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The Introduction of Attorney-Conducted Voir Dire in Massachusetts

by Mark D. Smith

Heads Up

Last year, the Massachusetts Legislature enacted General Laws chapter 254, §2, permitting attorneys (and self-represented parties) in Superior Court criminal and civil cases to examine prospective jurors. The Supreme Judicial Court subsequently created the Committee on Juror Voir Dire composed of judges, court officials, academics, and practitioners to help implement the new statute.

The Committee's efforts led to two important initiatives: **Superior Court Standing Order 1-15**, an interim order setting forth the procedures for attorney-conducted voir dire in the Superior Courts, and, in conjunction with the Superior Court, the creation of the **Panel Voir Dire Pilot Project**, which will provide the opportunity to conduct group or "panel" voir dire in selected Superior Courts.

The Standing Order now guides the process for all attorney-conducted voir dire in the Superior Courts. For now, it will be up to the discretion of each individual Superior Court Justice whether to permit attorney-conducted voir dire, except in the case of Superior Court Justices who have volunteered to participate in the Pilot Project, where the right to attorney-conducted voir dire will be automatic.

The Standing Order

An attorney who wants to examine prospective jurors must first file a motion requesting leave to do so. In civil cases, the motion must follow the procedures of Superior Court Rule 9A. In criminal cases, the motion must be served on all parties at least one week before filing and the opposition shall be filed with the court not later than two business days before the scheduled date of the final pre-trial conference. The motion shall identify generally the topics of the questions which the moving party proposes to ask prospective jurors, though reasonable follow-up questions will be permitted. The trial judge decides what questions are appropriate, but must give due regard to: (a) selecting jurors who will decide the case fairly and based solely on the evidence and the law; (b) conducting the selection process with reasonable expedition: and (c) respecting the dignity and privacy of each potential juror.

Generally, a court should approve questions that: (a) seek factual information about a prospective juror's background and experience pertinent to the issues expected to arise in the case; (b) elicit pertinent preconceptions or biases; and (c) inquire about the prospective jurors' willingness and ability to accept and apply pertinent legal principles.

A court should generally disapprove questions that: (a) duplicate questions appearing on the juror questionnaire; (b) seek information about a potential juror's political views or voting pattern; (c) ask about the outcome of or deliberation in any trial in which the prospective juror has previously served; or (d) purport to instruct jurors on the law, require speculation about facts or law, are argumentative or would tend to embarrass or offend jurors, or unduly invade their privacy.

As in prior practice, before any jurors are questioned, the trial judge shall provide the venire with a brief description of the case, including the facts alleged and the claims or charges being brought, as well as brief preliminary instructions on legally significant principles such as the standard of proof and the basic elements of the civil claims or criminal charges. The judge then shall proceed to ask all questions required by statute, and any other questions necessary to find jurors indifferent. As with prior practice, the judge may ask these questions of the venire as a group but should conduct at least part of the questioning of each prospective juror individually outside the presence or hearing of other jurors.

After the judge has found an individual juror indifferent and able to serve, the judge shall permit the attorneys to ask the previously approved line of questions. The questioning shall begin with the party having the burden of proof. The judge may require the questioning of each prospective juror to be conducted individually and outside the presence (or at least the hearing) of the other potential jurors.

Perhaps the most significant provision of the interim order is that it allows counsel to question jurors as a panel during voir dire. In such group questioning, the judge shall not permit questions that would elicit sensitive, personal information about an individual juror or that would specifically reference information provided in the jurors' statutory confidential jury questionnaire (such information is required to be kept confidential under Chapter 234A, §23 and so may only be elicited outside of the presence or hearing of the other members of the jury pool). If this procedure is followed, jurors shall be identified on the record by juror number only.

The trial judge may set a reasonable time limit for questioning of prospective jurors by attorneys, according to guidelines set forth in the interim order. Once the attorneys are through questioning, the parties may assert challenges for cause, even though the judge previously found the challenged jurors indifferent.

The Panel Voir Dire Pilot Project

To facilitate the introduction of so-called "panel voir dire," a subcommittee of the Committee on Jury Voir Dire and the Superior Court created a Pilot Project in which certain Superior Court Justices have

volunteered to conduct panel voir dire according to the principles established in the Standing Order. (The list of participating Courts can be found on the **Trial Court website**.) The Pilot Project will gather data on attorney-conducted voir dire to evaluate the efficacy of this selection process. Upon the completion of the Pilot Project, the Committee will issue a report on its findings, including suggested changes to the Interim Standing Order.

In Pilot Project courts, parties must still make a request for attorney-conducted voir dire in compliance with Standing Order 1-15. In cases where the parties are represented by counsel, jury selection in the Pilot Project shall include panel voir dire except for good cause shown. At the final pretrial conference, the judge shall confer with counsel as to the mechanics of the panel voir dire process, including the use of a supplemental jury questionnaire and the establishment of time limits on questioning.

At trial, once the preliminary steps in jury selection are completed, the court should seat up to 16 jurors based on the judge's preliminary findings of indifference. As the jury box is filled, and before any attorney questioning is allowed, the clerk shall read into the record which juror, identified by juror number, is seated in which numbered seat. It is incumbent upon the trial attorneys to correct any misstatements regarding any potential juror's number and seating. Also, as in prior practice, it is important for attorneys to keep track of this designation as they must address potential jurors by their identification number rather than by name.

Parties with the burden of proof shall conduct the questioning first. In cases in which multiple parties are on the same side, the parties on each side shall agree to an order in which to proceed. The questions may be posed by counsel to the entire jury panel or to an individual juror. An attorney is free to object to any question posed to the jury panel by an opposing attorney, and the court may openly rule on the objection.

During this process, the nature of a proposed question or the particular circumstances of an individual juror may warrant bringing a juror to side bar. The judge may rule on any challenge or cause at that time or at the conclusion of the panel questioning. Furthermore, if the juror is brought to side bar, the judge may direct the parties to do their own questioning on the same subject matter at that time to avoid the need to return to side bar for related questioning. No follow-up questioning of a panel is allowed once an attorney has had his or her turn with questioning an individual juror except in the judge's discretion and for good cause shown.

After all parties have questioned a panel, challenges for cause shall be heard and ruled upon at side bar. The parties then exercise any preemptory challenges they have as to the remaining panel members. Again, the party with the burden proceeds first, using all preemptory challenges the party seeks to use with that panel. If the first round of questioning of jurors does not result in a full panel, the same procedure shall apply for all subsequent panels required to seat a full jury.

The Superior Court will solicit feedback from participants in the Pilot Project, including judges, court personnel, attorneys, and jurors. It is expected that this feedback will be used to evaluate attorney-conducted voir dire and modify Standing Order 1-15 as appropriate.

Conclusion

The introduction of attorney voir dire in Massachusetts is a significant development in trial practice and a new opportunity for trial counsel, though the practical effects of attorney voir dire remain to be seen. Whatever those effects might be, it is important for trial attorneys to learn and properly apply the interim procedures and then provide appropriate feedback to help shape the final form of these rules.

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Transgender Student Admissions: The Challenge of Defining Gender in a Gender Fluid World

by Paul G. Lannon

Legal Analysis

Who is a *woman* for purposes of admission to an all-women's college? The answer may appear self-evident: a woman is someone who is not a man. But what about a transgender woman – someone born male but who later identifies as a woman? Or a transgender man – someone born female but who later identifies as a man? Or someone expressing neither a male nor female identity?**[1]** In a world where sex is assumed to be binary, distinctions are easy. But that is not our world. The transgender population has always been with us, challenging dichotomous and static views of sex and gender identity.

Today, women's colleges are answering the question of who is a woman in revolutionary ways that are breaking down traditional perceptions of sexual identity and discrimination. Just last year, Mills College in California became the first women's college to open its doors expressly to trans women.**[2]** Following suit, several Massachusetts women's colleges, including Mount Holyoke, Simmons, and this year, Wellesley, have revised their admissions policies to address transgender applicants, debunking myths about how discrimination laws apply to single-sex institutions and sparking a national discussion about how to define gender in a time and culture where gender expression is increasingly fluid.

Debunking the Title IX Myth

A pervasive myth in higher education goes something like this: single-sex colleges cannot admit transgender students because they would lose their exemption from Title IX, the federal statute prohibiting sex discrimination in any college program or activity receiving government financial assistance; in other words, unless colleges are exclusively single sex, they will be liable for sex discrimination under Title IX. Not so.

