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Judge Paula M. Carey: A Lifetime of Service

By The Massachusetts Trial Court Chief Justices

After twenty years of public service, Chief Justice Paula Carey retired in January. What follows are reflections from the Trial Court Chief Justices.

Superior Court Chief Justice Judith Fabricant (ret.)

Other tributes to Paula Carey will cite her many innovations and accomplishments, dedication to justice, commitment to equity, loyalty to colleagues, energy, selflessness, and the other qualities we have all observed over her twenty years as a judge and eight and a half years as Chief Justice of the Trial Court. All of that warrants recognition and honor.

I noticed another quality in the years we worked together: Paula Carey paid attention. She listened closely, asked questions, read, absorbed, processed, and responded, making judgments from information gathered and changing course as warranted. She paid attention in conversations with one person or many, in meetings in person or on Zoom, and in reviewing written materials. She gave her attention to those she met when she visited a courthouse – from the officer at the door, to the case specialist in the clerk's office, to the custodian who cleaned the courtrooms, to the First Justice or RAJ. She gave her attention to chiefs, judges, clerks, and probation officers, as well as to legislators and executive branch officials, lawyers, advocates, and litigants.

The scope of the role of Trial Court Chief is enormous, extending to areas of law, practice, and administration, that no single person could have touched on in previous roles, still less mastered sufficiently to make informed decisions. Chief Justice Carey recognized that and undertook the consultation and exploration she needed to become familiar with each area. She asked questions, listened to answers, read widely, and learned.

Some in the role might have chosen to delegate entire functions, relying on others' expertise. There were times when I and others urged her to do that, for the sake of her own survival through endless days and weeks of meetings, conversations, reading, and problem-solving. She did not take that advice, well-meaning though it was. She drew on the expertise of others in unfamiliar areas, paid attention to it, and developed her own views so that she could perform the role in its full scope.

As the first Chief Justice of the Trial Court under the structure established by the Court Reform Act of 2011, Paula Carey has set a high standard for the future. Her successor should and surely will take guidance from many features of her service. The quality of her attention to every person and every issue stands out as especially worthy of emulation.

District Court Chief Justice Paul C. Dawley

Given her many accomplishments, it is difficult to put into words what Chief Justice Paula Carey has meant to the Trial Court and the entire judicial system in Massachusetts.

From the time she was first appointed to the Probate and Family Court in 2001, she has made a major impact on the administration of justice.

As a Trial Court judge, she administered justice fairly and impartially; as Chief Justice of the Probate Court, she managed and led with innovation and energy; and as Chief Justice of the Trial Court, she led the entire judicial system with great competence and integrity. In all of her roles, her service has been defined by her never-ending effort to improve the system and to seek excellence.

Chief Justice Carey's judicial career has been highlighted not only by her skills as a judge, administrator,

and leader, but also for her tireless support of judges and court staff. She strove to bring out the best in all of us. She improved the Court system with her dedicated efforts focused on judicial education, recidivism reduction, access to justice, and a steadfast commitment to diversity, equity, and inclusion.

I have had the privilege of working with Chief Justice Carey on a daily basis over the past eight years and can attest that whether it was in a one-on-one meeting or in front of a large public event, she was always the embodiment of personal decency, kindness, and courtesy. No matter what issue she was working on and how much pressure she was under, she demonstrated professionalism, patience, dignity, and respect to all. While her mission to improve the system will no doubt be long lasting, Chief Justice Carey's single greatest contribution was promoting and strengthening a culture of civility. By her own example, she valued inclusion and collegiality, and her fundamental human decency and thoughtfulness has brought great credit to the Judiciary.

Boston Municipal Court Chief Justice Robert Ronquillo, Jr.

Tireless, inclusive, patient, determined, diligent, kind, and compassionate. All these adjectives describe not just Chief Justice Carey the leader, but also Paula Carey, the person. None before her have matched her energy, commitment, and love of all things Trial Court. As a result, her accomplishments have been the most significant and transformative that I can recall during my twenty-one years in the Trial Court.

The Commonwealth is losing not just a great judge, but a great leader. Without a doubt, we are a better judicial system for Chief Justice Carey's leadership, vision, and courage. Her legacy will live on as we carry forth the important work she has started, endeavoring to reach her inspired vision for the Trial Court.

I am personally grateful for Chief Justice Carey's leadership and support, but I am most grateful for her friendship.

Probate & Family Court Chief Justice John D. Casey

It is not easy to accurately reflect the impact that Chief Justice Carey has had on the Massachusetts justice system, and harder still to do so in a few words. She has influenced positive changes at all levels of the justice system. Chief Justice Carey always kept in mind how her decisions affected the individuals who access our court system, the judges who hear cases, the staff who implement policies, and the justice system as a whole. Harmonizing these different points of view could be challenging, but Chief Justice Carey never shied away from making the difficult decisions. I am grateful for that.

I will always be thankful to Chief Justice Carey for her patience, support, and positivity as I learned the role of Chief Justice of the Probate and Family Court. She has a way of encouraging you, even when you know you could have done better. She always asked, "How are you?", before asking, "How is the Probate and Family Court?" Although always a Probate and Family Court judge in her heart, she never favored the court, or penalized the court if we did something different than how she would have done it. Her ability to connect one-on-one with people is exceptional. Regardless of what other crises she may have been dealing with, if you were meeting with her, Chief Justice Carey focused on you, listened, made suggestions, and never made you feel like she had more important matters to deal with.

Chief Justice Carey is a remarkably strong and caring leader and friend, and I am grateful to have had the opportunity to work with and learn from her. Hers is a legacy of commitment to and love for everyone who works in the Trial Court. There will never be a question of whether she gave everything she had to her role as judge, Chief Justice of the Probate and Family Court, or Chief Justice of the Trial Court.

Chief Justice Carey leaves the Trial Court a far better organization than when she became Chief Justice – and all of Massachusetts is lucky to have had her leadership.

Juvenile Court Chief Justice Amy L. Nechtem

Chief Justice Carey's humanity, care and kindness was evident is every aspect of her leadership. In many of her public addresses, she often used a lighthouse metaphor to highlight the responsibility of those so empowered to light the way for others. The reality was, of course, that Chief Carey's own light shone brightly, steadily guiding the Massachusetts Trial Court for over twenty years. She was a beacon of passion, compassion, and brilliance, with a laser focus on the equitable delivery of justice, resulting in enhanced access to justice. Chief Justice Carey's ability to improve our justice system, ensuring justice for all, inspired our collective resolve. Her boundless enthusiasm, energy, and selfless commitment has left our Trial Court better, stronger and focused on the future.

Chief Carey was a visionary leader resulting in accomplishments benefiting the people of Commonwealth of Massachusetts and beyond. It was an honor, a privilege, and a joy to serve on Chief Justice Paula Carey's team. We will continue to follow that bright light that is Chief Justice Paula Carey's legacy.

Housing Court Chief Justice Timothy F. Sullivan

During my tenure as Chief Justice of the Housing Court, I have often reached out to Chief Carey for guidance and support on many challenging issues, both personal and professional. Regardless of the time of day, Chief Carey did not hesitate to lend a listening ear and offer a helping hand, which showcases her helpful, compassionate, and empathetic nature. Importantly, Chief Carey understands the value of family, and has been supportive in allowing me to focus on major milestones in my family, including when my twin daughters were preparing to go to college.

Chief Justice Carey's tireless commitment to public service has been inspiring to witness, and her many contributions to the judiciary have been remarkable. Chief among those contributions has been her focus on diversity, equity, and inclusion in the courts. Chief Carey has also been a pillar of support for the Housing Court as we have continued to navigate the many challenges brought about by the pandemic. I am grateful to Chief Carey for her unwavering support of, and commitment to, several key Housing Court initiatives, including housing court expansion and digitization, which, among other things, have supported access to justice and enhanced the user experience. After the sudden passing of Chief Justice Ralph Gants, Chief Carey picked up the torch without hesitation and continued to work with internal and external stakeholders to ensure that the most vulnerable residents of the Commonwealth were able to access the courts and were directed to community-based resources. Despite the unprecedented challenged posed by the pandemic, I was encouraged by Chief Carey's steadfast leadership, and she demonstrated to all who worked with her that she is a quick study. When dealing with the impact of the pandemic on court operations and eviction matters, for example, Chief Carey took the time to learn the intricacies of summary process (eviction) proceedings, while at the same time deferring to subject matter experts.

Chief Carey's friendship, mentorship, and leadership will certainly be missed.

Land Court Chief Justice Gordon H. Piper

Trial Court Chief Justice Paula M. Carey's retirement marks three years I have so far served as the Land Court's Chief Justice, all under her superb leadership. She stands out as a tireless, inspiring head of the Trial Court, and as a powerful and effective leader of its leadership.
Chief Justice Carey's boundless energy, and her unending focus and optimism, carried many of us through the great challenges of recent times. The pandemic; the persistence of racial, ethnic, gender discrimination; the economic strains felt by so many in Massachusetts—all these and more Chief Justice Carey helped the courts navigate in positive ways.

We all are grateful for Chief Justice Carey's dogged work making the courts a more open, diverse, hospitable, and comprehensible place for court users to seek and receive justice—fairly and impartially. Her efforts also have helped all who work in our courts feel that we are welcome and fully participating in carrying out our shared mission. Much remains to be achieved, but Chief Justice Carey has made great

strides, and will continue to inspire.

But it's also about the little things. Chief Justice Carey enthusiastically and ably dealt with the "details" that help the Trial Court, including the Land Court, the smallest of the seven departments, move through its daily work. I value her genuine interest in the matters that are of great consequence to the Land Court and its users. As a court of specialized and limited jurisdiction, the Land Court Department regularly confronts the need to transfer cases back and forth with the other departments, and to assign judges of one of those other departments to sit to hear one of our cases, and vice versa. For such a small court, we generate a disproportionate share of these requests, all of which are addressed to Chief Justice Carey to decide. She, with help from her expert staff, bored down deeply to understand these matters, built consensus among the involved departments, and forged practical and sensible outcomes for the parties and the Trial Court. Chief Justice Carey also took the time and interest to understand the needs of the Land Court in responding to new stresses placed on the Commonwealth's registered land system, which the Land Court oversees and administers. Chief Justice Carey has helped the court with the promulgation of orders, rules, and guidance to the bar and the Registries of Deeds intended to streamline the court's work in this arena. She has supported expanding resources to enhance the court's ability to serve the public, the conveyancing bar, and the land records offices.

Chief Justice Carey has been a strong ally of the Land Court in its initiative, rolled out in the past year, to address judicially the presence, in land records across Massachusetts, of odious restrictions and covenants based on race, religion, ethnicity, and other invidious grounds. Chief Justice Carey was closely involved in the promulgation and implementation of a new Land Court standing order to remedy these unfortunate relics of past discrimination, and has helped the Land Court's efforts to have news of this novel cause of action spread widely among the bar and the public.

These are a few examples of Chief Justice Carey's deeply immersive style during her years serving as the judicial head of our Trial Court. Both as a bold and capable leader setting major policies for the entire Trial Court, and as a skilled manager of many important details that the Chief Justice of the Trial Court must handle to keep the business of the courts moving, Paula Carey has led us all with distinction. I join a very large and loud chorus in praising her for all she has accomplished, and in wishing her well as she commences a richly-deserved retirement.

Chief Justice of the Superior Court Heidi E. Brieger

As Chief Justice of the Trial Court, Paula Carey faced a number of substantial management and administrative hurdles, but along with her "Partner in Justice" John Bello, she brought her full self — and more — to the task every single day. Some Chiefs fit the position, and some Chiefs create the position: Paula Carey's Chiefdom expressed her values and her fierce commitment to doing justice in the Commonwealth. The Trial Court is stronger, more conscious of its obligations to the community, and altogether better as a consequence of her hard work and caring for each and every one of us.

The Inevitable Disclosure Doctrine In Employment Litigation: Two Perspectives

By Russell Beck & Hannah Joseph / Josh Davis & Andrew O'Connor

Introduction

Imagine this scenario: A Chief Marketing Officer develops a strategic marketing plan for employer X then resigns to join a direct competitor Y in the same role where she is responsible for developing company Y's strategic marketing plan. How can she do so without, even inadvertently, drawing on the information that she learned at her prior employer?

