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By Chinh H. Pham

The Boston Bar Association is doing vital work within the Greater Boston community to ensure a more just application of the law for all. However, that work cannot be done without support—support both from the BBA to outside groups, and support of the BBA and its mission by decision makers, including elected officials.

Attending January's Beacon Awards, I was impressed with—but not surprised by—the incredible turnout, even despite inclement weather. It proved what I had already felt; the time has come for an event like that to receive the recognition it deserves. The BBA is focusing on DEI initiatives—not just this month as we celebrate Black History Month, but year-round—and recognizing those who are difference-makers in the community and who align with our organization as well as the values we seek to uphold every day. That focus is being noticed, both by our own membership and by those outside the BBA, and it brings me great pride that people are seeing the actions backing up our words and mission.

I think back to the words delivered by Boston Mayor Michelle Wu that night, even as she could not attend in-person.

"Our democracy and our legal structures and foundation have never been more important because rebuilding our systems to uplift everyone with compassion and care, and what you model through the Boston Bar Association, is making a difference every day," she said that night via pre-recorded remarks. "Together, we are seeing that in Boston, we're working on the promise of justice for all our residents across every neighborhood. It's an urgent fight in which I know we all stand shoulder to shoulder."

And she's correct—we must stand shoulder to shoulder with the city's leadership to enact lasting change. As a former lawyer, Mayor Wu recognizes the many resources at the BBA's disposal and the impact we as an organization can make. And we recognize the importance of fostering and cultivating a positive relationship with her office and those who ultimately decide what the city's values are and how they are upheld.

I also think of Empowerment Award honoree Citizens for Juvenile Justice (CfJJ), and the work they do to ensure equity within the system between treatment of adults and children, not only in the city of Boston but across the Commonwealth. Treating juveniles with respect and in manner which reflects the BBA's values—that's important, as evidenced by our recent amicus filing calling for the end of life-without-parole sentences for young adults. We at the BBA will continue to uplift and amplify those who strive for real change. Whether it's CfJJ, fellow honoree Fidelity Investments and their focus on improving outcomes for clients and employees alike—including a $250 million investment in the educations of underserved kids—or any other organizations, we need to continue to identify groups within the community that are doing good on behalf of any overlooked populations and support them however we can.

The recent Talk to the Hill event took that idea of standing shoulder to shoulder with our elected officials a step further. As I said that day, we show up for Talk to the Hill each year because we know that funding for civil legal aid addresses critical issues in our community and makes a

significant difference in many people's lives, including some of our most vulnerable neighbors. By strengthening our relationships with Beacon Hill—which, of course, is just steps from the BBA office—we can extend our reach beyond city limits throughout the entire Commonwealth. It is my sincere hope that, with a former BBA member serving as chief executive of the Commonwealth and a former legal services worker heading City Hall, we can continue to re-engage and re-establish those relationships to the benefit of the profession and community—in Greater Boston and beyond.

Finally, I recognize the importance, as President of the BBA, of leading these efforts. I am truly passionate about the work that the BBA is doing, and think it's important to show up, be involved, and participate as much as I can. It's important for both our membership and the community to see me in my role at these events—a responsibility that, especially as the first Asian person to take on this role, I do not take lightly. I need to be present to provide visibility on behalf of the BBA within the community, and it's my honor to continue doing so.

The Boston Bar Association has a mission to advance the highest standards of excellence for the legal profession, facilitate access to justice, foster a diverse and inclusive professional community, and serve the community at large. We will continue to make progress toward that goal by uplifting those who help others and fortifying our relationships with those who have the power to change the law and its administration from the top down.

As Mayor Wu said at the Beacon Awards, "We all know that the work of building and rebuilding our systems to be rooted in justice and to center our communities is never work that can be completed. It's never done." The BBA will continue to play a leading role in that fight, and, as President, I will continue to be on the front lines as we do so.