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity." 20 U.S.C. § 1681(a). However, Title IX's ban on sex-based discrimination is not absolute. One exception applies to women's colleges *but not because of their single sex status*. Rather, the exception applies because they are private, undergraduate programs. In regard to admissions, "Title IX applies only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education." 20 U.S.C. § 1681(a)(1). By its express terms, Title IX does not apply to admissions at *any* private, undergraduate college, regardless of whether the college is single-sex or co-ed, which means that private colleges have discretion under Title IX to deny admission to their undergraduate programs on the basis of sex.**[3]** Not surprisingly, therefore, there are no reported state or federal cases in which a private college has been found in violation of Title IX for failing to admit exclusively women or men.**[4]**

With respect to Massachusetts law, the legal analysis is similar. The Massachusetts Fair Educational Practices Law generally prohibits discrimination in admission, *see* M.G.L. Ch. 151C, § 2(a), but with respect to *undergraduate* degree programs, the law *excludes sex* from the list of prohibited considerations. *See id*. at § 2 (c) (prohibiting sex discrimination only in graduate programs). In 2012, Massachusetts passed the Transgender Equal Rights Bill, which broadly prohibits gender identity discrimination but exempts private college admissions. *See* 2011 Mass. Acts Ch. 199 (covering only public elementary and secondary schools).**[5]**

Thus, with respect to undergraduate admissions, private colleges in Massachusetts are exempt from both federal and state sex discrimination laws. There are no provisions in Title IX or Massachusetts law mandating or prohibiting consideration of transgender applicants for admission. The laws do not define "male" or "female," "man" or "woman," nor do they provide any standards or procedures for determining someone's "sex." The definition and application of those terms are left to the institutions or the states.

Defining Who Is a Woman

Having opened the door to transgender applicants, women's colleges are now experimenting with definitions of "woman" that recognize the diversity of gender expression yet remain faithful to the special environment provided by a single-sex college. No easy task. From practical and forensic standpoints, there are two threshold questions: On what basis should the college define "woman" for admissions purposes? And what proof should be required?

There are several options, but each has limitations. For example, one might choose to determine sex on a genetic basis, but there are people who have the physiology of a woman, from birth or through sex reassignment surgery, and also a Y chromosome like men. Physiology is another option, but there are hermaphroditic or "intersex" persons with the sex characteristics of both men and women, and others who lack one or more distinctive sex characteristics. Beyond the bodily aspects, being a woman can also be

considered a matter of cultural or self-identification, which may evolve over time and implicitly or explicitly reject binary gender norms. Some people express their gender as something other than male or female, using such terms as “gender non-conforming,” “gender neutral,” “gender queer,” or others. Gender expression may be the most inclusive baseline for sex identification, but its inherent breadth is problematic for colleges trying to identify a specific category of gender expression: being a woman.

Intimately linked with the basis for determining sex is the measure of proof. Determining sex by reference to bodily aspects, such as genetics or physiology, requires either medical testing or a form of government identification. Medical testing is not an appealing option, given privacy concerns, expense, and administrative requirements. Deferring to the government’s determination of sex on a birth certificate, driver’s license or passport is an easier, less costly alternative but raises concerns about fairness and independence. In relying on the government’s definition of sex, women’s colleges abdicate their discretion to determine who they want to educate in their single-sex environments. Moreover, because there are different standards for different forms of government identification, applicants may not be treated equally. For example, while the U.S. permits people to change the sex stated on their passport with certain supporting medical documentation, many other countries do not. Consequently, transgender applicants from different countries might be treated differently for admissions purposes. Similarly, transgender applicants from different states may be treated differently depending on their state’s laws for changing the sex stated on a birth certificate or driver’s license. Another option would be rules requiring confirmation of sex reassignment surgery, but that standard favors wealthier families and older applicants, as sex reassignment surgery is expensive and rarely performed on adolescents.

Given these difficulties in proof, it may not be surprising that many women’s colleges have opted to rely on the applicant’s own representation as to her sex. In doing so, there is always the risk of admitting a disingenuous applicant, but that risk seems acceptably low for many colleges given that dishonesty in the application process is ordinarily a cause for dismissal.

Women’s colleges in Massachusetts have, thus far, adopted a broadly inclusive definition of the category, “women,” inclusive of transgender persons and deferring to applicants’ representations regarding sex. Mount Holyoke and Simmons Colleges, like Mills, revised their admissions policies to expressly welcome transgender applicants and rely solely on the applicant’s representation as to gender identity. Mount Holyoke “welcomes applications for our undergraduate program from any qualified student who is female or identifies as a woman.”**[6]** Simmons’ policy states: “All applicants to the undergraduate program who were assigned female at birth and/or applicants who self-identify as women are eligible to apply for admission.”**[7]** These colleges will admit students born female but who are gender non-conforming. The only category of applicants who are clearly ineligible are cis-males, persons born male who express themselves as male at the time of application.

Opting for a more restrictive definition, Wellesley College “will consider for admission any applicant who lives as a woman and consistently identifies as a woman.”**[8]** This definition includes trans women but

excludes trans men. Gender non-conforming persons may also be eligible, provided that their birth sex was female and "they feel they belong in our community of women."**[9]** Bryn Mawr's policy is similarly open to transgender and intersex individuals, provided that they "live and identify as women at the time of application," but the Bryn Mawr policy also includes any applicant assigned the female sex at birth, which could include transmen, provided that they have not taken "medical or legal steps to identify as male."**[10]** What is particularly remarkable about these policies is that the colleges may go beyond the admissions materials and seek additional information about an applicant's gender identity. By contrast, Smith College, which is in the process of reviewing its transgender admissions policy, relies solely on the application materials to reflect an applicant's identity as a woman, without investigating whether or how the applicant lives as a woman.**[11]** To date, there have been no legal challenges to any of these policies.

Evolution of Legal Protection for Transgender Persons

The challenge of defining sex for admissions purposes at single-sex colleges reflects a broader national discussion about legal protection for gender identity. While there are few court decisions in this area, two national trends are discernable: (i) greater legislative protection for transgender individuals and (ii) broader interpretation of sex discrimination laws to cover discrimination based on gender identity.

With regard to legislation, the action has been at the state and local levels. So far, eighteen states and the District of Columbia have enacted laws expressly prohibiting gender identity discrimination. Over 150 municipalities have passed similar laws. At the federal level, change has been slower. The Employment Non-Discrimination Act, which would expressly prohibit gender identity discrimination in the workplace, passed the Senate in November of 2013 but has since stalled. In July 2014, President Obama issued Executive Order 13762, prohibiting federal contractors from discriminating on the basis of sexual orientation and gender identity but to date, the only federal statutory coverage expressly recognizing gender identity is the Matthew Shepard Hate Crimes Act, which passed in 2013. Federal disability discrimination laws explicitly *exclude* from the definition of disability "transsexualism" and "gender identity disorders" not resulting from physical impairments, *see* 42 U.S.C. § 12211(b)(1) and 29 U.S.C. § 705(20)(F)(i), even though the medical community recognizes a condition known as gender dysphoria, and the American Psychiatric Association has denounced discrimination against transgender and gender variant individuals.**[12]**

Contrasting sharply with federal disability laws, in 2001 a Massachusetts trial court ruled that Article 114 of the Massachusetts Declaration of Rights**[13]** prohibits discrimination against public school students diagnosed with gender dysphoria. *See Doe v. Yunits*, No. 00–1060A, 2001 WL 664947, *5 (Feb. 26, 2001) (denying motion to dismiss). The *Doe* decision, one of the very few reported decisions involving transgender students, is aligned with the trend towards broader enforcement of anti-discrimination laws to protect transgender persons. Federal and Massachusetts agencies are in agreement that discrimination

against transgender persons constitutes prohibited sex or gender discrimination in higher education *post admission*,**[14]** as well as in the workplace.**[15]**

Conclusion

In a revolutionary development for single-sex institutions, private women's colleges have begun opening admission to transgender applicants by redefining sex for purposes of undergraduate education. Their example has broadened and deepened society's larger discussion of sexual identity — how it is defined, authenticated and protected from discrimination. Their example has also exposed gaps and tensions within federal and state anti-discrimination laws which fail to address gender identity issues expressly or consistently. Lastly, their example spotlights the national trend towards greater legislative and law enforcement recognition and protection for transgender persons.

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Endnotes

[1] A helpful glossary of transgender terms can be found at**http://www.glaad.org/reference/transgender**.

[2] The admissions policy for Mills College states: "Mills College admits … 'self-identified' women to its undergraduate programs. Mills shall not discriminate against applicants whose gender identity does not match their legally assigned sex. Students who self-identify as female are eligible to apply for undergraduate admission. This includes students who were not assigned to the female sex at birth but live and identify as women at the time of application. It also includes students who are legally assigned the female sex, but who identify as transgender or gender fluid. Students assigned to the female sex at birth who have undergone a legal change of gender to male prior to the point of application are not eligible for admission."