Ordinarily, a noncompete agreement would be the appropriate tool to restrain such post-employment activities. However, in some jurisdictions, even without a noncompete, courts are willing to provide similar relief through application of the "inevitable disclosure doctrine" (the "IDD").

The IDD may be summarized as follows: "[W]here an employee's work for a new employer substantially overlaps with work for a former employer, based on the same role, industry, and geographic region, a . . . court may conclude that th[e] employee[] would likely use confidential information to the former employer's detriment."**[1]** The IDD "allows the court to enjoin a former employee from working at a competitor of the employer, even if the former employee never entered into a non-competition agreement, if the court finds that such employment would inevitably lead to a disclosure of the trade secret."**[2]** Historically, courts relied on their equitable powers to assess whether to issue injunctions to prevent inevitable disclosures.**[3]** More recently, however, courts have turned to language in the Uniform Trade Secrets Act (the "UTSA"), providing that "*threatened* misappropriation may be enjoined."**[4]** UTSA, § 2(a) (emphasis added).

Of course, the IDD is not without detractors. Courts that have rejected the IDD have found its application overly restrictive, particularly where the former employer has not negotiated in advance for the sought-after protections and relief in the form of a noncompete.

Discussed below are the reasons for and against adopting the IDD in Massachusetts.

[1] *Jazz Pharms., Inc. v. Synchrony Grp., LLC*, 2018 WL 6305602, at *6 (E.D. Pa. Dec. 3, 2018).
[2] *Architext, Inc. v. Kikuchi*, 2005 WL 2864244, at *3 (Mass. Super. May 19, 2005); *see also EMC Corp. v. Breen*, 2013 WL 1907460, at *2-3 (Mass. Super. Feb. 25, 2013).
[3] *See generally, e.g.*, *Standard Brands, Inc. v. Zumpe*, 264 F. Supp. 254, 268 & n.28 (E.D. La. 1967).
[4] *Polymet Corp. v. Newman*, 2016 WL 4449641, at *5–6 (S.D. Ohio Aug. 24, 2016); *CPG Int'l LLC v. Georgelis*, 2015 WL 1786287, at *11 (M.D. Pa. Apr. 20, 2015); *First W. Capital Mgmt. Co. v. Malamed*, 2016 WL 8358549, at *9 (D. Colo. Sept. 30, 2016) (Martinez, J.), *rev'd on other grounds*, 874 F.3d 1136 (10th Cir. 2017).

Point

By Russell Beck & Hannah Joseph

Status of the IDD in Massachusetts

Prior to October 1, 2018, no Massachusetts appellate court had embraced or rejected the IDD. However, when Massachusetts enacted the Massachusetts Uniform Trade Secrets Act, G.L. c. 93, §§ 42–42G ("MUTSA") in 2018, it "most likely" adopted the IDD. To understand the status of the IDD in Massachusetts, some background is important.

The current version of the UTSA was promulgated in 1985. When Congress passed the Defend Trade Secrets Act of 2016 (DTSA), **18 U.S.C. §1836**, it was modeled on the UTSA. There was, however,

concern about opening the floodgates to the IDD in states that did not permit it.**[1]** To address that concern, Congress narrowed the reach of the UTSA's "threatened misappropriation" language as follows:

> [A] court may . . . grant an injunction . . . to prevent any . . . threatened misappropriation . . . on such terms as the court deems reasonable, provided the order does not . . . prevent a person from entering into an employment relationship, and that conditions placed on such employment shall be based on evidence of threatened misappropriation and not merely on the information the person knows . . . . 18 U.S.C. § 1836(b)(3).

Two years later, drawing on both the UTSA and DTSA, the Massachusetts legislature passed the MUTSA, providing a third alternative. Specifically, the MUTSA provides, in relevant part, as follows:

> [T]hreatened misappropriation may be enjoined upon principles of equity, including but not limited to consideration of prior party conduct and circumstances of potential use, upon a showing that information qualifying as a trade secret . . . is threatened to be misappropriated. **G.L. c. 93, § 42A(a).**

This language rejected the DTSA's narrow approach and, instead, was intended to indicate that MUTSA would embrace the IDD, though only after a showing of prior misconduct or other enhanced risks created by the party sought to be enjoined.**[2]**

This interpretation is consistent with the legislature's express approval of the so-called "springing noncompete," in the contemporaneously-enacted Massachusetts Noncompetition Agreement Act, **G.L. c. 149, § 24L(c)**, which allows for "the imposition of a noncompetition restriction by a court, whether through preliminary or permanent injunctive relief or otherwise, *as a remedy for a breach of another agreement or a statutory or common law duty*." (Emphasis added.)

This interpretation is also consistent with the seminal IDD case, *PepsiCo, Inc. v. Redmond*, **54 F.3d 1262 (7th Cir. 1995)**, in which the district court enjoined the defendant based on the inevitable use of trade secrets in his new employment, but only after finding that he had been less than forthright and had "out and out lie[d]," suggesting a lack of trustworthiness. *Id.* at 1270. ("[W]hen we couple the demonstrated inevitability that [defendant] would rely on [plaintiff's] trade secrets in his new job . . . with the district court's reluctance to believe that [defendant] would refrain from disclosing these secrets in his new position (or that [the new employer] would ensure [defendant] did not disclose them), we conclude that the district court correctly decided that [plaintiff] demonstrated a likelihood of success on its statutory claim of trade secret misappropriation." *Id*. at 1271.)

Scope and Application of the IDD

It is well-settled that an employee may not go from one company to another and use the former company's trade secrets for the benefit of new company. Accordingly, the IDD "is really just a common sense response to a common dilemma: an employee who leaves to join a competitor can be tempted to gain an unfair head start by drawing upon proprietary information belonging to a past employer, and once the secret is disclosed, it may be forever lost."**[3]** While we know that employees do not come to their jobs with a "*tabula rasa*" (a clean slate), we also do not allow them to bring and use others' trade secrets.

We prefer to assume that most employees can be trusted to avoid circumstances where they will need to use or disclose their former employer's trade secrets. Accordingly, merely knowing the information is generally not sufficient to trigger the IDD. There must be a reason to believe that the employee will give in to temptation.

It will only be in rare instances that the IDD in its purest form (*i.e.*, without some evidence of misconduct) can be used. As the Court stated in *Earthweb, Inc. v Schlack*:

> [I]n its purest form, the inevitable disclosure doctrine treads an exceedingly narrow path through judicially disfavored territory. Absent evidence of actual misappropriation by an employee, the doctrine should be applied in only the rarest of cases. Factors to consider in weighing the appropriateness of granting injunctive relief are whether: (1) the employers in question are direct competitors providing the same or very similar products or services; (2) the employee's new position is nearly identical to his old one, such that he could not reasonably be expected to fulfill his new job responsibilities without utilizing the trade secrets of his former employer; and (3) the trade secrets at issue are highly valuable to both employers. Other case-specific factors such as the nature of the industry and trade secrets should be considered as well.

71 F. Supp. 2d 299, 310 (S.D.N.Y. 1999).

More typically, however, to establish inevitability, the *Earthweb* factors must be coupled with some evidence of misconduct, which includes but need not go as far as actual misappropriation. For example, deceitfulness may evince a lack of trustworthiness, warranting a finding that the employee cannot be trusted to protect his former employer's trade secrets.

This "something more" serves as the precise justification for the IDD. It allows a company to have a culture where noncompetes are not necessarily required, while not losing the ability to protect itself from the enhanced risks posed by an untrustworthy former employee. Otherwise, without the IDD, every employer would be relegated to requiring every employee with access to trade secrets to sign a noncompete – just in case an employee turns out to be a bad actor. Such a result would either encourage the unnecessary use of noncompetes, despite growing public sentiment seeking to limit their use, or, if noncompetes are not used, reward misconduct at the expense of the victim-employer.

Nevertheless, IDD detractors seek to justify this precise result based on the possibility that companies may see deceit where it does not exist and/or that, because the parties are generally free to contract around those risks, they must. Accordingly, opponents would elevate freedom of contract over compliance with the law (trade secret or otherwise), using the former to excuse violation of the latter. But, why should a company need to impose a noncompete to prevent conduct that the law otherwise prohibits? Must companies also have contracts prohibiting employees from stealing physical property? The absence of a contract reinforcing existing legal obligations does not nullify the law – nor should it.

The IDD also draws criticism based on the mistaken assumption that an injunction necessarily precludes the employee from working at the competitor. The IDD does not. Because an injunction is to be narrowly tailored to prevent only the misappropriation, in most instances, judicial intervention is limited to the specific activity within the employee's role that poses the risk of inevitable use or disclosure. *See, e.g.*, ***Doebler's Pennsylvania Hybrids, Inc. v. Doebler Seeds, LLC*, 88 Fed. Appx. 520, 523 (3d Cir. Feb. 12, 2004)** ("liability is not premised on the fact that [the former employee] competed with [the former employer], but rather on the fact that they used [the former employer's] own confidential information to compete against them"). That is where the DTSA's limitation actually harmonizes with most courts' interpretation and application of the IDD.

Viewed through this narrow lens, the IDD appropriately balances the interests in protecting companies' trade secrets against employees' job mobility. Absent employee misconduct, mobility will rarely be impacted.

[1] 114th Congress, 2nd Session, Senate, Report 114-220, pp. 8-9; 114th Congress, 2nd Session, House of Representatives, Report 114-529, pp. 12-13.
[2] *See* 114th Congress, 2nd Session, Senate, Report 114-220, pp. 8-9; 114th Congress, 2nd Session, House of Representatives, Report 114-529, pp. 12-13.
[3] William L. Schaller, "*Trade Secret Inevitable Disclosure: Substantive, Procedural & Practical Implications of an Evolving Doctrine*," 86 J. Pat. & Trademark Off. Soc'y 336, 337 (May 2004).

Russell Beck, founding partner of Beck Reed Riden LLP, is nationally recognized for his trade secret and

noncompete experience. He drafted most of the language in the Massachusetts Noncompetition Agreement Act, assisted the White House with noncompete policy, wrote the book, Negotiating, Drafting, and Enforcing Noncompetition Agreements and Related Restrictive Covenants (6th ed., MCLE, Inc. 2021), and teaches Trade Secrets and Restrictive Covenants at Boston University School of Law.

Hannah Joseph is a senior attorney with the firm's business litigation group, where she focuses her practice on the growing areas of trade secrets and restrictive covenants law, employee mobility, and unfair competition.

Counterpoint

By Josh Davis & Andrew O'Connor

The Inevitable Disclosure Doctrine ("IDD") is premised upon fundamental distrust of people and hostility to the notion of freedom of contract. Neither premise justifies the limit on personal liberty that is the price of the doctrine. And, neither premise warrants excusing an employer's failure to take steps necessary to protect its competitive interest through contract – either at the beginning or end of the employment relationship.

Employers operating in competitive spaces understand the degree to which a departing employee can threaten their success. As a consequence, many employers insist that a new employee agree – in multiple ways – to safeguard the employer's interests in the event of a departure. Employers' efforts in this regard have been aggressive enough to compel legislative limitation in Massachusetts and elsewhere. *See e.g.*, **G.L. c. 149, § 24L** (limiting non-competes); Cal. Bus. Prof. Code § 16600 (prohibiting non-competes); N.D. Cent. Code 9-08-06 (prohibiting non-competes); OK Stat. tit. 15, § 219A (prohibiting non-competes). Indeed, President Biden issued an executive order on July 9, 2021 encouraging the Federal Trade Commission to use its rulemaking authority to "curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."

Even within those statutory limits (which reflect state policy against restrictions on employee mobility), employers have ample opportunity to bargain for the kind of protection that aggressive application of the IDD provides them for free. Employers who fail to take steps necessary to protect their most vital confidential information run the risk of losing it. This should hardly be controversial – trade secrets are only trade secrets if the party seeking to protect them has taken the steps necessary to do so. A claim under the IDD only exists in circumstances where a party has failed to do something it now claims is necessary to secure their protection.

