dynamics Land Sys.*, 2016 U.S. Dist. LEXIS 134613 at *26 (D. Mass. 2016). Massachusetts cases are split on whether actual, current “use” is required for misappropriation; the Supreme Judicial Court has declined to address the issue. See *Lightlab Imaging, Inc. v. Axsun Tech., Inc.*, 469 Mass. 181, 186-87 (2014),

⁴ Most trade secret cases involve “breach of confidential relationship,” where information is properly acquired by employees or business associates, but its use allegedly exceeds limits permitted by the relationship. See Almeling, et al., *A Statistical Analysis of Trade Secret Litigation in State Courts*, 46 Gonz. L. Rev. 57 (2010).

⁵ The UTSA (which, again, Massachusetts has not enacted) also lacks a continuous-use requirement. A comment to the UTSA explains that such a requirement “extends protection to a plaintiff who has not yet had an opportunity or acquired the means to put a trade secret to use.” UTSA § 1(4), cmt.

⁶ E.g., *Portfolioscope, Inc. v. I-Flex Solutions Ltd.*, 473 F. Supp. 2d 252, 255 n.6 (D. Mass. 2007).

⁷ *Jet Spray Cooler*, note 2 *supra*; *Curtiss-Wright Corp. v. Edel-Brown Tool & Die Co.*, 381 Mass. 1 (1980).

⁸ Cal. Bus. & Prof. Code § 16600.

⁹ *Compare Safety-Kleen Sys., Inc. v. McGinn*, 233 F. Supp. 2d 121, 125 (D. Mass. 2002) (inapplicable as threatened use), with *U.S. Elec. Serv., Inc. v. Schmidt*, 2012 U.S. Dist. LEXIS 84272 (D. Mass. 2012) (applicable for irreparable injury, not likelihood of success), with *Corporate Tech., Inc. v. Harnett*, 943 F. Supp. 2d 233 (D. Mass. 2013) (applicable for likelihood of success).

¹⁰ Consider the theft-and-conversion language of Chapter 93, Section 42 and the EEA crimes against “owners” (note 1 *supra*). Can one “own” what is in another’s memory, experience and skills?

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