[3] *Accord* Katherine Kraschel, *Trans-cending Space in Women's Only Spaces: Title IX Cannot Be the Basis for Exclusion*, 35 Harvard Journal of Law and Gender 463 (2012) (concluding that Title IX does not prevent single-sex institutions from admitting transgender students). *See also* Stevie Tran, *Embracing Our Values: Title IX, The "Single-Sex Exemption," and Fraternities' Inclusion of Transgender Members*, 41 Hofstra L. Rev. 503 (2012) (addressing admission to fraternities).

[4] If Title IX is so clear about an exemption for private, undergraduate programs, from where then did the concern arise about the need to remain exclusively single sex? The myth appears rooted in the Title IX exception that permits a *public* institution to implement single-sex admissions policies only if it has "traditionally and continually from its establishment had a policy of admitting only students of one

sex." *See* 20 U.S.C. § 1681(a)(5). The "traditionally and continually" requirement does *not* apply to*private* colleges.

[5] The difficulty in describing and authenticating gender identity (for legal purposes) is evident in the statutory definition provided by the Massachusetts Transgender Rights Act: "[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. Gender-related identity may be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the gender-related identity is sincerely held as part of a person's core identity; provided, however, that gender-related identity shall not be asserted for any improper purpose." *See* M.G.L. Ch. 4, § 7. This effort is a flexible approach to a fluid phenomenon. How it will work in practice remains to be seen.

[6] **https://www.mtholyoke.edu/policies/admission-transgender-students**.

[7] **http://www.simmons.edu/admission-and-financial-aid/undergraduate-admission/how-to-apply/admission-requirements-and-deadlines/admission-policy-for-transgender-students-faq**.

[8] **http://www.wellesley.edu/news/gender-policy/communityletter**.

[9] **https://www.wellesley.edu/admission/faq#transgender**.

[10] **http://news.brynmawr.edu/2015/02/09/in-affirming-mission-bryn-mawr-board-sets-inclusive-guidelines-for-undergraduate-admission/**.

[11] **http://www.smith.edu/diversity/gender.php**.

[12] The most recent version of the Diagnostic and Statistical Manual of Mental Disorders (5th Ed.) ("DSM-V"), published on May 18, 2013, renamed Gender Identity Disorder as Gender Dysphoria after criticisms that the former term was stigmatizing. *See Report of the APA Task Force on Treatment of Gender Identity Disorder, Am. J. Psychiatry 169:8 (Aug. 2012*). The diagnosis for children was also separated from the diagnosis for adults, reflecting the purportedly lesser ability of children to have insight into what they are experiencing, or to express their experiences. *Id. See also* Am. Psychiatric Ass'n, Position Statement on Discrimination Against Transgender and Gender Variant Individuals 1 (2012).

[13] Article 114 prohibits discrimination against "qualified handicapped" individuals in all public and private entities in the Commonwealth, including private colleges, regardless of funding.

[14] *See* 20 U.S.C. § 1681(a) (exempting only admissions decisions); OCR, "Questions and Answers on Title IX and Sexual Violence" (Apr. 29, 2014), *available at***http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf**. With regard to accommodations for transgender students at colleges and universities, *see* Troy J. Purdue, *Trans* Issues For Colleges and Universities: Records, Housing, Restrooms, Locker Rooms, and Athletics*, 41 Journal of College and University Law 45 (2015).

[15] *See, e.g., Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012) (recognizing sex discrimination claim under Title VII by transgender plaintiff); *MCAD & Carlegne Millet v. Lutco, Inc.*, No. 98-BDM-3695, 2009 WL 2151780, *6, n. 2 (MCAD July 10, 2009) (recognizing sex discrimination claim under M.G.L. c. 151B by transgender plaintiff).

Earned Sick Time: Tips for Compliance

by Paul Holtzman, Esq. & Anjali Waikar, Esq.

Practice Tips


Against a backdrop of income inequality and stagnating wages of working class families, policymakers across the country are considering more generous, family-friendly workplace policies. President Obama has called on Congress to pass legislation mandating earned sick time and appropriating funds to help states pay for similar programs. The President has also issued directives requiring federal agencies to advance up to six weeks of paid leave for parents with a new child.

In November 2014, Massachusetts voters put the Commonwealth in the vanguard by approving a ballot initiative entitling almost all employees in the state to earned sick time. Massachusetts is now one of few states with an earned sick time labor standard.

Before the Earned Sick Time Act, to be codified at G.L. c. 149, s. 148C, becomes effective on July 1, 2015, lawyers should be aware of the following to ensure compliance.

What Employers Are Subject to the New Law?

The law applies to almost all public and private employers. For employers with 11 or more employees (including full-time, part-time and temporary workers), earned sick time is paid at the employee's standard hourly rate. For employers with 10 or fewer employees, sick time does not have to be paid. The law does not cover federal employees working in Massachusetts or municipal employees, unless the city or town votes to adopt or appropriates funding to cover the costs attributable to the earned sick time labor standard.

How Is Earned Sick Time Accrued and How Can It Be Used?

Employees will earn ("accrue") one hour of sick time for every 30 hours worked up to a maximum of 40 hours of sick time in a calendar year. Accruals will begin on the later of July 1, 2015 or the employee's date of hire, and may not be used until the 90th calendar day after accrual begins.

Employees may use up to 40 hours of earned sick time in a calendar year, either in hourly increments, or in the smallest increment that the employer's payroll system uses to account for absences. If the employer already has a paid time off (PTO) or other paid leave policies, the new law does not require the employer also to provide additional paid sick time, so long as the employer allows the employee to use at least 40 hours per calendar year for the purposes allowed under the earned sick time law.

Employees can use earned sick time, whether paid or unpaid, to:

1. care for a physical or mental illness, injury or medical condition affecting the employee or the employee's child, spouse, parent, or parent of a spouse;
2. attend routine medical appointments of the employee or the employee's child, spouse, parent, or parent of a spouse; or
3. address the effects of domestic violence on the employee or the employee's dependent child.

Can Earned Sick Time Be Carried Over to the Next Calendar Year?

Yes. Although employees are not entitled to use more than 40 hours in one calendar year, they may carry over up to 40 hours of unused earned sick time to the next calendar year. Thus, an employee could start a new calendar year with a "sick time bank" from the prior year that would be available for use immediately. Unlike vacation time, which is considered a form of wages, accrued unused sick time does not have to be paid upon termination of employment.

How Does an Employee Request Use of Earned Sick Time?

When the need for sick time is foreseeable, employees must provide "good faith notice" of their intent to use earned sick time.

What Medical Documentation May an Employer Require?

For sick time exceeding 24 consecutive work hours, an employer may request "reasonable" medical documentation, but may not require information regarding the nature of the illness. Moreover, an employer may not delay an employee's use of, or payment for, earned sick time for failure to provide the requested documentation.

What Are Consequences of Non-Compliance?

Like other wage and hour laws, the Attorney General is charged with enforcing the new earned sick time law, and employees have an individual right of action. Non-compliant employers may be subject to civil penalties up to $25,000 per violation, treble damages, attorney's fees and costs.

Will the Attorney General's Office Provide Guidance on Compliance?

Yes. The new law also requires the Attorney General to prepare a notice that employers must post conspicuously in their workplaces. Health care facilities, child care centers, and schools also must post the notice.

What Questions Remain Unresolved?

Some of the outstanding issues that may be resolved by regulations to be promulgated by the Attorney General or settled by the courts include:

- How is employer size determined if its workforce fluctuates during the year?
- May an employer decline requested sick time where the employee fails to provide "reasonable" medical documentation?
- What constitutes "good faith notice" of foreseeable need for sick time by an employee?
- How does the new earned sick time law interact with the requirements and rights under other wage and hour laws, such as the Family Medical Leave Act ("FMLA") and the new Act Relative to Domestic Violence, G.L. c. 149, § 52E?
- Does the federal Labor Management Relations Act preempt a claim under the new law for more sick time than afforded a union member under a collective bargaining agreement?

Conclusion: What Steps Should Employers Take?

Lawyers can advise their clients to encourage compliance before the July 1, 2015 effective date.

Employers should review existing employee handbooks and Paid Time Off (PTO) policies covering all types of paid leave (e.g., sick, vacation, personal days) to determine whether changes are needed to meet the new earned sick time standards. The new law allows employers to maintain their existing PTO policies if the existing policies provide at least the minimum rights under the new law, such as allowing employees to accrue sick time from the first day of employment and at the rate provided under the new law, to use at least 40 hours per calendar year for the purposes authorized under the new law, and to allow employees to carry over at least 40 hours of unused earned sick time to the next calendar year.