Advocates of the IDD suggest that forcing employers to contract to protect their most closely guarded secrets against misappropriation is somehow troubling. They argue, we should be comforted by the idea of court intervention in narrow circumstances – apparently, we are better off with litigation than with arms-length negotiated contracts. Litigation is inherently inefficient and creates an uneven playing field benefiting an employer with significantly greater resources. If the protection afforded by the IDD is sufficiently valuable to compel litigation at the end of the employment relationship, it warrants negotiation at the beginning of the relationship. Application of the IDD deprives the employee of the value they would receive from a negotiated contract and replaces it with a unilateral post-employment restriction that is inherently uncertain because it will shaped, in each instance, by a court.

Rather than grapple with these broad issues, IDD advocates resort to two arguments: (1) the Commonwealth has already adopted the IDD; and, (2) concerns about freedom of contract and employee mobility are misplaced because the IDD's application will be limited to demonstrably untrustworthy employees. Neither argument withstands scrutiny.

Both the Massachusetts Uniform Trade Secret Act, G.L. c. 93, §§42-42G ("MUTSA") and amended noncompete laws, G.L. c. 149, §24L, became effective as of October 1, 2018. It is no coincidence that these statutes were enacted together. The amended noncompete laws, **G.L. c. 149, § 24L**, restrict

noncompete agreements in geographic scope, length, and subject matter, include a "garden leave" provision, and bar enforcement against an employee who is terminated without cause or laid-off. In conjunction with the amended noncompete laws, the MUTSA contains specific provisions designed to restrain the use of trade secret laws to circumvent noncompete laws, which is effectively what the IDD does.

For example, the MUTSA includes a heightened pleading requirement stating that a plaintiff must allege with "reasonable particularity" the "circumstances" of the misappropriation, "including the nature of the trade secrets and the basis for the protection." **G.L. c. 93, § 42D(b)**. Similarly, discovery under a MUTSA claim cannot commence until the plaintiff "identif[ies] the trade secret with sufficient particularity under the circumstances of the case to allow the court to determine the appropriate parameters of discovery and to enable reasonably other parties to prepare their defense." **Id**. Additionally, a plaintiff who brings a claim of misappropriation in bad faith may be liable for the defendant's attorneys' fees. **G.L. c. 93, § 42C**. These provisions demonstrate Massachusetts' efforts to restrict vague claims of misappropriation of generalized know-how or swaths of information that a former employee may have learned while employed and might potentially disclose to a new employer, without more. They discourage claims based on "threatened" misappropriation premised on presumptions about how a departing employee will behave.

Additionally, the MUTSA includes a preemption provision that encourages employers to enter into written non-disclosure agreements with their employees that specifically define protected information that meets the definition of a trade secret rather than merely confidential information or information that may otherwise be obtained through lawful means. S**ection 42F of the MUTSA** states that the MUTSA supersedes "any conflicting laws of the commonwealth providing civil remedies for the misappropriation of a trade secret," but does not preempt "contractual remedies, provided that, to the extent such remedies are based on an interest in the economic advantage of information claimed to be confidential, such confidentiality shall be determined according to the definition of trade secret in section 42, where the terms and circumstances of the underlying contract shall be considered in such determination." In other words, the "MUTSA supersedes a claim for breach of a nondisclosure agreement intended to protect economically valuable information unless the information sought to be protected by the agreement meets the statute's definition of a trade secret." ***Needham Bank v. Guaranteed Rate, Inc.*, No. 2184-cv-0661-BLS1, 2021 WL 2019287 (Suffolk Superior, April 17, 2021).** Similarly, the United States District Court of the District of Massachusetts, after a detailed statutory construction analysis, held that the preemption provision of the MUTSA does not preempt certain non-contractual claims, such as those brought under c. 93A, "where these claims rely upon the alleged theft of confidential and [proprietary] information" that does not meet the definition of a trade secret. *Neural Magic, Inc. v. Facebook, Inc.*, 20-cv-10444 (Casper, J.) (D. Mass. Oct. 29, 2020). In reaching this conclusion, the District Court noted that "the focus should be on the causes of action that give rise to such civil remedies, not the factual conduct that give rise to same." *Id.* The IDD contradicts this principle. This risk of preemption encourages employers to be specific in their agreements about the nature of protected information. It discourages employers from bringing claims under the MUTSA where the information comprises generalized knowledge or information that does not constitute a trade secret, which is often the subject of IDD arguments.

The amended noncompete laws and the MUTSA demonstrate Massachusetts' intent to discourage the use of the IDD and, instead, encourage employers to enter into written agreements with employees that specifically define the employee's duties and obligations to the employer that comply with Massachusetts noncompete laws, rather than creating *post hoc* obligations on employees of which the employee was unaware. This is consistent with Massachusetts caselaw prior to the enactment of the MUTSA. ***See, e.g., The Gillette Co. v. Provost,* 33 Mass. L. Rptr. 265 (Mass. Super. Dec. 23, 2015)** ("Massachusetts courts have not embraced the doctrine of inevitable disclosure"); ***Architext, Inc. v. Kikuchi*,** 20 Mass. L. Rptr. 127 (Mass. Super. May 19, 2005) (same). In cases where inevitable disclosure is a concern, it is in the context of breach of a valid noncompete agreement, not purely a trade secrets claim. ***See SimpliVity Corp. v. Moran,* 33 Mass. L. Rptr. 587 (Mass. Super. Aug. 14, 2016)** ("Massachusetts courts have been willing to enforce covenants not to compete to protect against inevitable, even inadvertent,

disclosure…"). Contrary to the other side's position, courts addressing this issue since the MUTSA's enactment do not endorse the use of the IDD to support trade secrets claims. *See* ***National Medical Care, Inc. v. Sharif,* 2020 WL 6318922 (D. Mass. 2020)** (explaining limited use of the IDD to enforce valid noncompete agreements and distinguishing same "as distinct from a pure trade secrets claim").

Finally, the proponents' reassurances of the limitations of the use of the IDD are of little comfort. The "something more" sought in support of an IDD claim rests on deceitfulness. Oftentimes, an employee will, suddenly without warning, leave one employer for another. The manner of departure, although professionally necessary, appears deceitful. In that context, the "something more" is really nothing. Moreover, if there truly is "something more," the MUTSA provides for the recovery of double damages and attorneys' fees if "willful and malicious misappropriation exists." **G.L. c. 93, §§ 42B(b) and 42C.**

Deceitfulness is an argument that is too often available to employers seeking relief under an IDD theory. The IDD rests on a presumption that an employee will be unable to manage to work for a new employer without disclosing trade secret information gained at the prior employer. The word "inevitable" presumes deceit, while contract presumes the opposite. It rests on a premise of honor. People can promise to behave in a certain manner and courts can then intervene when they fail to do so. An employer that fails to act to protect its most vital information does so at its own peril.

The law does not, and should not, give it a backstop.

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Addressing Hate Crimes: Massachusetts Can Do Better

By Madison Bader & Christina Miller

Incidents of hate crimes in the United States surged to the highest level in twelve years in 2020.**[1]** With 7,759 hate-based incidents and 10,532 related offenses reported to the Federal Bureau of Investigation ("FBI"), there are many hate crimes that remain unreported.**[2]** The fact remains that, notwithstanding federal efforts to capture all hate-based incidents, such as under the **Hate Crime Statistics Act of 1990**, 28 U.S.C. § 534 ("HCSA"), and the **Uniform Crime Reporting ("UCR") Program** which includes data from more than 18,000 city, university and college, state, tribal and federal law enforcement agencies covering 92% – 97% of the population, victim under-reporting, law enforcement under-identification, and under-investigation of hate crimes leads to the underestimation of the actual number of incidents.**[3]**

State-based efforts–such as under the **Massachusetts Hate Crimes Reporting Act**, **G.L. c. 22C, §§ 32**–**35** (the "Massachusetts Act" or "Act") –also underestimate the number of hate crimes because they do not mandate that cities and towns report hate-based incidents. Lack of reliable information on the volume and type of hate crimes occurring in Massachusetts may cause certain communities to perceive that they are being targeted but ignored or inadequately protected by law enforcement agencies. Furthermore, without accurate data, it is difficult to allocate appropriate resources and create effective prevention and intervention efforts to address hate-based incidents. Notwithstanding efforts, addressing hate-based criminal conduct in Massachusetts continues to present challenges, including inadequate reporting and data collection and limited resources targeted to effective investigation, prosecution, and prevention. This article summarizes current barriers and recommendations where Massachusetts can do better.

Citizen Reports of Hate Crimes

Reporting is the first and most important step to holding perpetrators accountable and ensuring the deployment of appropriate resources for the victim, impacted communities, investigation, and prosecution of hate crimes. Hate crimes impact not only the targeted victim; the entire community is harmed by the hate motivating the perpetrator.**[4]** While hotlines and other avenues for witnesses to report hate crimes are a good start, increasing public knowledge of what constitutes a hate crime and community trust to overcome barriers that discourage reporting are needed.

There are numerous reasons why hate crimes are underreported. Some victims do not report hate crimes because they do not know that the act they suffered is legally recognized as a hate crime.**[5]** Hate crime recognition may be particularly difficult among immigrant communities where their countries of origin do not criminalize or prosecute similar hate-based acts. Other reasons for non-reporting include the "normalization" of hate crimes.**[6]** For example, a victim who experienced repeated hate-based incidents before being targeted for a hate crime may "normalize" the crime as a common incident not worth reporting. Additionally, cultural and religious influences may cause incidents to be characterized as shameful and deter reporting. For example, identifying as a victim may translate into labeling oneself as "weak" or "shameful." Distrust of government and law enforcement within a community can also reduce reporting. For example, Muslim and transgender communities may underreport due to perceived or actual negative experiences with law enforcement,**[7]** including fear of abusive or disrespectful treatment.**[8]** Others, such as undocumented individuals, may avoid involvement with law enforcement for fear of being reported to Immigration and Customs Enforcement. Language barriers also frustrate reporting.

Government Reporting of Hate Crimes

As with civilians, law enforcement officers may not recognize many incidents as hate crimes because they define hate crimes too narrowly. Officers may see only blatant violations of two of the Massachusetts hate crime statutes–violation of constitutional rights (**G.L. c. 265, § 37**) and assault or battery for

purposes of intimidation (**G.L. c. 265, § 39**)–as hate crimes. However, the Massachusetts Act which provides for the collection, analysis, and public dissemination of hate crime data, defines "hate crimes" broadly as:

> any criminal act coupled with overt actions motivated by bigotry and bias including, but not limited to, a threatened, attempted or completed overt act motivated at least in part by racial, religious, ethnic, handicap, gender or sexual orientation prejudice, or which otherwise deprives another person of his constitutional rights by threats, intimidation or coercion, or which seek to interfere with or disrupt a person's exercise of constitutional rights through harassment or intimidation**[9]** (emphasis added).

The Act also expressly provides that hate crimes include the crimes of violation of civil rights (**G.L. c. 265, § 37**), assault or battery for purposes of intimidation (**G.L. c. 265, § 39**), the destruction of place of worship (**G.L. c. 266, § 127A**), and crimes against morality and good order (**G.L. c. 272**).**[10]** Yet, Massachusetts officials reported only 351 hate crimes to the FBI in 2020,**[11]** which likely underestimates the actual number of hate-based incidents in the state.

Furthermore, when a civilian does not expressly identify an incident as motivated at least in part by hate, investigating officers may discover a hateful intent only upon asking specific, tailored questions. However, the likelihood of asking tailored questions is reduced without specialized training on interview techniques and the identification of key features of hate crimes. Without training on the expansive definition of hate crimes, effective interviewing techniques, and the ability to recognize key features of hates crime, the under-investigation and under-reporting of hate crimes will continue in Massachusetts.

Allocating appropriate resources for the investigation and prosecution of hate crimes depends on knowing the scope and nature of hate crimes committed in Massachusetts. However, the Act is silent on whether law enforcement must report the hate-based incidents they investigate to the FBI or state data repositories, making reporting of hate-based incidents voluntary for police organizations and their city or town employers.**[12]** This permits cities and towns to avoid reporting and publicizing hate crimes out of concern their community will be labeled as biased and discriminatory, as recently highlighted by Town of Danvers' initial decision not to publicize certain hate-based incidents in their community, which was quickly reversed.**[13]** Mandatory reporting under the Act would improve public transparency, appropriate police and government responses, allocation of targeted resources, and community trust.