Chinh H. Pham
President
Boston Bar Association

Change and the Legal Profession: There is Hope for the Future

By Heidi Alexander

Introduction

Data on the well-being of our profession demonstrates a great deal of suffering, dissatisfaction, and burnout. In the past year alone, the legal profession lost numerous lawyers and law students to suicide. According to key findings from the recent report on *Lawyer Well-Being in Massachusetts* conducted by NORC at the University of Chicago, a majority of Massachusetts lawyers report burnout from their work. They also report high rates of anxiety, depression, suicide ideation, and hazardous or unhealthy drug and alcohol use. Even more worrisome is the finding that lawyers are **not** seeking help. The report found that half of lawyers experiencing high rates of mental health concerns did not seek care and almost all lawyers reporting hazardous or unhealthy alcohol use did not seek care. Studies on the legal profession cite high rates of suicide contemplation, including a *2021 Mental Health Survey* by Law.com and ALM Intelligence in which 19% of all respondents and 31% of Black lawyers responded that they contemplated suicide at some point in their careers. A *2021 Survey of Law Student Well-Being* reported that 11% of law student respondents had suicidal thoughts during the past year (up from 6% in 2014).

For years now, the legal community has mostly reacted to these challenges, rather than take a proactive approach. This is made clear from the challenges identified in the 2016 report *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*, published by the National Task Force on Lawyer Well-Being, as well as the *2019 Report to the Justices*, published by the Massachusetts Supreme Judicial Court Steering Committee on Lawyer Well-Being. The recommendations in these reports stress proactive strategies to address problems inherent in the profession and which will support attorneys, allowing them to thrive.

With supporting data and growing institutional awareness, we are at a pivotal point. These reports and their recommendations show our leaders and advocates are being thoughtful about change. Now is the time for all of us to act.

Massachusetts: An Exemplar State

Since its founding, the Standing Committee on Lawyer Well-Being (Standing Committee) has worked to implement recommendations from the *2019 Report to the Justices*. Individuals alone cannot solve the problems enumerated in that report. While self-care, awareness, education, and encouraging help-seeking behaviors are important components that contribute to better well-being outcomes, they are only a piece of the puzzle. If individual action is half of the equation, the other half is change in systems, culture, organization, and policies. The latter requires collective, collaborative, and non-traditional actions that may cut against the dominant and longstanding structures of the profession. Much of the Standing Committee's role is to influence, encourage, and incentivize stakeholders to focus on well-being and to support their efforts.

One of the Standing Committee's first steps was convening the Legal Well-Being Network to provide an opportunity for well-being pioneers and advocates in legal practice and education to come together to share best practices, ideas, challenges, and their vision to improve the well-being of Massachusetts legal professionals. This group meets every other month; participation continues to grow. Presentations and conversations span from suicide awareness, building

healthy physical office environments, firm vacation policies, public service support groups, leadership and management tools and training, retention and support of attorneys from underrepresented communities, making the business case for well-being, peer support and identifying colleagues in need, and much more. By continuing to grow this network and introduce new ideas and approaches, these well-being ambassadors take their knowledge and integrate it into their legal sectors and workplaces.

Integral to the Standing Committee's work is addressing the lack of diversity in the profession and improving the experiences of historically underrepresented and marginalized lawyers. In addition to the numerous benefits that diversity brings to the profession, it also reduces isolation often felt by individuals underrepresented within the bar. The Standing Committee works to amplify the lived experiences of historically underrepresented and marginalized attorneys, in particular through its *Affinity Bar Town Hall Report*. While some were shocked at its findings, many were not. As a result, people began to pay attention, including Trial Court leadership. Those leaders now meet regularly with Affinity Bar leaders and have redoubled their efforts to tackle systemic racism by creating the Trial Court's Committee to Eliminate Racism and Other Systemic Barriers, as well as expanded education and awareness of their reporting hotline and investigation processes. The Standing Committee is also developing actionable ideas that workplaces in each legal sector can use to make structural and policy changes to increase diversity and support diverse lawyers. These will publish early this year.

In another related, major initiative, the Standing Committee in October 2022 published the first ever large-scale data set that provides demographic and law practice information on the legal profession, available at the Standing Committee's website. This was a direct result of implementing a recommendation of the *2019 Report to the Justices* that a system to collect demographic data on an ongoing basis be integrated into the annual registration process. SJC Rule 4:02, as amended in November 2020, now requires the anonymous collection of demographic and law practice information to provide insights into the profession, benchmark diversity, and inform programs and services to aid lawyers.

The numbers give teeth to the severe lack of diversity in the Massachusetts legal profession, showing diverse lawyers underrepresented as compared to the general population. The report also shows a growing population of lawyers 55 or older, indicating the potential for a workforce shortage as lawyers begin to retire. As older lawyers, predominately identified as White and male, begin to retire, it appears that the youngest generation of lawyers is more diverse, possibly indicating a trend toward increased diversity in the profession.