Before July 1, 2015, employers should ensure that managers, supervisors and human resources administrators are informed about the requirements of the new earned sick time law, the new law's definition of "sick time" (which is considerably more expansive than the FMLA), and the unresolved issues, including the level of medical documentation an employer is permitted to require under the new law.

The Earned Sick Time Act will bring significant changes as Massachusetts steps forward at the vanguard of states adopting mandatory sick time labor standards.

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Massachusetts Lobby Law: Five Years Later

by Benjamin Fierro III

The Profession

On January 1, 2010, the most sweeping reform of the state's lobbying law since the early 1990s became effective. As was the case with past reforms, the Legislature was spurred to action by allegations of corruption and unethical behavior by some elected officials and others. The enactment of Chapter 28 of the Acts of 2009, which also amended the state's campaign finance and ethics laws, was intended to address perceived shortcomings in those laws.

Of particular interest to attorneys are the changes to the state's lobbying law (G.L. c. 3, §§39-50). That's because activities previously thought to be the practice of law might now be considered lobbying.

What Is a Lobbyist?

A lobbyist is a person who for compensation or reward engages in lobbying, which includes at least one lobbying communication with a government employee made by said person. To be considered a lobbyist, an individual must be paid for engaging in lobbying activities. However, a person's compensation, whether salary or fee, need not be specifically allocated to lobbying for that individual to be considered a lobbyist. "Compensation" also includes any additional employee benefits, such as an equity interest in an organization, health insurance, pension contributions, life insurance or commuter benefits. *See Lobbying Advisory Opinion 10-16,* ***Secretary of State's Advisory Opinion.***

"Executive Lobbying" and "Legislative Lobbying"

The Statute recognizes two types of lobbying activities. "Executive lobbying" is "any act to promote, oppose, influence, or attempt to influence any officer or employee of the executive branch or an authority, including but not limited to statewide constitutional officers and employees thereof, where such decision concerns legislation or the adoption, defeat or postponement of a standard, rate, rule or regulation . . . or any act to communicate directly with a covered executive official to influence a decision concerning policy or procurement."

“Legislative lobbying” is “any act to promote, oppose, influence or attempt to influence legislation, or to promote, oppose or influence the governor’s approval or veto thereof, including the introduction, sponsorship, consideration, action or non-action with respect to any legislation.”

The definitions of “executive lobbying” and “legislative lobbying” also include any act to influence the decision of any officer or employee of a city or town when those acts are intended to carry out a common purpose with lobbying at the state level. An attorney who testifies on behalf of a client before a city council in support of a home rule petition that requires the approval of the Legislature, and who later attends a meeting with a state representative on that petition, would be engaging in lobbying.

Excluded from the definition of “executive lobbying” is providing written information in response to a written request from an officer or employee of the executive branch or an authority for technical advice or factual information regarding a standard, rate, rule, regulation, policy, or procurement. Similarly, “legislative lobbying” excludes providing written information in response to a written request from an officer or employee of the legislative branch for technical advice or factual information regarding any legislation.

What activities constitute lobbying was among the most significant of the changes to the law. The term “lobbying” is no longer limited to direct communication with a covered public official. It was expanded to include “strategizing, planning and research if performed in connection with, or for use in, an actual communication with a government employee.”

The terms “strategizing,” “planning” and “research” are not defined in the law but could easily ensnare an attorney. “Strategizing” and “planning” might encompass advice to a client on how a proposed law, rule, rate, regulation or policy may affect its interests and development of arguments that are used by the client to influence a government official. “Research” would include a legal analysis of comparative statutes from other states that is used by a client to advocate for the enactment of similar legislation. Drafting legislation or testimony to be given to a government employee would constitute lobbying.

While an attorney might engage in the aforementioned lobbying activities for compensation, he or she does not have to register as a lobbyist unless those activities are accompanied by at least one lobbying communication by that attorney. And, even if an attorney does have one lobbying communication with a public official, he or she may nevertheless be exempt from registering as a lobbyist if the lobbying is only “incidental,” as explained below.

Exemption for “Incidental Lobbying”

The Statute has long provided an exemption from lobbyist registration requirements under certain circumstances—even if the activity an individual engages in fits the definition of “lobbying.” However, the reduction in scope of this so-called “safe harbor” provision is especially noteworthy.

Prior law exempted an individual from lobbyist registration if that person engaged in lobbying for not more than 50 hours during a six-month period *or* received less than $5,000 for such services during that period, because in that case the person's lobbying was presumed to be incidental to his or her regular and usual business or professional activities. This provision exempted many lawyers who were not full-time lobbyists.

Chapter 28 narrowed the incidental lobbying exemption so that it now applies only to persons who were engaged in lobbying for not more than 25 hours during a six-month period *and* who received less than $2,500 for such services during that period. To be presumed to have engaged in "incidental lobbying," an individual must meet both conditions. The law is silent as to whether this presumption is absolute or rebuttable.

Exemptions for Executive Lobbying

The Statute provides that certain communications with an executive official regarding a matter of "policy or procurement" are exempt from the definition of "executive lobbying."

"Policy" is defined as a plan or course of action which is applicable to a class of persons, proceedings or other matters and which is designed to influence or determine the subsequent decisions and actions of any covered executive official. It does not include the adjudication or determination of any rights, duties, or obligations of a person made on a case-by-case basis, such as the issuance or denial of a license, permit, or certification or a disciplinary action or investigation involving a person.

Thus, preparing, submitting and negotiating agreements regarding public benefits such as grants, tax credits or other economic incentives would not constitute "executive lobbying." In addition, meeting with state officials on behalf of a client to secure a permit or negotiating and drafting permit conditions would also not be lobbying.

However, an attorney's representation of a client seeking a license or permit could become "executive lobbying" under certain circumstances. Consider the case of a lawyer representing a developer seeking a state permit. While the state agency might be supportive of the project, its regulations may prohibit it from issuing the permit. If the attorney proposes a change to the regulations that would both further the agency's goals and allow the permit to be issued, such advocacy by the attorney, including the drafting of an amendment to the regulations, would constitute "executive lobbying."

The exemptions from the definition of "executive lobbying" include the following: (a) A request for a meeting, the status of an action or any similar administrative request; (b) An act made in the course of participation in an advisory committee or task force; (c) An act required by subpoena or civil investigative demand; (d) A communication made with regard to a judicial proceeding or a criminal or civil law enforcement inquiry, investigation or proceeding; (e) An act made in compliance with written agency

procedures regarding an adjudicatory proceeding; (f) An act made on behalf of an individual with regard to that individual's benefits, employment or other personal matters; (g) A response to a request for proposals or similar invitation for information relevant to a contract; (h) Participation in a bid conference or an appeal or request for review of a procurement decision. "Procurement" is defined as the buying, purchasing, renting, leasing or otherwise acquiring or disposing, by contract or otherwise, of supplies, services or construction or the acquisition or disposition of real property or any interest therein; but not including any item of expenditure the value of which is $25,000 or less.

Statutory Obligations and Limitations of a Lobbyist

A registered lobbyist must comply with a number of statutory requirements, including: filing an annual registration statement with the Secretary of State; completing an annual in-person or on-line seminar on the lobbying law; paying an annual filing fee; and filing semi-annual disclosure reports. Those disclosure reports must provide an itemized statement of expenditures and campaign contributions by the lobbyist and a detailed statement of the lobbyist's activities, including identifying all matters acted upon, the name of each client and the amount of compensation received.

Among the more controversial aspects of Chapter 28, was a new requirement that lobbyists disclose "all direct business associations with public officials." The Secretary of State maintained that because a lobbyist is doing business when he or she contacts a legislator in an attempt to influence legislation, those communications create a "business relationship" between the two that required disclosure. A diverse group of lobbyists challenged the secretary's interpretation as wrong as a matter of statutory interpretation. On February 1, 2013, Judge Janet Sanders entered judgment in favor of the plaintiffs finding that the law required only that lobbyists disclose any financial or commercial relationships with a government official. *See* ***Gibbons, et al v. Galvin****,* (No. 12-3278, Suffolk Superior Court).

Registered lobbyists are prohibited by law from entering into contingent fee arrangements for their services as a lobbyist, giving any gift or paying for any meal or beverage consumed by a public official or employee, and making a political contribution to any one candidate for state, county or municipal office in excess of $200 annually.