Hate-based incidents that avoid reporting may ultimately lead impacted communities to believe that they are devalued or their government will not protect them or their members. The fact that law enforcement agencies across Massachusetts may rely on inconsistent or narrower definitions of "hate crimes" than specified under the Act, or lack the appropriate resources, motivation, policies, or training to accurately report, investigate, and prosecute hate crimes must be remedied.**[14]**

Addressing Hate Based Incidents

Since 1996, any person convicted of assault or battery for purposes of intimidation is statutorily required to complete a "diversity awareness program" designed by the Executive Office of Public Safety.**[15]** Twenty-five years later, no such program has ever been created in Massachusetts, leaving courts with no standardized educational, reformative program to address recidivism and the underlying cause of hate crimes. Some judges impose no educational program requirement or resort to a patchwork of available resources, such as individualized counseling or public service hours. This prolonged failure to implement an important statutory requirement must be remedied.

Recommendations to Improve Reporting and Ensure Effective Investigation and Prosecution

Reporting by law enforcement agencies should be made mandatory under the Act for accurate statistics for enhancing training, education, transparency of police and government responses, community trust, and the efficient allocation of resources all directed at eliminating hate crimes. Another crucial step lies with

educating both the public and law enforcement about the broad, legal definition of hate crimes under the Massachusetts Act.

State and local governments need more resources, thoughtful policies, and specialized training to improve reporting and effective investigation and prosecution of hate crimes. Police academies and investigative organizations should increase programs for cadet and continuing training opportunities on how to identify hate crimes, the special handling of investigations in this area, and reporting of hate crimes to superiors and government data repositories. At a recent law enforcement roundtable on the subject, panelists stated that "[n]ot every agency may be able to support a specialized unit, but all should be able to develop procedures and collaborations that will ensure cases are handled with the appropriate expertise."**[16]** The roundtable members also recommended:

- Establishing policies that specify how hate incidents are identified and investigated, and who within the agency should be notified when a suspected hate crime occurs.
- Employing community liaison officers and bias crime coordinators to manage agency responses to reported hate crimes.**[17]**
- Establishing bias crime detective positions or assigning someone to these specific responsibilities, allowing for a more thorough investigation and offering a check against hate crimes that may be misclassified by patrol officers.
- Exploring the possibility of sharing a regional bias crime position among multiple smaller or rural law enforcement agencies where resources do not permit establishment at individual agencies.

Furthermore, establishing a "diversity awareness program," as mandated in G.L. c. 265, § 39, to address the hateful intents harbored by those adjudicated responsible for hate crimes will prevent future hateful acts and show victims and their communities that Massachusetts is serious about addressing hate in our communities. While such a program is mandated for those convicted of assaulting or battering another for purpose of intimidation, the program can be used for all those convicted of hate crimes as defined in the Act. Just as workplaces have unconscious bias and religious respect training, so should perpetrators of hate crimes.

We can do better to ensure hate has no home in Massachusetts.

[1] Carrega, Christina and Krishnakumar, Priya. "Hate crime reports in US surge to the highest level in 12 years, FBI says." CNN, 26 October 2021, **https://www.cnn.com/2021/08/30/us/fbi-report-hate-crimes-rose-2020/index.html**.
[2] **2020 FBI Hate Crime Statistics**, **https://crime-data-explorer.fr.cloud.gov/pages/explorer/crime/hate-crime**.
[3] *Id*.
[4] Davis, Ronald. "The Hate Crimes Reporting Gap: Low Numbers Keep Tensions High." *Police Chief Magazine*, International Association of Chiefs of Police, May 2016, **https://www.policechiefmagazine.org/the-hate-crimes/**.
[5] Shively, Michael (et al). "Understanding Trends in Hate Crimes Against Immigrants and Hispanic-Americans." *Office of Justice Programs*, United States Department of Justice, January 2014, **https://www.ojp.gov/ncjrs/virtual-library/abstracts/understanding-trends-hate-crimes-against-immigrants-and-hispanic**.
[6] Malik, Sanam. "When Public Figures Normalize Hate." *CAP*, Center for American Progress, 25 March 2016, **https://www.americanprogress.org/article/when-public-figures-normalize-hate/**.
[7] Massachusetts Advisory Committee to the U.S. Commission on Civil Rights, "Advisory Memorandum on Hate Crimes in Massachusetts." *USCCR.gov*, 13 June 2019, **https://www.usccr.gov/files/pubs/2019/Advisory-Memo-on-Hate-Crimes-in-Massachusetts.pdf.**

[8] Schwencke, Ken. "Confusion, Fear, Cynicism: Why People Don't Report Hate Incidents." *ProPublica*, Publica Inc., 31 July 2017, **https://www.propublica.org/article/confusion-fear-cynicism-why-people-dont-report-hate-incidents**.
[9] Pursuant to regulations promulgated by the colonel of the State police in accordance with G.L. c. 22C, § 33, enumerated bias indicators "can assist law enforcement officers in determining whether a particular crime should be classified as a hate crime." **501 Code Mass. Regs. § 4.04(1) (1993)**.
[ix] G.L. c. 22C, § 32.
[10] *Id*.
[11] US Department of Justice, "2020 Hate Crimes Statistics for Massachusetts", *Justice.gov*, DOJ, 2020, **https://www.justice.gov/hatecrimes/state-specific-information/massachusetts**.
[12] Referred to in the statute as "crime reporting unit." G.L. c. 22C, § 33 (1991); *see also* G.L. c. 22C, § 32.
[13] In a three-day span, the Town of Danvers went from announcing that not all hate- based incidents would be reported to the public to stating that all hate-based incidents would be made public, including a publicly available database. *See* Town of Danvers, Press Releases, **Statement from Town of Danvers on Recent Incident** (Dec. 20, 2021) & **Update to the Statement from Town Officials** (Dec. 23, 2021). *See also* **Danvers reports another hate incident; future incidents won't be made public (wcvb.com)**.
[14] Bureau of Justice Assistance, *A Policymaker's Guide to Hate Crimes*, March 1997, **https://www.ojp.gov/pdffiles1/bja/162304.pdf**.
[15] *See* G.L. c. 265, § 39. The programing requirement to section 39 was added by St.1996, c. 163, § 2.
[16] U.S. Department of Justice Hate Crimes Enforcement and Prevention Initiative, "Improving the Identification, Investigation and Reporting of Hate Crimes – A Summary Report of the Law Enforcement Roundtable." *Cops.USDOJ.gov*, 2020, **https://cops.usdoj.gov/RIC/Publications/cops-w0895-pub.pdf**.
[17] "State hate crime statutes vary significantly, and the elements required for UCR reporting do not mirror state statutes. The coordinator can help code hate crimes and reinforce training during roll call or in-service. Based on agency size, certain responsibilities could be assumed by civilians, reserve personnel, or volunteers. Bias crime coordinators can also maintain statistical data and produce statistical reports monthly as well as comprehensive reports twice yearly for law enforcement and other leaders." *Id.*

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Before Assistant Professor of Law Christina Miller joined Suffolk University Law School to run the Prosecutors Clinic and teach in the area of criminal law and effective advocacy, she supervised all hate crime prosecutions and prosecuted several hate crime cases for the Suffolk County District Attorney's Office during her eleven years as the Chief of District Courts and Community Prosecutions.

Mentoring the Next Generation

By Joshua Levy

It is a fundamental tenet of the legal profession that lawyers should give back to the communities they serve. Generally embodied by the requirement that lawyers provide direct pro bono legal services to the community, many lawyers also find creative ways to serve through community engagement and service with a variety of non-profit organizations.

When the John Joseph Moakley United States Courthouse (Moakley) opened in 1999, I was a young Assistant United States Attorney looking for the best way to directly connect with the community I served. When I learned about Discovering Justice, which was founded in conjunction with the opening of the Moakley Courthouse, I quickly volunteered for their Mock Trial Program.

I vividly recalled our first class with a dozen wide-eyed 8th graders from a Boston middle school in one of the Moakley's august courtrooms. We started the session by asking the students to share what they knew about the law and our legal system. Some students shared stories about crime in their neighborhood or family members who had brushes with the law. None of them, as I recall, talked about knowing a lawyer or dreaming of being a lawyer. I will never forget how some of the kids were so overwhelmed in that initial meeting that they looked straight down when they talked, avoiding eye contact at all costs.

Fast forward ten weeks from that initial session to the culminating Mock Trial in front of a real federal judge. Every one of those students was on their feet examining witnesses and addressing the jury of community members that included their city councilors, state representatives, and school principals. Their beaming parents were in the gallery thunderstruck by the command and poise demonstrated by their children.

As a legal mentor, I led sessions where the students learned about how the justice system works, the different players in a trial, and the importance and complexity of wrestling to resolve conflicts. By examining and better understanding how the process works, the students built confidence and agency and evolved to believe there was a role for them in this beautiful federal courthouse. The young men and women left the mock trial program with knowledge, self-confidence and new ideas of where their education could take them. My work had laid the groundwork for a dozen students to believe they could be a part of the workings of our justice system and consider pursuing a career in the law.

My work with the young students made me a better and more empathetic lawyer. I was able to bridge the gap between the gleaming office towers where lawyers generally ply their trade and the children who are the future of this City. The returns on my investment of time have been significant. Teaching trial practice allowed me to sharpen my courtroom skills. Explaining the fundamentals of good cross-examination only enhanced my understanding of the strategy and the craft. Through our team of legal mentors, I developed even closer relationships with my fellow prosecutors/mentors going through this experience of getting to know these students, earning their trust, and sharing the collective joy when they soared. The program also allowed me to interact with judges and other legal professionals outside of the adversarial context, building a foundation of shared experience and trust that paid dividends in interactions in future cases.

To borrow Bryan Stevenson's paradigm, working with programs out in the community helps volunteers to "get proximate" with kids in Boston and to give back in a direct and personal way. I had the opportunity to contribute to a positive experience for these students and to spread the word that being a lawyer was something interesting and attainable.

There is a huge need for legal professionals across the Commonwealth to engage in meaningful work in our communities. As an attorney in Boston for three decades, it is clear that civic education and engagement is foundational to building our capacity to protect and steward our democracy and justice

system. Boston has a new generation of students eager to learn the skills to act on their passion to address and meet the significant challenges their City faces.

For more information on the Discovering Justice's Mock Trial and Mock Appeal programs, contact Malia Brooks at ***mbrooks@discoveringjustice.org***

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Taking on Past Injustices: New Land Court Procedure Offers Solutions to Homeowners for Racially Restrictive Covenants in Land Records

By Lauren Reznick

"No part of the land hereby conveyed or any of the improvements thereon shall ever be sold, leased, traded, deeded or donated to any one other than of the Caucasian race."

These above words live within Massachusetts land records and remind us of a not-too-distant shameful past.

Throughout the early twentieth century, racially restrictive covenants, like the above example, proliferated in Massachusetts deeds. They sought to accomplish through private contract what state law could not do openly since the passage of the Fourteenth Amendment: restricting the purchase, lease, or occupation of property by people of color. While practices like redlining systematically but covertly denied residents of color access to lending resources and services, the use of private restrictive covenants overtly excluded them from acquiring property in communities marketed and sold exclusively to white buyers. Together, these practices barred people of color from the principal means of building wealth in the United States – homeownership – a legacy that has had lasting racial and economic effects throughout the Commonwealth and the United States.

The first blow against racial covenants in land deeds was struck in 1948 by the United States Supreme Court in *Shelley v. Kraemer*, 334 U.S. 1 (1948). There, the Supreme Court declared that state enforcement of racially restrictive covenants violated the guarantee of equal protection under the Fourteenth Amendment. However, in the same breath, the Court stated that "[s]o long as the purposes of those agreements are effectuated by voluntary adherence to their terms…the provisions of the [Fourteenth] Amendment have not been violated." Id. at 13. And so, racial restrictions – deemed unenforceable but not unlawful – continued in use unabated.