Furthermore, the demographic and law practice report provided data employment characteristics of Massachusetts lawyers, indicating that most lawyers in Massachusetts practice in solo or small firms or organizations. This data provides further support for expansion of programs and services that support solo and small firms, discussed in detail in the *2019 Report to the Justices*. Already, the Standing Committee has worked to enhance these supports through free financial education and coaching, advocacy for loan forgiveness for solo practitioners, statewide mentorship opportunities, and a recently launched partnership with the Massachusetts Health Connector to offer health insurance and cost savings for small firms.

A Call to Action

Recommendations from the *2019 Report to the Justices* span far and wide, encompassing law

schools, the judiciary, bar regulators, and more, and, as a result, so do the efforts of the Standing Committee and its partners and collaborators. Awareness, education, and collective action is key. Everyone plays a part in this evolving work.

What can you do to contribute to this well-being movement and work to create positive change in the profession? Here is our call to action:

1. Talk. Talk about mental health and well-being. Be authentic, be a role model. Talk about challenging situations in your life and what you did to get support. We need people to know that it is important to seek help, and that they will be better off as a result. Be an ambassador of well-being by modeling it in your workplaces and sharing helpful resources, including, for example, those from the Standing Committee, Lawyers Concerned for Lawyers, and the Mindfulness in Law Society. Take breaks, take vacations, and establish boundaries.

2. Collaborate. Create a well-being committee or group at your workplace. Get buy-in from the leaders in your firm or organization. There is no lack of data on the impact of well-being on productivity, retention, and performance. Provide well-being programming, but also address systemic and structural problems that may be barriers to well-being in your workplace. Work collaboratively with any DEI committee (or leader) or workplace affinity groups or even reach out to and support individual attorneys.

3. Innovate. Just because something has always been done a certain way, does not mean it is the right way. There are many traditional aspects of our profession, workplaces, and legal education system that encourage inefficiency, exclusivity, and inequality (e.g., the billable hour, the Socratic method, grading curves, leave policies, binary bathrooms). Ask whether your policies and practices advantage or disadvantage certain people. Think about how you can harness technology in a positive way to further wellness.

4. Prioritize. Prioritize continuing education and training, particularly in skills and topics such as cultural awareness, competency, humility, communications with and management of people, emotional intelligence, leading with compassion and empathy, and systemic racism, to name a few topics. For example, do you know how to manage people through a trauma- or stress-informed lens? Do you understand micro and macro aggressions? Do you know why it is important to not make assumptions about someone's pronouns? Whether you like it not, the new generation of lawyers will demand that you answer these questions.

Conclusion

Each day, the well-being movement gains more traction and attention. And, yet, we continue to hear stories of attorneys suffering in toxic work environments, accomplished attorneys dying by suicide after suffering in silence, lawyers leaving practice due to inflexibility, young women leaving the profession due to its incongruence with family, lawyers and law students of color being regularly mistaken as defendants and interpreters in court, attorneys pursuing high billable targets and then burning out, public service attorneys experiencing vicarious or secondary trauma, and more. My hope is that we hear these stories because of increased awareness and not increased incidence.

As someone who has committed much of their legal career to this work, I see progress particularly in changes in mindset and willingness to pursue culture change. I see optimism in law students and young lawyers demanding changes. I see leaders advocating for change, particularly in Massachusetts. I encourage you to join this movement by taking the actions described above and seeking out opportunities to contribute to institutional change. A profession that supports thriving lawyers benefits all – your colleagues, your staff, and your clients alike – and, most importantly, you.

Visit www.lawyerwellbeingma.org to learn more about the SJC Standing Committee on Lawyer Well-Being and www.lawyerwellbeing.net to learn about national well-being efforts through the Institute for Well-Being in Law.

For free and confidential mental health and practice management support, reach out to Lawyers Concerned for Lawyers, www.lclma.org.