Statutory Obligations of a Client of a Lobbyist

A client retaining the services of a lobbyist is required to file an annual registration statement with the Secretary of State and semi-annual disclosure reports. These reports must list all expenditures incurred or paid separately by the client during the reporting period in connection with its lobbying activities. These expenses would include lobbying services provided by an attorney, even if the attorney did not meet the statutory definition of a lobbyist or was otherwise exempt from registering as a lobbyist.

Advisory Opinions

An attorney who is unsure whether his or her representation of a client might be considered lobbying should seek an advisory opinion from the Secretary of State. An opinion, unless amended or revoked, is a defense in a criminal action brought pursuant to the lobby law and is binding on the Secretary of State, the Attorney General or the District Attorney in any subsequent proceedings, subject to certain conditions.

Conclusion

Now more than five years later, there is little doubt that Chapter 28 has swelled the ranks of registered lobbyists–including many lawyers who in the course of their practice usually don't walk the halls of the State House. Lawyers who are representing clients in matters that bring them in contact with legislators or state government officials should carefully review the Statute to ensure they are in compliance with the law.

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Promoting Diversity in the Criminal Justice System

by Professor R. Michael Cassidy

Viewpoint

The decisions of grand juries in Missouri and New York not to indict police officers responsible for shooting unarmed black men has sparked intense debate in this country about racial disparities in our criminal justice system. Turning this public outcry into meaningful reform will not be easy. But if public confidence in law enforcement is going to be strengthened, one important step is to make sure that the most powerful actors in our criminal justice system mirror the racial composition of the communities they represent.

We need more people of color serving as police officers, judges, jurors, public defenders, and perhaps most importantly *prosecutors*. Their talent, background, and perspective are essential to balanced and informed decision-making. Just as importantly, their presence in the courthouse will be critical to restoring a perception that our criminal laws will be fairly applied to all. Until our prosecutors are as diverse as the public that they purport to protect, citizens will naturally question the fairness of charging and plea bargaining decisions that occur behind closed doors.

African Americans make up almost 13% of the population in this country, but only about **4.8 % of licensed attorneys**. The National Black Prosecutor's Association, a membership organization that bills itself as the premier professional network for black prosecutors across the country, counts only **800 members in their entire organization**, even though there are over 25,000 lawyers working as state prosecutors in the United States. Here in Massachusetts, my colleagues among the district attorneys estimate that in some counties as little as 2% of the courtroom legal staff identify as African American.

One factor contributing to this underrepresentation is salary. Massachusetts prosecutors are among the lowest paid in the country—even below those in Arkansas and Mississippi, states with dramatically lower costs of living. Entry level prosecutors in Massachusetts earn $37,500 per year. The national median starting salary for prosecutors among the 50 states and the District of Columbia is $51,000. In most

courthouses across this Commonwealth, the prosecutor is the lowest paid state employee in the building—behind the custodians, the secretaries, and the assistant clerks. And the public defender does not fare much better.

This problem is not new. The starting salaries for prosecutors in Massachusetts have not been raised since 2007. In May of 2014, a blue ribbon commission formed by the Massachusetts Bar Association issued a report entitled **"*Doing Right by Those who Labor for Justice*"** exposing this gross inequity. The report concluded that "The present salaries paid to attorneys working in our criminal justice system are so inadequate that they cannot meet the financial obligations attendant to everyday, normal living. The unvarnished truth is the compensation is so poor that it drives these lawyers away from the criminal justice system or into the ranks of the working poor." The Boston Globe **highlighted** prosecutors forced to live with their parents just to make ends meet. A Commission formed by Governor Patrick to study the problem issued **a report** in December, 2014 highlighting the urgency of this situation, and calling on the legislature to make specific reforms.

What does this have to do with diversity? Many African American law students who are passionate about careers in criminal law simply cannot afford to work as prosecutors or public defenders due to the low salary. **On average**, law students borrow $125,000 to attend a private law school and $75,000 to attend a public law school. This debt can lead to average monthly loan repayments of between $650 and $1600, depending on consolidation and the term of the loan. With an entering salary of $37,500, young prosecutors in Massachusetts take home a monthly paycheck of approximately $2,200 after deductions– barely enough to pay for housing, transportation, food, clothing and utilities. This salary structure makes recruitment and retention of minority attorneys particularly difficult, as **recent surveys** show minorities are more likely to graduate law school with debt. Many African American students who have high loans simply cannot afford to undertake careers as prosecutors, and thus choose to work at law firms instead. Low salary and high indebtedness may not be the only reason African American lawyers forsake careers in the criminal justice system, but they are certainly a contributing factor. Governor Patrick echoed this concern in his **letter to the legislature** that accompanied the 2014 Special Commission Report, where he stated that the low salary structure "inhibits the recruiting and retention of public lawyers who mirror the communities they serve."

Race is not the only demographic affected by low salaries in our state's prosecutors' offices. The grossly inadequate salary for ADAs has led to a situation where the only people who can afford these jobs are those who have a cushion of support from other family members; e.g., a parent or spouse. Single men and women and persons from lower socioeconomic backgrounds are increasingly becoming underrepresented in many county DA offices, making these important public positions less and less reflective of the communities they serve. Unless we are prepared to tolerate a situation where law school graduates with independent means and family support are the only ones capable of undertaking this crucial form of public service, we must improve the salary structure for prosecutors and public defenders.

It is well past time for the legislature to take action. Parity with other states, parity with other government lawyers within Massachusetts, and fundamental fairness all dictate that salaries for our state prosecutors and public defenders should be raised in the 2016 budget. Adding to the urgency of this situation is a legitimate concern for increased diversity among the ranks of our prosecutors, who are making life and death decisions that affect all of us.

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From Here to Clemency: Navigating the Massachusetts Pardon Process

by William G. Cosmas, Jr.

Practice Tips

In the last weeks of his term, Governor Deval Patrick granted the first four pardons in the Commonwealth of Massachusetts since 2002. Of the more than 70 people who petitioned for a pardon in 2014, the Advisory Board of Pardons recommended five favorably to Governor Patrick. These were the Board's first such recommendations since 2009. Governor Patrick submitted four pardons to the Governor's Council for its advice and consent. Following public hearings on each petition, the Council approved all four, one of whom was my client.

Obtaining clemency is a rare occurrence – combining legal and political processes with little guidance. The journey from petition to pardon involves uncertainty for petitioners and their attorneys alike. This article aims to shed some light on the process.

The Governor

The Governor's pardon power is long established. Article 73 of the Amendments to the Massachusetts Constitution invests the Governor with "the power of pardoning offences… by and with the advice of [the Governor's Council]." As a result, "[t]he power to pardon as vested in the Governor is not absolute but conditional, and that condition is that it shall be exercised in accordance with the advice of the Council." *In re Op. of the Justices*, 210 Mass. 609, 611 (1912). The Governor has plenary power to determine candidates for pardon relief, but no form of clemency may issue without "concurrent action by both the Governor and Council." *See id.* Since 1991, Massachusetts governors have issued a total of 57 pardons, drawn from an average of roughly 100 petitions per year, and 80 percent of those pardons date to Governors Weld and Cellucci. *See* Margaret Colgate Love, **NACDL Restoration of Rights Resource Project, December 2014**; Gavriel B. Wolfe, Note, *I Beg Your Pardon: A Call for Renewal of Executive*

Clemency and Accountability in Massachusetts, 27 B.C. Third World L.J. 417, 429 (2007); Michael Rezendes, *Granting Pardons No Priority for Cellucci,* Bos. Globe, Nov. 26, 1999 at A1.

Each governor establishes parameters for the pardon process through Executive Clemency Guidelines that express his or her philosophy. Governor Patrick issued three sets of such guidelines during his tenure (2007, and January and July 2014). Both of the sets he issued in 2014 made clemency more attainable for petitioners. According to those guidelines, pardons are "primarily intended to remove barriers that are often associated with a criminal record or sentence, thereby facilitating the reintegration of the petitioner into the community of the law abiding." Such relief will be considered "for a petitioner who has demonstrated a substantial period of good citizenship subsequent to the criminal offense and either: (1) a compelling need for a pardon; or (2) extraordinary contributions to society that would justify restoration of his/her reputation as a concluding step of rehabilitation." Governor Baker has formally rescinded these guidelines and has yet to release his own. Three hundred petitions for clemency – whether pardon or commutation – currently are pending before the Advisory Board of Pardons, which has suspended its review of such petitions until Governor Baker issues his guidelines for them to follow. Gintautas Dumcius, ***Actor Mark Wahlberg's Pardon Request, Like Others, On Hold, Parole Board Chairwoman Says****,* State House News Serv., April 8, 2015.