In a 1969 Report of the Massachusetts Attorney General, the Civil Rights Division noted that "[m]any citizens of the Commonwealth had raised objections to the Massachusetts Commission Against Discrimination" about such covenants in Massachusetts deeds, but the MCAD lacked jurisdiction to address them. See 1969 Massachusetts Attorney General Reports and Opinions 6, at p. 11 (1968-1969). In response, the Civil Rights Division drafted legislation to make such covenants unlawful, which the General Court enacted as Chapter 523 of the Acts of 1969, "An Act invalidating restrictive covenants and conditions relating to real property on the basis of race, color or religion and prohibiting the use of such covenants." St. 1969, c. 523. This Act not only voided provisions "which purport[] to forbid or restrict the conveyance, encumbrance, occupancy, or lease [of real property] to individuals of a specified race, color, religion or national origin," see G.L. c. 184, § 23B, but also declared it a crime, punishable by up to a $500 fine or up to one year imprisonment, to knowingly include such provisions in conveyance instruments. See G.L. c. 151B, § 4A. In 1978, section 23B was expanded to add "sex" to the list of prohibited characteristic-based restrictions. See St. 1978, c. 127, § 3.

Thus, in today's legal landscape, restrictive covenants based on race, religion, national origin, or sex are unenforceable, unlawful, and punishable as a crime in this Commonwealth. Most may also have expired by operation of law. See, e.g., G.L. c. 184, §§ 23, 27 and 28. Yet their words dwell within our land records, retelling our hurtful past. Even today, they can be carelessly carried forward in new conveyances in a property's chain of title. And those reminders can haunt the consciences of today's homeowners who may unwittingly come face to face with them when they buy a home, reopening old wounds. See, e.g., Cheryl W. Thompson, "Racial covenants, a relic of the past, are still on the books across the country," npr.org, November 17, 2021 (last accessed December 16, 2021).

Now, the Massachusetts Land Court is offering homeowners a new option to address these provisions.

Under newly-adopted Land Court Standing Order 2-21, an owner or other interested person may bring a land record containing a racially-restrictive covenant before the court. A judge will then review the restriction and fashion a remedy, such as a declaratory judgment, a new certificate of title, the entry or cancellation of a memorandum upon a certificate of title, or other appropriate relief. The resulting court order or judgment will then be recorded or registered with the title—a repudiation of the covenant and its harmful and lasting effects on the land and people of this Commonwealth. By this means, the Land Court hopes to help our citizens reckon with a hurtful past without erasing or ignoring that history.

Mindful of the navigational hurdles that can accompany the filing of a court case, the Land Court has adopted a set of simplified procedures and forms for a party to bring this new kind of "Void Provisions" or "VP" case before the court. All that is needed to complete the one-page Complaint form available on the court's website, is a copy of the current deed or certificate of title for the property and a copy of the instrument that contains the prohibited restriction. Most of the time, these documents can be accessed online through the Secretary of the Commonwealth's Massachusetts Land Records website, available at masslandrecords.com. There is no fee for filing a Void Provisions case, and the court has streamlined the procedures so any person, even those without legal representation, can navigate the steps. Registry of Deeds staff are also qualified to help and have received a Memorandum from the Land Court Chief Title Examiner explaining the new registered land procedures related to Land Court Standing Order 2-21. Members of the bar experienced in registered land conveyancing may find a review of the Chief Title Examiner's Memorandum helpful to understanding how the Assistant Recorders have been instructed to handle registered land documents that contain racial restrictions.

Once the court has reviewed and determined the Void Provisions Complaint, a Land Court judge will issue a judgment or order of court, which will be transmitted to the local Registry of Deeds or Registration District of the Land Court for recording or registration. The filer will also receive confirmation of the completion of the case. We anticipate that most Void Provisions cases will be straightforward and reach a prompt resolution with no need for court events, and minimal expenditure of filer, court, or Registry resources. However, for any thornier issues (which we expect to be quite rare), the professional team of Land Court Attorney Title Examiners and judges stand ready to provide their considerable expertise and experience in land titles.

For over a century, bigotry, racism, and discrimination have been embedded into private land agreements known as restrictive covenants, bisecting our Massachusetts neighborhoods along racial lines. These provisions are painful, poignant reminders of the formalized and systemic discrimination perpetrated against people of color in this Commonwealth, effects of which can still be felt today. For homeowners impacted by this scar in our land records, the Land Court is opening its doors. These historical injustices should not be erased or forgotten, but can be acknowledged and faced head on with a new Land Court procedure.

Lauren Reznick is the Assistant Deputy Court Administrator-Legal Counsel to the Land Court and advises the Chief Justice on new court rules and standing orders.

Understanding the Role of "Outside Sections" in Massachusetts Law

By Tara Myslinski

In Massachusetts, fiscal appropriations bills often contain "outside sections," which are pieces of legislation that may – but frequently do not – relate to the appropriations themselves. Although the majority of outside sections make minor legislative changes or technical corrections to laws, legislators can pass substantive legislation via an outside section. For example, one outside section of the 2021 budget expanded abortion access and another regulated the use of restaurant logos and trademarks by delivery services.**[1]**

While some outside sections amend the General Laws (and are easily found once codified), legislators still can pass them with minimal advance notice and without the typical public debate and hearing process. Even more elusive are outside sections that are "Special Acts." Legislators can also pass these with minimal notice and debate, but because they apply to particular state agencies, towns, or constituencies (rather than the general population), they are never codified in the General Laws. As such, they are easily overlooked when researching Massachusetts law.**[2]** For all these reasons, understanding how outside sections become law, how to monitor them, and where to find them, are important parts of researching Massachusetts law.

The Typical Legislative Approval Process

A typical bill must be filed by a deadline at the beginning of each biennial legislative session (although the Governor may file legislation at any time). It then follows a familiar path before becoming law: public committee hearings; several rounds of floor votes (and potential floor amendments); and approval in one chamber, followed by a parallel process in the other.**[3]** If necessary, the two chambers negotiate differences, vote again, and finally send the bill to the Governor. Most bills never get that far. While legislators filed more than 6,000 bills in the 2019-2020 legislative session, only 539 became law.

Legislative Approval Process for the Annual Appropriations Bill

In sharp contrast, the approval process for the annual appropriations (state budget) bill, to which outside sections are routinely appended, is quite different.**[4]** It is fast-tracked and must pass for the government to continue to operate in the normal course. This makes appropriations bills attractive vehicles for passing *non*-appropriations legislation on an expedited timetable, through the use of outside sections. The Governor initiates the budget process by filing a proposed budget bill in January, which may or may not contain outside sections. It goes directly to the House Ways & Means Committee for debate and possible amendment – including addition or deletion of outside sections – but no public hearing. The full House then votes on the Ways & Means Committee's version of the budget and sends it to the Senate Ways & Means Committee, which debates and amends the House's version (including adding its own outside sections) but holds no public hearings. The Senate then votes on the Senate Ways & Means Committee's version of the budget. Differences between the House and Senate versions send the bill to conference committee, which negotiates a compromise (known as a conference report) without public hearings. The House and Senate must vote up or down, without amendment, on the entire conference report *including* outside sections.

The Governor may veto outside sections, but cannot line-item veto or amend them. *Opinion of the Justices*, 411 Mass. 1201, 1215-16 (1991). During the 2019-2020 legislative session, legislators passed approximately 350 outside sections as parts of the annual budget or supplemental budget bills and passed over 30 more as parts of the Transportation Bond Bill.**[5]** The FY2022 budget that passed in July 2021 had more than 100 outside sections.

The History of and Validity of Appending Outside Sections to Appropriations Bills

Article 63 to the Amendments to the Massachusetts Constitution mandates an annual state budget but does not mention "outside sections." The practice of adding them to appropriations bills, however, has existed since the passage of Article 63 in the 1917-18 Constitutional Convention.**[6]** Originally, they related solely to appropriations, but starting in 1975, when an outside section to the FY1976 budget eliminated certain unemployment benefits, legislators have used them to pass legislation on subjects unrelated to appropriation. *Id.*

While there are critics of using outside sections for non-appropriations purposes,**[7]** the Supreme Judicial Court has held that outside sections are valid and enforceable laws, rejecting the assertion that they violate Article 63. *First Justice of Bristol Div. of Juvenile Ct. v. Clerk-Magistrate of Bristol Div. of Juvenile Ct.*, 438 Mass. 387, 408 (2003). Moreover, unless expressly tied to the fiscal year of the appropriations bill, legislation passed through outside sections is effective until repealed. *See Finch v. Commonwealth Health Ins. Connector Auth.*, 461 Mass. 232, 239 (2012) (holding that an outside section expressly limited to one fiscal year did not extend beyond that timeframe, but acknowledging that "outside sections of appropriations acts certainly may be used to enact general legislative amendments").

Researching Outside Sections

Once enacted, a bill — including its outside sections — becomes one of the "Acts and Resolves" of that legislative session (also referred to as "Session Laws"). If the Session Law amends a general law, even by an outside section, the amendment will be easy to find via basic online research methods once the General Laws are updated. For instance, Outside Section 51 of the FY2019 Budget amended M.G.L. c. 130, § 44, concerning the minimum legal size of lobster for sale.

Tracking *pending* legislation in an outside section, or searching for Special Acts enacted by an outside section (*see, e.g.* Final FY2020 Budget at § 103, establishing an eviction diversion task force) is more difficult. This is because outside sections are not labeled as such. That said, annual and supplemental budget bills are titled "An Act Making Appropriations for Fiscal Year" and "An Act Supplementing Certain Existing Appropriations," respectively. Bond bills and other appropriations bills, although not uniformly titled, frequently contain the terms "investment" and "bond." *See* Chapter 383 of the Acts of 2020 (entitled "An Act Authorizing and Accelerating Transportation Investment"). Outside sections typically begin at "SECTION 3" of these bills.

Here are some other tips for finding outside sections:

- The Massachusetts Legislature's website catalogs all filed bills and their progress through the Legislature; it allows for a simple text search of bills and enacted Session Laws since 1997. It also provides consolidated access to annual budget bills, allowing for tracking of the current bill from filing through the Ways & Means Committees, for the most recent ten years. *See* **https://malegislature.gov/Budget/**.
- Unofficial budgets that break out outside sections back to 2008 are available at **https://www.mass.gov/lists/budget-archives**; *see also* **https://budget.digital.mass.gov/summary/fy22/outside-section**.
- Lexis contains proposed bills from 1990 onward. Results can be filtered for time period and bill status (enacted) and Lexis allows for sophisticated Boolean searches (*g.*, appropriations and supplement! to locate supplemental budgets).
- Hein Online, available through the Social Law Library, permits Boolean searches of all Massachusetts Session Laws from inception.
- Pre-2010 Session Laws are available by number at the Massachusetts state library archive website.

While harder to locate, outside sections are still Massachusetts law. Conducting thorough research requires being aware of the existence of outside sections – whether for legislative history research, tracking potential legislation, or reviewing Special Acts – and where to find them.

[1] *See* Acts of 2020, c. 227, §§ 40 (abortion access) & 100 (restaurant logos).
[2] *See, e.g.*, Acts of 2020, c. 227, § 101 (requiring the MBTA to take certain procedural steps before making service reductions). Special Acts not passed in outside sections are sufficiently difficult in their own right to locate and track, but those difficulties are outside the scope of this article. *See, e.g.*, Acts of 1979, c. 565 (exempting the City of Cambridge from certain major zoning statutes that are otherwise applicable to municipalities).
[3] *See* Joint Rules of the Massachusetts Legislature, available at **https://malegislature.gov/Laws/Rules/Joint**.
[4] Outside sections also appear in other appropriations bills, such as bond bills, *see, e.g.*, Chapter 383 of the Acts of 2020 and supplemental budgets.
[5] Several of these outside sections concern dates on which other sections take effect, or repeal previous outside sections, which brings to light the difficulty in tracking their fate.
[6] *See* Herbert P. Gleason & Thomas H. Martin, *State and Local Government*, 28 Ann. Surv. Mass. L. 197, 208-09 (1981).
[7] *See, e.g.*, *Long Term Care Pharmacy Alliance v. Ferguson*, 17 Mass. L. Rep. 372 (Sup. Ct. 2004) (observing that "the whole process would work much better if the General Court would adopt important, and fiscally significant, legislation in the more traditional way"); *DirectTV v. Commonwealth*, 31 Mass. L. Rep. 48 (Sup. Ct. 2012) (citing plaintiff's contention that an outside section was a "backdoor" legislative process); Herbert P. Gleason & Thomas H. Martin, *State and Local Government*, 28 Ann. Surv. Mass. L. 197, 208 (1981) (criticizing outside sections as "bypass[ing] all usual legislative channels and propos[ing] general legislation which must, to be sure, be voted upon by the membership – but in a form and at a time in the session where there is overwhelming pressure on the membership to vote yes").