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Well-Being Series: Voice of the Judiciary

Judicial Wellness

By Hon. Jennifer L. Ginsburg & Hon. Kathryn E. Hand

The importance of lawyer and judicial well-being has been the subject of considerable attention and study in recent years – witness National Task Force on Lawyer Well-Being, entitled the 2017 Report "The Path to Lawyer Well-Being: Practical Recommendations for Positive Change", the 2019 Massachusetts Supreme Judicial Court Steering Committee on Lawyer Well-Being Report, and the American Bar Association's 2020 National Judicial Stress and Resiliency Survey. These studies and reports, and others in the same vein, demonstrate the direct link between the mental and physical health of those providing legal services and the quality of the services provided. The ABA report, in particular, addressed the challenges specific, if not unique, to judges, including the pressures of making impactful decisions and "the systemic isolation" inherent in the transition from lawyer to judge.

Based on input from more than one thousand judges nationwide, the authors of the ABA report identified a variety of sources of stress for judges. Among the most frequently-acknowledged stressors were those related to making important decisions and managing heavy caseloads; other concerns included frustration with unrepresented litigants, particularly in the family courts, and "a lack of public awareness of the courts," generally. Not surprisingly, the effects of these and other day-to-day strains on judges were not limited to the judges' own sense of well-being; the authors noted that the manifestations of judicial stress had the potential to impact judicial performance in a negative way, risking a loss of public confidence in the courts and the judiciary. Viewed together with the National Task Force report and the SJC report, the ABA report demonstrates a need for awareness of, and a commitment to, fostering wellness across the entire legal community.

The authors of the ABA report made a series of specific recommendations to court leaders and judges urging attention and education around issues of well-being and ongoing assessment of caseloads. The report also highlighted the importance of judicial education on the use of constructive stress-management techniques, and reminded judges that some significant stressors – for example, social isolation and time management – were within their own control. Underscoring the currency of these recommendations, in a task force publication issued in July 2022, the National Center for State Courts developed a compendium of well-being strategies for judges and court personnel to better promote their individual resilience in the face of ongoing, unprecedented changes in our court system. Unsurprisingly, these suggested strategies contain advice with value well beyond the courts.

The SJC report provided specific recommendations to support judges in the Commonwealth, including expanding awareness of challenges and the importance of judicial well-being, engaging in training and education, and highlighting resources to manage judicial stress. In addition, the SJC report recommended assessments and surveys to address the challenges and stressors among judges and to help develop future steps to aid judicial well-being. To implement these recommendations, the SJC Standing Committee on Lawyer Well-Being (Standing Committee) formed a Judicial Well-Being Subcommittee (Judicial Subcommittee) composed of judges from the Appeals Court, Boston Municipal Court, District Court, Housing Court, Juvenile Court, Land Court, Probate and Family Court, Superior Court, and a retired member of the Supreme Judicial Court, as well as the Director of the Standing Committee.

Against this backdrop, we, as members of the Judicial Subcommittee conducted a very informal survey of judges from each of Massachusetts' courts and court departments, asking for insights into local challenges to judicial wellness and suggestions for addressing them. Also, members of the Judicial Subcommittee participated in a number of listening sessions during the winter of 2022 with participation from judges throughout the state and across Trial Court departments on the topic of judicial well-being. Every one of the judges who participated in the survey expressed overarching personal and professional satisfaction with the job. All the judges expressed appreciation for their opportunity to serve on the bench, and all described judging as a fulfilling vocation. Many of the most rewarding aspects of judging –- for example, the camaraderie and mentoring relationship with other judges and the sense that the work of our judges and courts is meaningful – track points underscored in the ABA report as supporting judicial well-being. Given the direct link between respondents' sense of professional satisfaction and their ability to do a job that they view as adding value to the legal profession and our communities, it is not surprising that respondents flagged as "challenges" those issues or conditions that interfere with their ability to do their best work. Massachusetts' judges' concerns regarding well-being largely echo those identified by the ABA report. Although certain details of the responses were necessarily court- or department-specific, several general themes emerged from our responses.

Judges noted the following causes of stress in their work:

- Making weighty decisions that greatly impact peoples' lives.
- Isolation of the job.
- Managing cases involving unrepresented litigants and litigants with mental health challenges.
- Lack of resources for judges, including limited law clerk support and insufficient technology.
- Lack of resources for litigants, such as court-appointed lawyers, and substance use disorder or mental health services.
- Judges' work is often misunderstood by the public, and judges' limited ability to address directly comments and criticisms (as constrained by ethical rules) too often gives the impression that the judiciary is uncaring, inept, or some combination of the two.
- Difficulty ensuring standards of civility and professional courtesy when litigants and lawyers participate online. Judges acknowledged the value of Zoom hearings in certain proceedings but expressed uniform preference for conducting essential court business in person.
- Finally, judges reported struggling with maintaining a work-life balance. Many respondents acknowledged the need to step away from their work from time to time to avoid burnout; none reported perfect success in doing so effectively.