The Petitioner

Not many people complete their incarceration and then pursue an education towards a career that will involve work in jails and prisons. Arrested at nineteen for his participation in a string of burglaries on Plum Island and the New Hampshire seacoast, my client served eight months in a New Hampshire jail and two years of concurrent probation in New Hampshire and Massachusetts. He sought the pardon of a single related Massachusetts burglary conviction for which he served that probation. Eight years after his release from jail, my client had turned his life around. He graduated from college with honors, two years of which he spent interning at the local jail and counseling inmates. After graduation, a professor – who was the superintendent of another county jail in New Hampshire – hired him as a corrections officer, exploiting a loophole subsequently closed following news coverage of my client's successful service. In Massachusetts, my client sought a pardon so he could pursue a career in criminal justice that would have been practically unattainable to him with a criminal record.

There were challenges to his petition, however. Like the petitioner whom Governor Patrick did not recommend to the Governor's Council, my client was not a Massachusetts resident, living instead with family in New Hampshire as he attended graduate school. Unlike the other successful petitioners, my client was a young man – only in his late twenties – and his age might have worked against him by facilitating a perception that he was more likely to re-offend.

My client's journey to a pardon began, as each one must, with a pardon petition form, available on the Parole Board's website, which requests biographical information, discussion of the events related to the

conviction for which pardon is sought, and an explanation of why the candidate seeks and merits a pardon. The form remains centrally important through the pardon process, and therefore it is best if counsel assists in filling it out. Relevant CORI information and police reports should be reviewed to create as accurate a petition as possible to avoid problems due to mistaken memory as the petition advances. Any petition also should avoid claiming the petitioner deserves the pardon, no matter the merits of the petition.

Counsel also should advise the petitioner as to the nature of a pardon pursuant to Massachusetts law. While a pardon removes the penal consequences of a conviction, such as statutory bars to employment, the facts of the underlying offense remain and may present similar barriers. *Comm'r of Metro Dist. Comm'n v. Dir. of Civil Serv.,* 348 Mass. 184, 194 (1964). The petitioner must decide whether to seek a full pardon – which restores the ability to apply for a firearms permit – or to proceed with a conditional pardon that does not and therefore may be more palatable to the Governor and/or the Governor's Council, based on the petitioner's underlying offense and biography. The guidelines will dictate the required additional steps, if any, that a full pardon application requires; however, the facts of the pardoned offense may still preclude the issuance of a permit. *See Firearms Records Bureau v. Simkin*, 468 Mass. 168, 180 (2013).

The Advisory Board of Pardons

Candidates submit their petition forms, together with letters of recommendation and other documentation, to the Council, which forwards them to the Parole Board, operating in clemency cases as the Advisory Board of Pardons. *See* G.L. c. 127, § 154; 120 CMR 100.00, 902.02. The Board initially reviews pardon petitions for "substan[tial] compli[ance] with the criteria set by statute, the Governor's Pardon Guidelines, and the Advisory Board's regulations…" 120 CMR 902.04(1). Based on this review, the Board must submit a recommendation to the Governor within ten weeks, unless "adequate consideration of the case requires a hearing on the merits." *See* G.L. c. 127, § 154. In such cases, the Board's Executive Clemency Unit directs an investigation "concerning the petitioner's criminal, social, and institutional histories, as well as concerning any other factor deemed relevant to the issue of pardon." *Id.* Parole officers fact-check the petition, following up on background and CORI information, and conduct an in-person interview of the petitioner. Copies of the petition also go to the Attorney General's Office, to the district attorney and chief of police for the relevant jurisdiction, and the Secretary of Public Safety, each of whom has six weeks to make a written recommendation to the Board. *See id.;* 120 CMR 902.05.

If the petitioner merits further consideration, the Board convenes a hearing before at least two of its members, at which time the petitioner has the burden "to show, by clear and convincing evidence, that pardon relief is appropriate." 120 CMR 902.09(2). Regulations enumerate both a list of potential topics and the procedure for such hearings, and petitioners may offer testimony in support of their application, as may government officials and victims, whether in opposition or support. *See* G.L. c. 127, § 154; *see*

also 120 CMR 902.09. Considering only "matters which properly bear upon the propriety of the extension of clemency to the petitioner," the Board makes a recommendation to the Governor no later than six months after the Board's receipt of the petition. *See* G.L. c. 127, § 154; 120 CMR 902.10. However, "[a] pardon is not generally available to individuals who do not meet the applicable Governor's Pardon Guidelines." 120 CMR 902.01(2).

Back to the Governor's Office

Once the petition returns to Beacon Hill with the Board's recommendation, the Governor and the Office of the Governor's Legal Counsel review the two documents and begin their formal analysis of the candidate. Nothing requires the Governor to follow the Board's recommendation – Governor Patrick advanced only four of the five candidates recommended for pardon relief – as he or she applies his or her Guidelines.

The Governor's Council

If the Governor decides to grant a pardon, the venue shifts to the Governor's Council and therefore the focus shifts to the Council's constitutional advise and consent function. The Governor's Guidelines do not bind the Council even as it considers pardon petitions – and Advisory Board recommendations – crafted to comply with them. *See Pineo v. Exec. Council*, 412 Mass. 31, 36-37 (1992). As a result, the Councilors, in coordination with the Governor's Office, control the structure, extent and nature of any public hearings the Council holds on a pardon petition. *See id.* In 2014, the Council held a series of intensive public hearings on each pardon, and during these hearings, Councilors posed questions directly to the petitioners, witnesses, and counsel. Other incarnations of the Council, however, may choose to proceed differently. Finally the Council schedules a vote on whether to ratify the Governor's decision to grant a pardon. A petitioner must wait a calendar year from any denial of pardon relief to reapply. 120 CMR 902.12.

At the end of this long and winding process, the petitioner hopefully has a well-earned second chance at life under the law. My client remains grateful for the clemency afforded him – and hopeful, both for his own future and for the futures of others who may, eventually, obtain such relief for themselves.

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Exclusive Forum Bylaws Are Going Mainstream: What's Next, Bylaws Eliminating Shareholder Class Actions?

by Matthew C. Baltay

Legal Analysis

Bylaws and charter provisions controlling shareholder litigation are hot topics in corporate governance. Most notable are "exclusive forum bylaws" that require that shareholder litigation be brought in a specific jurisdiction, most commonly the state of incorporation (often Delaware) or the state where the company is headquartered. These provisions have now been tested in court and, to the chagrin of shareholders' rights champions and the delight of some boards and corporate advisers, are becoming generally accepted and enforceable.

Companies, practitioners, and the courts are now assessing just how far litigation-control bylaws and charter provisions might go. The new frontier includes fee-shifting bylaws that require shareholders who unsuccessfully sue corporations to pay the corporate legal bill and provisions that require shareholder disputes to be arbitrated. Given recent Supreme Court decisions upholding contractual arbitration provisions that waive class actions, including as to federal statutory claims, it is conceivable that future bylaws will preclude shareholder class actions, requiring instead arbitration on an individual-claim basis, possibly with fee-shifting to boot.

In Massachusetts, corporations are beginning to adopt exclusive forum provisions. Practitioners here should familiarize themselves with these, and other, emerging litigation-control provisions including arbitration and fee-shifting clauses.

This article reviews exclusive forum bylaws and the state of other emerging provisions, including those in Massachusetts, and assesses the pros and cons of adopting them.

Contours of Exclusive Forum Provisions

Exclusive forum provisions provide that a given court, generally in the state of incorporation (or, less frequently, in the state where the company is headquartered, if different) shall be the sole and exclusive forum for intra-corporate and shareholder disputes. Four types of disputes are generally covered: (1) derivative actions; (2) actions asserting claims of breach of a fiduciary duty owed by a director, officer or company employee to the company or its shareholders; (3) actions asserting claims pursuant to the corporate statutory code of the state of incorporation or the company's certificate of incorporation or bylaws; and (4) actions asserting claims governed by the internal affairs doctrine.**[1]** Such provisions may be inserted into corporate bylaws, often by the board of directors without shareholder approval, or in the corporate charter with shareholder approval. One unexplored question is whether other shareholder suits, including, for example, for federal securities fraud, could be included.

Exclusive Forum Bylaws – How We Got Here

Corporations, like litigants in general, have always faced the risk of multi-forum litigation in which the same claims are litigated in different courts. The risk is particularly prevalent in shareholder litigation in which different representative plaintiff shareholders purporting to represent the same class of shareholders bring dueling claims in different jurisdictions. This issue has been pronounced in merger litigation, in which some 95% of all public company mergers result in shareholder litigation and half to two-thirds of such litigation historically is filed in two or more jurisdictions.**[2]** Needless to say, multi-forum litigation drains corporate resources, increases the distraction and hassle of litigation, magnifies the perceived litigation problem, and risks inconsistent rulings and judgments.