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Massachusetts High Courts Weigh In On the Limits of Local Control Over Cannabis Businesses

By Stephen Bartlett

I. Introduction

Within the past year, the Supreme Judicial Court ("SJC") and Appeals Court provided some clarity on the role of municipalities in the Commonwealth's adult-use cannabis market. Through three cases – *West Street Associates LLC v. Planning Bd. of Mansfield*, 488 Mass. 319 (2021), *Mederi, Inc. v. City of Salem*, 488 Mass. 60 (2021), and *Valley Green Grow, Inc. v. Town of Charlton*, 99 Mass. App. Ct. 670 (2021) – the courts addressed the limits of municipal authority within the cannabis licensing regime established by the Cannabis Control Commission ("Commission"). In different ways, these cases clarified some of the uncertainty left by "An Act to Ensure Safe Access to Marijuana (the "Act", now codified at General Laws c. 94G), providing important guidance to those seeking to resolve how much control municipalities may exert over prospective cannabis licensees. In turn, the decisions highlight important ambiguities that remain unaddressed.

II. Statutory Background – Chapter 94G

In 2017 the Massachusetts Legislature passed the Act, which established the parameters for the state licensing regime that the newly established Commission was to oversee and manage. The Act envisioned specific roles for municipalities within the Commission's licensing framework – most notably: 1) requiring prospective marijuana establishment licensees to first obtain a Host Community Agreement ("HCA") before submitting a license application to the Commission; and 2) permitting cities and towns to adopt ordinances and by-laws that impose reasonable safeguards on the operation of marijuana establishments.**[1]** However, the Act provided scant detail on the process through which prospective licensees and municipalities should negotiate HCAs and failed to clearly delineate the limits of municipal control over the location and operation of marijuana establishments. Perhaps unsurprisingly, these noticeable gaps in the Act spurred litigation as the nascent adult-use cannabis industry jostled with local authorities over the standards for issuing HCAs and legality of local bylaws purporting to restrict cannabis facilities and their accessory uses.

III. *West Street Associates LLC v. Planning Bd. of Mansfield*, 488 Mass. 319 (2021) – Home Rule and Preemption of Existing Town Bylaws

In *West Street Associates LLC v. Planning Board of Mansfield* ("*West Street*"), the SJC addressed the limits of local regulation of adult-use marijuana facilities, finding that a local bylaw established in conflict with a provision of the Act was preempted and, therefore, invalid.

Before the Act took effect, many municipalities in the Commonwealth, including the Town of Mansfield, adopted bylaws requiring any entity seeking to obtain a license to operate a medical marijuana establishment to be a non-profit entity.**[2]** Such bylaws mirrored a then-existing requirement under state law. However, the Act represented a sea change by declaring, in salient part, that "[n]otwithstanding any general or special law to the contrary, any person with a provisional or final certification of registration as of July 1, 2017[,] to dispense medical use marijuana … shall be entitled to convert from a non-profit corporation … into a domestic business corporation…."**[3]**

In *West Street*, a for-profit entity (CommCann, Inc.) that had converted from a non-profit entity in accordance with the Act, applied for and received a special permit from the Mansfield Planning Board to construct a medical dispensary on West Street. An abutting landowner, West Street Associates LLC, challenged the issuance of the special permit pursuant to G.L. c. 40A, § 17, arguing that the Planning

Board erred in issuing the special permit to a for-profit entity in violation of the then-existing town bylaw. The trial court upheld the Planning Board's issuance of the special permit to CommCann, Inc. and West Street Associates LLC appealed.

On direct appeal to the SJC,**[4]** the Court affirmed the trial court ruling under the Home Rule Amendment to the Massachusetts Constitution. The Home Rule Amendment expanded local power by granting municipalities the authority to undertake any action "not inconsistent" with the Constitution or laws of the Commonwealth.**[5]** While acknowledging the purpose of the Home Rule Amendment was to preserve municipal rights of self-governance, the Court highlighted the inherent limit of local authority, ruling that municipalities may not intrude into the realm of "inconsistency with the constitution or laws enacted by the general court." Relying on familiar principles of implied preemption,**[6]** the Court concluded that the Mansfield bylaw could not require all medical marijuana dispensaries to organize as nonprofit organizations. The Court explained that "legislative intent to preclude local action… may be inferred where the local regulation would somehow frustrate the purpose of the statute so as to warrant an inference that the Legislature intended to preempt the subject."**[7]** Here, the Mansfield bylaw frustrated the purpose of the Act because the Legislature "evinced its clear intent to allow for-profit entities to distribute medical marijuana." Therefore, the bylaw was unlawful.

IV. *Mederi, Inc. v. City of Salem*, 488 Mass. 60 (2021) – Host Community Agreements

In *Mederi, Inc. v. City of Salem*, the SJC affirmed the inherent discretion of cities and towns to decline to execute an HCA with a particular entity, confirming that section three of the Act**[8]** does not create an entitlement to an HCA for prospective marijuana establishment licensees.

The City of Salem established a competitive HCA application process overseen by an "HCA Committee" and capped the number of adult-use retail facilities that could be operated within the City limits at five. Salem's process emulated the competitive processes for state cannabis licenses used in a number of other jurisdictions across the country, including Georgia, New Jersey, Ohio and Virginia. Mederi, Inc. ("Mederi") applied for an HCA, but the City denied its request to negotiate, after determining that four other applicants were more qualified. Mederi then brought both a *mandamus* claim and a *certiorari* action pursuant to G.L. c. 249, § 4 to challenge the City's issuance of HCAs to other entities but not its own. After failing in the trial court, Mederi appealed, arguing to the SJC**[9]** that: 1) the City was required execute an HCA with Mederi upon its submission of the required application materials; 2) the City's evaluation of the applications was arbitrary and capricious; and 3) the application process itself was an unlawful "pay-to-play" scheme. Mederi's first argument – the crux of the *mandamus* claim – was that, because an HCA is a prerequisite to applying to the Commission for a license, a municipality's role in the licensing structure must be purely ministerial. Otherwise, cities and towns and not the Commission would impermissibly control which entities won licenses and which ones did not.**[10]**

The SJC was unpersuaded. As to the first argument, the SJC concluded that nothing in the Act *requires* cities or towns to enter into an HCA with a prospective licensee and that cities and towns have broad discretion to enter into HCAs with those applicants they determine to be most suitable, provided that their decisions are neither arbitrary nor capricious. As to the second argument, the SJC concluded that the City's exercise of its discretion in selecting other applicants was above board. Indeed, the City's HCA Committee expressly and specifically concluded that the applications of Mederi and two other entities were "not as strong as the others." For instance, Mederi's application lacked demonstrations of "sufficient capitalization" and "direct experience in the industry."

The SJC also rejected Mederi's final argument that Salem's HCA process was a "pay-to-play" scheme unduly benefitting deep-pocketed entities willing contribute funds and make donations in excess of the City's statutorily mandated 3% community impact fee.**[11]** Although receptive to the arguments, the SJC ruled that Mederi lacked standing to challenge the legality of excess community impact fees because he neither executed an HCA with Salem nor paid any community impact fees. The Court also rejected Mederi's other "pay-to-play" arguments, which decried the additional financial benefits pledged by other

applicants, because Mederi presented no credible evidence that the City actually based its decisions on the promise of such additional benefits.

However, in *dicta* the Court raised valuable questions about the purpose of HCAs and underscored the ambiguity in the Act that could thwart (and, in fact, some believe has thwarted)**[12]** the Commission's effort to promote diversity, equity and inclusion in the fledgling adult-use industry. The SJC acknowledged that the Commission's regulations**[13]** call for economic empowerment priority applicants to receive "priority application review" by the Commission. However, because municipalities function as *de facto* gatekeepers and are not required by law to consider whether any entity seeking to enter into an HCA is an economic empowerment priority applicant, such applicants may never receive Commission review. In turn, the SJC maligned the growing practice among municipalities of requiring prospective licensees to make payments *in addition to* the 3% community impact fee described in the Act. According to the SJC, this too had the potential to create an unfair advantage for better-capitalized applicants.

V. *Valley Green Grow, Inc. v. Town of Charlton*, 99 Mass. App. Ct. 670 (2021) – Agricultural and Accessory Uses

Finally, in *Valley Green Grow, Inc. v. Town of Charlton*, the Appeals Court considered what categories of activity could be considered "ancillary" to cannabis cultivation and, therefore, part and parcel of an agricultural use for the purposes of local zoning. In a two-to-one decision, the Appeals Court decided that cannabis manufacturing activities and a co-located energy generation facility were such "ancillary" uses that were permitted as of right within certain zoning districts of the Town of Charlton.

Valley Green Grow, Inc. sought to overturn a decision of the Charlton Planning Board, which concluded that the company's proposed marijuana establishment constituted "light manufacturing" and was therefore not allowed in agricultural and commercial business districts. Notably, when the company submitted its application for site plan approval to the Planning Board, Charlton's zoning bylaw stated that "indoor commercial horticultural/floricultural establishments (*e.g.* greenhouses)" "are allowed by right in every zoning district in the [t]own."**[14]** On summary judgment, the Land Court disagreed with the Charlton Planning Board and concluded that the proposed use of the site was properly classified as an indoor commercial horticulture/floriculture establishment and therefore an allowable use as of right. A neighboring property owner and intervener in the Land Court case appealed the decision.

Valley Green Grow, Inc.'s proposed plans for the site consisted of a one million square foot indoor marijuana growing and processing facility, including 860,000 square feet of closed greenhouses, a 130,000 square foot postharvest processing facility, and a 10,000 square foot cogeneration facility. The Planning Board and intervening neighbor argued that the cogeneration facility and processing operation were the principal uses proposed by the site plan and bore no resemblance to agricultural use. A majority of the Appeals Court panel disagreed, concluding that a "reasonable relationship" existed between the cannabis cultivation and manufacturing/cogeneration activities. Analogizing the proposed cannabis operation to the harvesting of fruits and vegetables that require separation from trees or stalks, the Appeals Court concluded that "the proposed cogeneration facility, incidental processing, and incidental manufacturing, when viewed as components of the entire indoor commercial horticultural use, are allowed as of right in the agricultural district."

In dissent, Justice Peter Rubin voiced concern about the slippery slope on which the majority's ruling perilously rested, surmising "that, despite the [zoning] bylaw, a project like this, with its eighteen-megawatt electric power plant, must be permitted anywhere in Charlton, in any zoning district, including a residential one." In contrast to his colleagues, Justice Rubin promoted deference to the Planning Board's reasonable interpretation of the town's bylaw that an eighteen-megawatt electric power plant and industrial facility for manufacturing marijuana consumables removed this project from the realm of a traditional agricultural use allowed as of right in the town.

VI. Conclusion

Although these three cases provide some additional clarity to local authorities and the industry, much ambiguity and confusion remain regarding the roles that municipalities can or should play within the Commonwealth's adult-use cannabis licensing regime. This reality did not go unnoticed by Justice Kimberly Budd, author of the opinion in *Mederi, Inc. v. City of Salem*, who recounted that the Commission has made several overtures to the Legislature for additional clarity – especially with respect to the provisions in c. 94G governing HCAs – but that each time the Commission has been rebuffed. Perhaps prophetic, Justice Budd's call for legislative action preceded increased public awareness and scrutiny of the shortcomings of c. 94G and the HCA construct, which seem to invite criminal enterprise and nefarious actors.**[15]** As the drumbeat for legislative action grows, one would expect the Legislature to review with fresh eyes c. 94G and offer more certainty to an industry that shows no signs of slowing down.

[1] *See* G.L. c. 94G, § 3; 935 CMR 500 and 501 *et seq.*
[2] *See W. St. Assocs. LLC v. Planning Bd. of Mansfield*, 488 Mass. 319, 324, 173 N.E.3d 329, 333 (2021).
[3] 2017 Mass. Acts c. 55, § 72.
[4] The SJC exercised its right of direct appellate review.
[5] *See* Art. 89, § 6, of the Amendments to the Massachusetts Constitution.
[6] State law can preempt local bylaws either expressly ("express preemption") or by implication ("implied preemption"). *See Bos. Gas Co. v. City of Somerville*, 420 Mass. 702, 704, 652 N.E.2d 132, 133 (1995) ("To determine whether a local ordinance is inconsistent with a statute, this court has looked to see whether there was either an express legislative intent to forbid local activity on the same subject or whether the local regulation would somehow frustrate the purpose of the statute so as to warrant an inference that the Legislature intended to preempt the subject.")
[7] *W. St. Assocs. LLC v. Planning Bd. of Mansfield*, 488 Mass. 319, 323-24, 173 N.E.3d 329, 332-33 (2021) (internal quotation marks omitted).
[8] G.L. c. 94G, § 3 (A "marijuana establishment or a medical marijuana treatment center seeking to operate or continue to operate in a municipality which permits such operation shall execute an agreement with the host community setting forth the conditions to have a marijuana establishment or medical marijuana treatment center located within the host community").
[9] The SJC exercised its right of direct appellate review.
[10] *Mederi, Inc. v. City of Salem*, 488 Mass. 60, 65-67, 171 N.E.3d 158, 162-64 (2021).
[11] G.L. c. 94G, §3(d) (Community impact fee "shall not amount to more than 3 per cent of the gross sales of the marijuana establishment or medical marijuana treatment center….")
[12] **https://www.bostonglobe.com/2021/11/15/opinion/massachusetts-is-failing-grow-marijuana-industry-equitably/?p1=BGSearch_Advanced_Results**.
[13] 935 CMR 500 and 501 *et seq.*
[14] *Valley Green Grow, Inc. v. Town of Charlton*, 99 Mass. App. Ct. 670, 677, 173 N.E.3d 395, 402 (2021).
[15] **https://www.bostonglobe.com/2021/05/14/metro/our-city-was-sale-fall-river-officials-react-after-former-mayor-jasiel-correia-found-guilty-extortion-fraud/?p1=BGSearch_Overlay_Results**; **https://www.bostonglobe.com/2021/09/28/metro/judge-orders-former-fall-river-mayor-jasiel-f-correia-ii-pay-back-more-than-310000-restitution-investors-smartphone-app/?p1=BGSearch_Advanced_Results**.

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New MBTA Communities Zoning Law Makes it Easier to Create the Homes the Commonwealth's Residents Need

By Eric Shupin, Abhidnya Kurve, and Dana LeWinter

As **home prices** and **rents** continue to rise at rates that far outpace incomes, particularly for people with low wages, Massachusetts has put a new law on the books to support the goal of producing the **200,000 homes** needed to meet the Commonwealth's housing demand. The **Economic Development Bond Bill** of 2021 creates a new **Section 3A** in the state's Zoning Act, G.L. c. 40A ("Section 3A"), which requires **175 communities** served by the MBTA ("**MBTA Communities**"), as currently defined under G.L. c. 161A, §§ 1 and 6**,** to zone for at least one district where multifamily housing is permitted as of right. The legislative goals of Section 3A include providing MBTA Communities with more tools to direct development in transit-oriented locations that can reduce the need for people to drive, offer residents more choice through the creation of diverse housing types, protect the environment and preserve open spaces, and boost foot traffic for local businesses and amenities in a manner consistent with the community's long-term planning goals and fair housing and equity principles. The Baker Administration issued draft compliance guidelines for Section 3A on December 15, 2021 ("**Draft Guidelines**") and are accepting **public comments** until March 31, 2022. This article provides an overview of the new statutory requirements and Draft Guidelines.

New Statutory Requirements

Section 3A requires MBTA Communities to have zoning ordinances or by-laws that comply with the following requirements ("Multifamily Requirements"):

- At least one zoning district must permit "multi-family housing" uses "as of right".
- The multifamily district must be of "reasonable size" to allow a minimum gross density of 15 units per acre.
- The multifamily housing must have no age restrictions.
- The multifamily housing must be suitable for families with children.
- A multifamily district must be located not more than ½ mile from a commuter rail station, subway station, ferry terminal or bus station, if applicable.

Overview of Draft Guidelines

On December 15, 2021, the Department of Housing and Community Development (DHCD) issued Draft Guidelines for MBTA Communities to implement and comply with the new zoning requirements of Section 3A. Community-specific **technical assistance** and a **Frequently Asked Questions** guideline are available.

First Compliance Response Due by May 2, 2022

Effective December 15, 2022, an MBTA Community must take the following actions by 5:00 PM on May 2, 2022 to comply with Section 3A:

- Hold a briefing on the Draft Guidelines with the Select Board, City Council, or Town Council, as applicable;
- Submit a completed **Community Information Form**; and
- Submit updated GIS parcel maps to DHCD if the most recently submitted maps were submitted prior to January 1, 2020.

Determination of Compliance

DHCD is responsible for determining compliance with the Multifamily Requirements of Section 3A in accordance with the following **schedule** and criteria:

By December 31, 2022, an MBTA Community must either:

- Submit a request for a determination of "full compliance" on a form required by DHCD with certain required information on DHCD-approved templates**,** demonstrating that the zoning and multifamily district complies with the Multifamily Requirements; or
- Notify DHCD that there is no existing/compliant multifamily zoning district**,** and submit a proposed action plan by certain deadlines.

Upon receipt of a complete application, DHCD will either issue a written determination of full compliance**,** or state what steps must be taken to achieve compliance. A determination of interim compliance will allow the MBTA Community to plan for and pass a multifamily district to achieve full compliance.

By either March 1, 2023 or July 1, 2023, depending on the category of MBTA Community (see below), an MBTA Community must obtain approval for its Action Plan to maintain interim compliance.

By December 31, 2023, or December 31, 2024, depending on the category of MBTA Community, an MBTA Community must adopt its multifamily zoning amendments under Section 3A.

By March 31, 2023, or by March 31, 2024, depending on the category of MBTA Community, an MBTA Community in interim compliance must apply for determination of full compliance.

Effects of Noncompliance

Failure to comply with the Multifamily Requirements would make a community ineligible for funds from:

- **Housing Choice Grants**;
- **Local Capital Fund Projects**; and
- **MassWorks Infrastructure Program**.

DHCD may also, in its discretion, consider non-compliance when making other discretionary grant awards.

Definitions of "Multifamily Housing" and "As of Right"

To comply with Section 3A, the required multifamily zoning district must allow multifamily uses "as of right**.**" This means that multifamily housing must be able to be constructed and occupied without being subject to any discretionary permit or approval process (or even a site plan review), which would deny the project or impose conditions that make proceeding with the multifamily housing infeasible or impractical.

"Multi-family housing" is defined in the draft guidelines as a building with:

- Three or more residential units; or
- Two or more buildings on the same lot with more than one residential unit in each building.

Categories of MBTA Communities

The draft guidelines separate the 175 MBTA Communities into four categories**,** based on the level of public transit service in that city or town. The category of MBTA Community impacts the deadlines for compliance:

Type of Community	Definition	Action Plan Approval Deadline	New Zoning Deadline
Rapid Transit Community	Community with a subway station within its border or within ½ mile of its border, even if there is one or more commuter rail stations or MBTA bus lines in that community	3/31/2023	12/31/2023
Bus Service Community	Community with a bus station or MBTA bus stop within its border or within ½ mile of its border, and no subway station or commuter rail station in or within ½ mile of its border	3/31/2023	12/31/2023
Commuter Rail Community	Community with a commuter rail station within its border or within ½ mile of its border, and no subway station in or within ½ mile of its border	7/1/2023	12/31/2024
Adjacent Community	Community with no transit station within its border or within ½ mile of its border	7/1/2023	12/31/2024

Determining "Reasonable Size"

To determine a "reasonable size" for a district, DHCD will consider both the area of the district and the district's multifamily unit capacity. The draft guidelines require a district to have:

- Land area of at least 50 contiguous acres or approximately one-tenth of the land area within 1/2 mile of a transit station; and
- Unit capacity to meet or exceed certain requirements based on the municipality's assigned category of MBTA Community, as set forth below.

Unit Capacity Requirements for Multifamily Districts

The draft guidelines set specific percentages of the total housing units that can be developed as of right within the multifamily district, which is calculated based on the category of transit service.

Type of Community	Minimum multifamily units as % of total housing stock requirement
Rapid Transit Community	25%
Bus Service Community	20%
Commuter Rail Community	15%
Adjacent Community	10%

See this **chart for multifamily unit capacity for each MBTA Community**.

15 Units per Acre Minimum "Gross Density"

"Gross density" is defined in the Zoning Act as "a units-per-acre density measurement that includes land occupied by public rights-of-way and any recreational, civic, commercial and other nonresidential uses." Section 3A compliance requires that a multifamily district—not just the individual parcels of land within the district—have a minimum gross density of 15 units per acre, "subject to any further limitations imposed by section 40 of Chapter 131 and title 5 of the state environmental code."

In addition to district-wide gross density, MBTA Communities can establish sub-districts within a multifamily district with different density requirements and limitations**,** provided that the gross density for the district as a whole is not less than 15 multifamily units per acre.

Housing Suitable for Families with Children

DHCD will deem a multifamily district to be in compliance with the Section 3A prohibition on age restrictions and suitability for families with children if the zoning does not require uses to include units with age restrictions (*e.g.*, restricted to those aged 55 years or older) and prohibits any limits or restrictions on the:

- number of bedrooms,
- size of bedrooms, or
- number of occupants.

Location of Districts

Section 3A requires multifamily districts to be located within ½ miles of a transit station, if applicable. The draft guidelines state that DHCD will:

- Follow a general rule for measuring the distance from the transit station to allow measurement from the boundary of any parcel of land of that transit station, such as an access roadway or parking lot.
- For MBTA Communities with some land within ½ mile of a transit station, the draft guidelines require a substantial portion–at least half–of the multifamily district to be located within that distance.
- For MBTA Communities with no land within ½ mile of a station, the multifamily district should, if feasible, be located in an area with reasonable access to a transit station or in an area near an existing downtown or village center.

Conclusion

Section 3A, along with other long-overdue changes to the Zoning Act under the Economic Development Bond Bill, provides our state with a welcome opportunity to ensure that our communities grow stronger and healthier. To learn more about the guidelines, including FAQs, and to submit comments by the March 31st deadline, go to **https://www.mass.gov/info-details/multi-family-zoning-requirement-for-mbta-communities**.

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Revisiting Motions to Sanction Faithless Litigants and / or their Faithless Attorneys

By Hon. Mitchell Kaplan (Ret.)

I was asked to write a "View from the Bench" concerning my experiences and impressions in ruling on motions brought under **Mass. R. Civ. P. 11(a)** (Rule 11) and **G. L. c. 231, § 6F** (§ 6F) to sanction lawyers and/or parties for asserting frivolous claims or defenses. As I have now been retired from the Superior Court bench for a year and a half, this is a view from the bench as seen through my rear-view mirror. In reviewing my rulings on the motions for sanctions that came before me, it became clear that I often found them to be an aggressive litigation tactic rather than a well-supported request for this extraordinary relief, and rarely granted them.

I began by searching my data base of opinions that I authored from 2013 to 2020. In general, my criteria for saving an opinion were that the memorandum was at least a few pages in length and applied some law to facts. My search generated 17 opinions in which I ruled on motions brought under Rule 11 or § 6F: 15 denied sanctions and two awarded them. I am certain that I decided many more Rule 11 and § 6F motions with marginal orders or very brief written statements. Since I am quite certain that I never allowed a Rule 11 or § 6F motion without a substantive opinion, these are the only two sanction motions that I allowed. More about them in a moment.

One genre of Rule 11 motions which I nearly always denied without an opinion were the Rule 11 motions that were appended to a substantive motion or opposition. Examples are an opposition to a motion for summary judgment that both opposes the motion and requests Rule 11 sanctions for having served it, or, conversely, a motion to dismiss a complaint that joins with it a motion under Rule 11 to sanction the attorney who filed the complaint. I suspect that in most of these cases the Rule 11 pleading was really the moving lawyer's attempt to signal me that the opposition's position was so manifestly without any merit that I should simply reject it out of hand, rather than a genuine request for sanctions. Personally, I never received that signal in the intended manner. Rather, I considered these motions to be overly aggressive litigation tactics of no value to me. A Rule 11 motion constitutes an allegation that an attorney has willfully acted in bad faith in pursuing a course of action. It ought not be filed until the court has ruled on the underlying claim or motion; it should acknowledge the seriousness of the allegation; and it should be well supported in the moving papers.