The concept of exclusive forum charter and bylaw provisions gained traction after the Delaware Court of Chancery remarked in 2010 that one solution to multi-forum litigation would be the adoption of exclusive forum provisions. Practitioners and corporate boards took note and began implementing exclusive forum provisions, generally designating the Delaware Chancery Court as the exclusive forum for shareholder litigation. Many companies adopted such bylaw provisions by unilateral resolution of the corporation's board of directors while a few put the matter to shareholders by way of proposed amendments to corporate charters.

In early 2012, the plaintiffs' bar filed a string of test cases in Delaware challenging the validity of such provisions. In 2013, Chancellor Leo Strine (who has since been elevated to Chief Justice of Delaware's Supreme Court) issued a landmark decision upholding the validity of exclusive forum bylaws unilaterally adopted by boards of directors. ***Boilermakers Local 154 Retirement Fund v. Chevron Corporation*, 73 A.3d 934 (Del. Ch. 2013)**. The Chancery Court ruled that boards are statutorily empowered to adopt such bylaws so long as the specific corporate articles of organization permit director amendment of bylaws, which is generally the case. The court observed that bylaws constitute a form of contract between corporations and their shareholders and that bylaws unilaterally adopted by a corporate board

become a part of the contract. The Delaware Supreme Court has since affirmed the validity of exclusive forum bylaws unilaterally adopted by boards of directors.

Exclusive Forum Bylaws – More Recent Developments

Since the Delaware Chancery Court issued its *Boilermakers v. Chevron* decision in 2013, a growing number of corporations, both public and privately-held, have adopted exclusive forum provisions. While there are no precise tallies, some 250 publicly-traded companies had adopted exclusive forum bylaws by the time *Boilermakers v. Chevron* was decided, and another 100 Delaware corporations adopted such provisions in the four months following the decision.**[3]** The majority of corporations adopting exclusive forum bylaws have done so through unilateral board action, although a number have put the matter to shareholders in the form of charter amendments, including some prior to an IPO.

It has also become common for publicly-held corporations that are being taken over to adopt exclusive forum bylaws simultaneously with the announcement of the takeover. For example, when Massachusetts-based Hittite Microwave Corporation announced it was being acquired in June 2014, it simultaneously announced that its board of directors had adopted an exclusive forum bylaw designating Delaware Chancery Court as the exclusive venue for shareholder litigation. Similarly, when Massachusetts corporation MicroFinancial, Inc. announced in December 2014 that it was being acquired, its board adopted a bylaw amendment setting the Business Litigation Session of the Massachusetts Superior Court as the exclusive forum for shareholder litigation. Both provisions worked as intended and the anticipated litigation took place only in the designated courts. More broadly, the recent prevalence of exclusive forum bylaws (adopted at the time of merger) has caused multi-forum merger litigation to drop significantly.**[4]**

Exclusive forum provisions have also been challenged in secondary jurisdictions (i.e., those other than the jurisdiction designated as the exclusive forum). These cases have been in the context of motions to dismiss the duplicative multi-forum action on grounds it is barred by an exclusive forum provision. In virtually all instances, the courts have upheld the validity of forum selection clauses and have dismissed the secondary actions in favor of the identified exclusive forum. Thus, for example, courts in California, Illinois, Louisiana, New York, Ohio and Texas have all ruled in recent months that exclusive forum bylaws designating one forum (Delaware) were enforceable, with the result being the dismissal of litigation filed in those jurisdictions.**[5]**

Another notable recent decision is ***City of Providence v. First Citizens Bancshares, Inc.*****, 99 A.3d 229 (Del. Ch. 2014)**. There, the Delaware Chancery Court dismissed a class action lawsuit challenging a corporate merger because a bylaw amendment, adopted by the board of directors when the merger was announced, designated North Carolina, where the company was headquartered, as the exclusive forum. While pending legislation may alter the rule, this decision establishes that Delaware corporations

may designate the courts of the state they are headquartered in as the exclusive forum for shareholder litigation and the Delaware courts will respect that choice.

Three decisions, however, have gone the other way. Two of these are federal court decisions predating the Delaware *Boilermakers v. Chevron* decision, and they hold that under federal common law, bylaws not in effect when the shareholder purchased its shares, and that were unilaterally adopted by the board thereafter, are not binding on the shareholder.**[6]** A more recent federal court decision, however, upheld an exclusive forum provision and characterized these two earlier federal decisions as outdated.**[7]** The third decision to strike down an exclusive forum bylaw was issued by an Oregon trial court in August 2014. *Roberts v. TriQuint Semiconductor, Inc.*, C.A. No. 1402-02441, 2014 WL 4147465 (Cir. Ct. Or. Aug. 14, 2014). The matter involved a bylaw designating Delaware as the exclusive forum. The provision was adopted by the board on the day the company announced it would be acquired. The court refused to uphold the provision and declined to dismiss the duplicative Oregon action because the board adopted the bylaw after the wrongdoing alleged in the suit. The court noted that it would have upheld the provision and dismissed the Oregon action "had the board . . . adopted [the bylaw] prior to any alleged wrongdoing, and with ample time for shareholders to accept or reject the change." The Oregon decision is the only post-*Boilermakers v. Chevron* decision that has refused to uphold an exclusive forum bylaw. The Oregon Supreme Court has granted mandamus to review the trial court's decision; oral argument is set for June 2015. While the Oregon decision is an outlier and is subject to reversal, it may caution in favor of adopting litigation-control bylaws on a "clear day" prior to major transactions or circumstances that may predictably lead to litigation.

Fee-Shifting Bylaws

On the heels of exclusive forum bylaw amendments comes an even more far-reaching corporate litigation-control device in the form of fee-shifting. In a bombshell decision in May 2014, the Delaware Supreme Court held that the fee-shifting bylaw at issue was valid. ***ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 558 (Del. 2014)**. The subject bylaw provision was unilaterally adopted by the board of directors and provided that a plaintiff bringing suit in an intra-corporate dispute must pay the corporation's legal expenses if the plaintiff is unsuccessful. The court also made clear that the bylaw amendment would apply to those who purchased their corporate interests prior to the bylaw's adoption. At issue was a non-stock corporation which operates a professional men's tennis tour, with the members being the organizations that sponsor individual tournaments. It is possible that the rule will be limited in future cases to non-stock corporations. Indeed, one then-justice of the Delaware Supreme Court has stated that the decision does not address the rule applicable to stock corporations, while one Vice Chancellor of the Delaware Chancery Court has stated informally that the rule should not apply to stock corporations. Nevertheless, the decision contains broad language that could apply equally to stock corporations.

Following the Delaware Supreme Court's fee-shifting bylaw decision, the plaintiffs' bar and institutional investors including large pension funds mobilized to have the decision overturned by the Delaware legislature. Proponents of the decision, including the U.S. Chamber of Commerce, lobbied the Delaware legislature not to take action. In early March 2015, legislation was put before the Delaware legislature that will, if passed, prohibit fee-shifting for Delaware stock corporations. The proposed legislation also would expressly permit exclusive forum bylaws for Delaware corporations so long as they designate Delaware as the forum (in effect overruling ***City of Providence v. First Citizens Bancshares, Inc.*****, 99 A.3d 229 (Del. Ch. 2014)**), and prompting some commentators to suggest the proposed legislation is intended in part to keep the Delaware courts and bar busy). Lastly, the proposed legislation would also forbid arbitration bylaws (discussed below) for intra-corporate disputes. Observers anticipate that the Delaware legislature will act on the legislation one way or another before the session recesses in June 2015.

Corporations have not rushed to adopt fee-shifting bylaws. As of early 2015, only some 40 corporations have adopted fee-shifting bylaws, including, recently-public Alibaba.**[8]** Aside from straight fee-shifting provisions, other variants are being discussed, including, for example, bylaws barring a plaintiff from recovering its attorney's fees in merger litigation. Presumably, most corporations are awaiting further developments, including on the legislative front, before leaping into the fray. Nevertheless, absent legislative action, there is the very real possibility that fee-shifting bylaws may be here to stay.**[9]** And regardless of whether Delaware reverses course legislatively, litigation-control provisions will be part of the landscape moving forward.

Arbitration and Other Litigation-Control Bylaws

Once one accepts that bylaws are viewed as contractual in nature, there is no reason why corporate bylaws could not include the wide variety of litigation-control devices that practitioners commonly see in commercial and consumer contracts. For example, not only are forum selection and fee-shifting provisions common in contracts, but many agreements contain arbitration clauses, including those with class action waiver provisions. Provisions requiring that shareholder claims be subject to arbitration, not litigation, are starting to appear in corporate bylaws. The first test cases have upheld the provisions. In a set of decisions in 2013 and 2014, a state trial court in Maryland upheld a bylaw provision of a publicly-traded real estate investment trust (REIT) requiring shareholders to arbitrate rather than litigate claims; the provision also set forth that in no event would plaintiff be awarded attorney's fees. *Corvex Management LP v. Commonwealth REIT*, No. 24-C-13-001111, 2013 Md. Cir. Ct. LEXIS 3 (Cir. Ct. Balt., May 8, 2013); Katz v. Commonwealth REIT, No. 24-C-13-001299 (Cir. Ct. Balt., Feb. 19, 2014). In so ruling, the Maryland court followed the Delaware decision in *Boilermakers v. Chevron* and applied its reasoning to the arbitration bylaw at issue.

Interestingly, a group of shareholders of the same Maryland REIT subsequently brought a derivative suit in federal court in Boston for declaratory judgment that arbitration bylaws are invalid. United States District Court Judge Denise Casper rejected the challenge. ***Del. County Emples. Ret. Fund v. Portnoy*, 13-10405-DJC, 2014 U.S. Dist. LEXIS 40107 (D. Mass. Mar. 26, 2014)**. The court first explained that, pursuant to *res judicata* principles, the issue had already been decided by the Maryland court. The decision also recited that arbitration bylaws are supported by a line of cases, including Supreme Court precedent on enforceability of arbitration clauses. Accordingly, the court upheld the provision. The opinion also rejected the challenge that the inability of a plaintiff to recover attorney's fees or sue in federal court conflicts with federal securities laws.

Arbitration bylaws could be taken a step further to require that any claims be brought on an individual and not class basis. Such provisions would find support in the Supreme Court's recent *American Express* decision, which held that a provision in a consumer contract requiring individual arbitration is enforceable even though it deprives plaintiffs the ability to pursue in court federal fraud and Sherman Act anti-trust class actions.**[10]**

Another recent bylaw amendment by a Florida public company limits the right of shareholders to sue the company and its directors and officers to those shareholders owning or representing 3 percent or more of the shareholder base. Plaintiffs promptly challenged the far-reaching provision in court; the litigation remains pending.**[11]**

One source of push-back comes from regulators. The Securities and Exchange Commission publicly criticizes provisions restricting shareholders' ability to seek redress under the federal securities laws and is reluctant to allow IPOs to go forward where the corporate charter or bylaws contain a shareholder-suit arbitration provision.**[12]** Other regulators might also get into the fray, including possibly FINRA and the new federal Consumer Financial Protection Bureau.**[13]**

Massachusetts

Corporations in Massachusetts have begun to adopt exclusive forum bylaws, either designating Massachusetts or Delaware as the exclusive forum for shareholder litigation. It is only a matter of time before Massachusetts corporations begin to experiment with other litigation-control provisions.

Although the Massachusetts state courts have not yet had occasion to rule on the validity of any such provisions (even though as noted above, the federal court in Boston has), one can expect they will do so before long. There would not appear to be any reason why the Massachusetts courts would not uphold the validity of a forum selection clause designating another jurisdiction as the exclusive forum, as Delaware has done. Not only do the Massachusetts courts look to Delaware on matters of corporate law,

but the building blocks are already in place, as Massachusetts law allows directors to amend bylaws**[14]** and it regards bylaws as contractual in nature.**[15]**

Should Your Corporation Adopt Such Provisions?

A question for many corporations will be whether they should adopt litigation-control provisions. One risk of doing so is inviting more litigation. Early adopters of litigation-control bylaws have invariably been sued by plaintiffs' lawyers for the very act of adopting them. While the risk now seems to have passed, at least as to exclusive forum bylaws, corporations contemplating fee-shifting or arbitration bylaws might wait until they gain more acceptance and traction.

Another consideration is the reaction of the shareholder base. Glass Lewis and Institutional Shareholder Services (ISS), two of the better-known shareholder advisory firms, generally oppose provisions limiting the ability of shareholders to bring claims for redress of wrongs. Both generally advise against the adoption of such provisions when put to the shareholders and may recommend against reelection of directors who unilaterally adopt bylaws substantially affecting shareholder rights. Glass Lewis also recommends voting against the entire governance committee where a corporation's pre-IPO charter or bylaws limit the ability of shareholders to pursue full legal recourse without putting the provisions to shareholder approval. Given this, corporations, particularly those with pending shareholder issues, might consider adopting litigation-control provisions by way of amendments to articles of incorporation effected by shareholder approval. Privately-held corporations may be more free to adopt such provisions.

Of all of the various litigation-control provisions, corporations first might consider adopting exclusive forum bylaws. While multi-forum litigation is not the greatest threat to corporate well-being, it only takes one instance of multi-forum litigation or litigation in a distant, unfriendly forum for a corporation to wonder why it does not have an exclusive forum provision designating a preferred forum. Corporations located in Massachusetts should consider provisions designating local Massachusetts courts, including the high-performing Business Litigation Session, as their exclusive forum for shareholder actions.

The risks to a corporation of adopting fee-shifting or arbitration provisions seem greater because the mere act of adopting them may attract litigation. As noted, one solution might be to put any considered provisions to the shareholder base, although even that approach may not be immune to challenge. Regardless, it seems clear that litigation-control provisions will remain and become an increasing part of corporate governance going forward.

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Endnotes

[1] The internal affairs doctrine concerns those matters that pertain to the relationships among or between a corporation and its officers, directors, and shareholders, and provides that the law of the state of incorporation governs those relationships.

[2] **Matthew D. Cain and Steven Davidoff Solomon, "Takeover Litigation in 2013" (January 9, 2014)**; **Olga Koumrian, "Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2014 M&A Litigation," Cornerstone Research (February 2015)**.

[3] **Claudia H. Allen, "Trends in Exclusive Forum Bylaws," Director Notes—The Conference Board (Jan. 2014)**.

[4] **Olga Koumrian, "Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2014 M&A Litigation," Cornerstone Research (February 2015**).

[5] *See Groen v. Safeway Inc.*, No. RG14716641 (Alameda Cty Cal., May 14, 2014); *Miller v. Beam Inc.,* No. 2014 CH 00932 (Cook Cty., Ill., Mar. 5, 2014); *Genoud v. Edgen Group,* No. 625,244 (19th Jud. Dist. Ct., East Baton Rouge, La., Jan. 17, 2014); *Hemg Inc. v. Aspen University*, 2013 WL 5958388 (Supr. Ct, NY, Nov. 4, 2013); *North v. McNamara*, 2014 U.S. Dist. LEXIS 131672 (S.D. Ohio, Sept. 19, 2014); *Daugherty v. Ahn*, CC-11-06211 (Cty. Ct. No. 3, Dallas Cty. Tex., Feb. 15, 2013).

[6] **Galaviz v. Berg, 763 F. Supp. 2d 1170 (N.D. Cal. 2011**) (denying motion to dismiss derivative action on the basis of an exclusive forum bylaw*);* **In re Facebook, Inc., IPO Sec. & Derivative Litig., 922 F. Supp. 2d 445, 463 (S.D.N.Y. 2013)**.

[7] *North v. McNamara*, 2014 U.S. Dist. LEXIS 131672 (S.D. Ohio Sept. 19, 2014).

[8] For a list of these companies, see **link here**.

[9] The Oklahoma legislature passed legislation in 2014 governing shareholder derivative actions pursuant to which the nonprevailing party must pay the prevailing party's reasonable attorney's fees.

[10] ***American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013)**.

[11] *Rothenberg v. Imperial Holdings, Inc.* (Cir. Ct.. Palm Beach Cty, Fla., filed Jan. 20, 2015).

[12] In 2012, the SEC forced the Carlyle Group to withdraw a proposed provision from an IPO registration statement that would have required all shareholder suits, including those pursuant to federal securities laws, to be resolved by arbitration on an individual, not class basis. SEC "no action" letter to Gannett Co., Inc., dated February 22, 2012 (allowing public company to omit shareholder proposal that would have inserted shareholder suit arbitration provision).

[13] FINRA disciplined Charles Schwab in 2012 for including an arbitration class action waiver in its consumer contracts in violation of a FINRA rule prohibiting contractual provisions purporting to waive judicial class actions by customers.

[14] **Mass. Gen. L. ch. 156D, §10.20(a)** (allowing directors to amend bylaws if the charter so provides and as to matters not reserved for shareholders).

[15] ***Merriam v. Demoulas Super Mkts., Inc.*, 464 Mass. 721, 727, 985 N.E.2d 388 (2013)**.