I suspect that I am not the only judge who received a motion for Rule 11 sanctions filed in response to a Rule 11 motion; in other words, a demand for sanctions for having been served with a demand for sanctions. I found this an especially unimpressive round of pleadings by both parties.

Nearly all my written opinions on sanctions addressed § 6F. Perhaps this is because § 6F motions can be filed only after an order or a judgment has entered. Further, since § 6F expressly requires the court to hold a hearing and issue a "separate and distinct finding" that the offending claim or defense was "wholly insubstantial, frivolous and not advanced in good faith," the moving party tends to more thoroughly support and brief its position. Although, as noted, I allowed only two of these motions for sanctions, a number of them required serious consideration. I believe that the bar that the moving party must clear to recover an award under § 6F is a very high one, and appropriately so. The movant must show both that all or substantially all of the claims or defenses asserted were frivolous *and* that they were not advanced in good faith—in other words that the party acted with an actual intention to harass or increase the costs of the litigation or some other similar bad motive.

In retrospect, I was always reluctant to impose Rule 11 or § 6F sanctions. I considered them far more serious than the more common discovery sanctions awarded under **Mass. R. Civ. P. 37**. Indeed, the SJC has suggested that conduct that violates Rule 11 is likely also a breach of the Rules of Professional Conduct. As I read my old opinions, I came across several decisions in which I denied the motion, but

commented that it presented a close question; I guess that I felt some manner of admonition to the lawyer was warranted. In one case, I found the facts on which a claim was premised "far fetched" but not "impossible" and therefore not frivolous. In another, I found the legal argument which had expressly been rejected by another Superior Court judge highly unlikely to succeed but not yet decided by an appellate court, although I also suggested that not every pleading literally permitted by the rules is necessary to a fair and efficient resolution of disputed issues. In at least a few opinions, my decision to deny sanctions was clearly colored by the conduct of the moving party. When both parties had been overly aggressive, uncooperative, and contentious throughout the litigation, I was not disposed to order sanctions against either.

An issue that arose with some frequency was considerable delay in filing a sanctions motion. In two cases I was asked to award § 6F sanctions many months after judgments entered following jury waived trials—tried by another judge. In another, a sanctions motion was filed more than a year after I entered summary judgment on nearly all of plaintiff's many claims. As noted above, § 6F expressly requires the court to make "a separate and distinct finding" that substantially all claims or defenses were frivolous and proffered in bad faith. In ***Powell v. Stevens***, the Appeals Court explained that a §6F motion should be filed immediately after the relevant verdict, ruling, or order because "[a]t that moment, the total circumstance of the case are full and fresh in the mind of the judge." I relied on *Powell* in several opinions. Frankly, considering how many cases a judge touches in a busy civil session each week, I thought it unfair, even cruel, to ask a judge to revisit a complex decision months after it issued. In affirming my last decision denying sanctions, the Appeals Court extended the *Powell* timeliness requirement to Rule 11 motions as well. ***von Schönau-Riedweg v. Continuum Energy Technologies, LLC***.

The two cases in which I awarded sanctions involved egregious conduct. In one, I allowed a motion to dismiss a complaint with leave to amend to plead additional facts, but cautioned the plaintiff's attorney that he should take care to be certain that he had a good faith basis to add the allegations. He amended, but clearly ignored the good faith basis part of my ruling. In the other case, the sanctions motion followed a trial that included a malicious prosecution claim in which a jury expressly found that the defendant had filed his complaint without a good faith basis for the facts alleged—a finding with which I fully concurred.

Perhaps, there were instances in which I might have resolved a close question in favor of an award of sanctions, but I don't think any judge enjoys sanctioning an attorney. Certainly, sanctions should be reserved for truly egregious cases where the claims or defenses are "wholly insubstantial" and the lawyer or client has purposely acted in a malicious manner.

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Hornibrook v. Richard: Massachusetts Conservators Granted Quasi-Judicial Immunity

By Owen Vanderkolk

Over the summer of 2021, while headlines related to the overreach and misconduct of Britney Spears's conservatorship captivated the public, Massachusetts' highest court was in the process of deciding a case that provides conservators with a greater level of protection from personal liability. In *Hornibrook v. Richard*, 488 Mass. 74 (2021), the Supreme Judicial Court (SJC) decided that court-appointed conservators act as "quasi-judicial officers" and are therefore entitled to quasi-judicial immunity from personal liability for conduct carried out under express authorization or approval by a probate court. The decision is part of a judicial trend toward expanding immunity to individuals acting in the service of the court and marks conservators as protected from personal liability alongside court clerks, guardians ad litem, and personal representatives. The opinion follows similar rulings from other jurisdictions but may result in unintended protection for actions that are contrary to the interests of the individuals whom conservators are appointed to protect.

Hornibrook Facts and Procedural History

In *Hornibrook*, a probate court appointed a conservator for an elderly woman suffering from dementia and living with her alcoholic son. The conservatee, Kathleen Hornibrook, moved into a nursing care facility and her other son was appointed guardian. The alcoholic son remained living in the home and refused to leave. The guardian son formulated a plan to rent out the top two floors of the triple-decker home to pay for in-home care. To accomplish this plan, however, the alcoholic son would need to be evicted. The conservator received the probate court's permission to evict the alcoholic son and attempted to do so in December of 2014 without success. There is no record the conservator attempted another eviction for over a year.

In early 2016, the conservator received notice that the home was being foreclosed on due to a home equity mortgage on the home with a provision requiring the mortgagor's occupancy. The conservator finally acted, defending against the foreclosure action and evicting the alcoholic son. In May of 2016, the conservator informed the guardian of her intention to sell the home in order to pay for the substantial nursing care debt accumulated by the conservatee. After a dispute between the conservator and the guardian about the selling price, the probate court issued the license to sell in August 2016.

In January 2018, the guardian son filed a complaint against the conservator in probate court. The complaint alleged breach of fiduciary duty, legal malpractice, conversion, and fraud. Following a transfer to the Superior Court, the conservator filed a motion to dismiss on quasi-judicial immunity grounds, which the court granted. The son moved for relief from judgment, but the court denied the motion without prejudice. In 2019, the conservatee died, and her guardian son was appointed personal representative of her estate. He filed a renewed motion for relief from judgment that included an opposition to the motion to dismiss and sought to amend the complaint by substituting parties. The court granted relief from judgment and allowed the substitution of parties. On the motion to dismiss, the court again dismissed the counts of legal malpractice and fraud but allowed the breach of fiduciary duty and conversion counts to remain, stating that although the allegations were "paper thin" they were substantial enough to warrant a trial. The conservator appealed the decision, and the SJC, on its own motion, transferred the case for direct appellate review.

Hornibrook Reasoning and Holding

To determine whether an individual performs a quasi-judicial function, and is therefore entitled to quasi-judicial immunity, the SJC applies a "functional analysis." *Hornibrook*, 488 Mass. at 79. This analysis focuses on the "nature of the duties performed, and whether they are closely associated with the"

functions of the court. *Id.* at 79 (quotation omitted). If the duties being performed by the individual are "integrally related to the judicial process," then those individuals must be free to carry-out their work without the threat of lawsuit. *Id.* at 80. Following this reasoning, the SJC noted that courts appoint conservators to manage the estate of a protected person, which requires managing properties and paying bills for work done. The SJC held that, when fulfilling this estate management function on behalf of the probate court, the conservator is entitled to absolute immunity. *Id.* at 79.

The SJC noted that the duties being performed by the conservator must be expressly authorized by a court to be entitled to immunity from liability. *Id.* So, while a court-appointed psychiatrist is immune from liability for assessments performed at the request of the court, *see LaLonde v. Eissner*, 405 Mass. 207 (1989), a court clerk who assaults a co-worker while at work is not immune from personal liability, *see Commonwealth v. O'Neil*, 418 Mass. 760 (1994).

"Quasi-Judicial Immunity" as a Judicial Trend

Although the issue of whether conservators are entitled to judicial immunity remains unsettled law in many states, federal courts have been more willing to grant the privilege to conservators. *See, e.g., Holmes v. Silver Cross Hosp.*, 340 F. Supp. 125 (N.D. Ill. 1972); *Cok v. Cosentino*, 876 F.2d 1 (1st Cir. 1989). The *Hornibrook* decision charts a similar course to one taken by the Connecticut Supreme Court in 2012. In *Gross v. Rell*, the court held that conservators who had obtained express authorization from the probate court were acting as agents of the probate court rather than on behalf of the conservatee and were thus entitled to judicial immunity in the performance of the authorized conduct. 304 Conn. 234, 251-52 (2012).

The *Hornibrook* decision exemplifies a broader judicial trend of expanding judicial immunity to individuals serving a function of the court. When the SJC held that a court-appointed psychiatrist was entitled to judicial immunity, the SJC adopted the same reasoning for why judges are entitled to immunity, finding them "exempt from liability to an action for any judgement or decision rendered in the exercise of jurisdiction vested in him [or her] by law." *LaLonde*, 405 Mass. at 210. Similar reasoning was used when Massachusetts courts extended quasi-judicial immunity to court clerks, *Temple v. Marlborough Division of the District Court Dep't*, 395 Mass. 117 (1985), guardians ad litem, *Sarkisian v. Benjamin*, 62 Mass. App. Ct. 741, 745 (2005), and personal representatives, *Farber v. Sherman*, 2018 Mass. App. Div. 46 (Dist. Ct. Mar. 15, 2018).

Where Does Quasi-Judicial Immunity End?

Hornibrook leaves some questions unanswered. The most pressing is where immunity ends for court-appointed conservators. The SJC's only guidance is that personal liability exists for acts "not authorized by the probate court." *Hornibrook*, 488 Mass. at 81. This standard begs the key question: how much of a delay in action is allowed by the probate court before the court's authorization is no longer a safe harbor from liability for the conservator? Considering the facts from *Hornibrook*, how long could the conservator have waited before taking action to evict the troublesome brother, while the nursing care facility continued to collect fees for the conservatee's care and the house depreciated in value? The decision isn't clear about when a conservator's inaction can be considered a fiduciary breach that nullifies the judicial immunity conferred by the court for actions taken to sell the house. Hypothetically, a conservator could delay any attempts to create a sustainable in-home care plan until the costs from the care provided by the nursing facility had accumulated to an amount that necessitated selling the home. At that point, the conservator could choose a buyer willing to reciprocate, set an artificially low price, and only adjust the price if the conservatee's guardian filed an objection with the probate court, a process not every guardian may be savvy or attentive enough to carry out. The conservator would be protected from personal liability for any injury sustained by the conservatee's estate because every action was done with the approval of the probate court.

Risks of Over-Extending Judicial Immunity

In *Hornibrook*, the SJC followed a clear judicial trend of expanding judicial immunity to individuals acting as an "arm of the court." The public policy rationale is clear: those tasked with carrying-out the objectives of the court must be unafraid to make principled decisions that could otherwise expose them to personal liability from a litigant dissatisfied with the outcome. Judges cannot maintain objectivity when a sword of Damocles in the form of personal liability hangs over their head. So, too, conservators acting under the authority of the probate court.

However, expanding the umbrella of judicial immunity to protect more categories of individuals serving the court is not without risk. Exploitation by profiteers within the system is a danger. When conservators are charged with protecting valuable assets of vulnerable conservatees and pursuant to an appointment by an over-worked and understaffed probate court, circumstances arise that are ripe for abuse. For guardians, the injury to the estate may not be discovered until after it is too late to object. Questions of whether the conservator was acting in bad faith could be explored at trial, but if a probate court has approved the action at the center of the controversy, the investigative process afforded by a trial will be denied. This creates an environment where backroom dealing, hidden from the eyes of the court, could lead to negotiations that benefit unscrupulous buyers and illegitimate conservators, and injure the estates conservators are appointed to protect.

Owen Vanderkolk is a third-year law student at New England Law | Boston and has a strong interest in property law, tax law, and estate planning. He is an associate member of the New England Law Review, president of his school's Real Estate Law Society, and moved to Boston from Seattle to attend law school.