The results of all the surveys and reports we have briefly touched on here – the National Task Force report concerning lawyer well-being, the SJC report on the Massachusetts legal profession, the extensive ABA report of judges across the country, and our own unscientific survey of Massachusetts judges – suggest that the goals and next steps here in the Commonwealth are similar for lawyers and judges alike. Some practical steps towards realizing these goals include encouraging communication and peer support, helping to assure critical resources go to those who need them, focusing on civility in a digital age, and encouraging judges and lawyers to take

a long view of the interrelationship between their professional and personal lives. Judges appreciate the opportunity to serve on the bench, and undoubtedly do so most effectively when they feel well-supported. To that end, we urge judges across our court system to consider strategies like those suggested in 2022 NCSC Judicial Wellness Booklet and to make use of available resources like the National Helpline for Judges Helping Judges — 1-800-219-6474 and Lawyers Concerned for Lawyers (LCL), which serves lawyers, judges, law students, and their families. We are hopeful that with increased attention toward professional well-being, we can continue to expand both access to justice and the quality of the justice our courts provide.

Judge Jennifer Ginsburg, a District Court judge, is the chair of the Judicial Well-Being Subcommittee of the SJC Standing Committee on Lawyer Well-Being; Judge Hand, an Associate Justice of the Appeals Court, is a member of the subcommittee. This article is the result of the combined efforts of all members of the Judicial Subcommittee, including Attorney Heidi Alexander, Hon. Margo Botsford (ret.), Hon. David J. Breen, Hon. Robert G. Fields, Hon. Mary Beth Heffernan, Hon. Susan Jacobs, Hon. Peter B. Krupp, Hon. Janine D. Rivers, Hon. Daniel C. Roache, and Hon. Michael D. Vhay.

Well-Being Series: Law Student Viewpoint

Law Student Mental Health: An Open Dialogue

By Raashi Sharma

Content warning: The following article discusses topics including eating disorders, self-harm, and suicide. If you or your loved ones need support, please reach out to the National Suicide Prevention Line toll-free at 1-800-273-8255.

"Remember to prioritize self-care."

This is the usual phrase that appears when the topic of mental health arises in law school. Although it is a helpful reminder during a busy week, it is often the last thing students think about when managing competing deadlines, including multiple reading assignments, part-time jobs, pending job interviews, journal responsibilities, and family duties. The reality is that the day-to-day experience for many law students takes a heavy psychological toll. For 1Ls, the first few weeks of classes highlight the competitive environment of law school and instill a sense of academic insecurity. For 2Ls, there is an overwhelming urge to undertake numerous extracurricular opportunities in an effort to stand out. For 3Ls, there is significant pressure to pass the bar exam on the first attempt and to secure a postgraduate position, all while anxiously watching others share their personal successes on LinkedIn.

While these experiences may be universal to the law school experience, research shows that students' mental health has reached historic lows. According to a 2021 survey, 68.7% of law students reported needing help with emotional or mental health problems over the past year, with women being significantly more likely to seek and receive help. This figure reveals a 26.7% increase from the last survey conducted in 2014. In comparing the two studies, researchers also found that respondents reported increased levels of depression, anxiety, eating disorders, self-harm, and suicidal ideation. These numbers are similarly reflected in surveys from practicing lawyers. According to the American Addiction Centers, over 45% of attorneys experience depression during their career, with nearly 12% experiencing suicidal ideation.
While one could easily blame the challenges and isolation imposed by COVID lockdowns and transitioning to remote learning and living over the last several years, other barriers to law student well-being include the inaccessibility of mental health resources and professionals, absence of mentorship and support during law school, and the perception that one's challenges are exclusive to their own experience. This is where law schools play a special role.

Law schools have the privilege of introducing and integrating students into the legal field. For many historically underrepresented and first-generation students, law school may be their first exposure to the legal profession. Moreover, law schools are in a unique position to proactively address and aid students' mental health concerns before they evolve into more dangerous territory.

Recognizing the importance of mental health implications within the law school curriculum, the American Bar Association recently passed Standard 303, which requires law schools to provide substantial opportunities to students for the development of professional identity and well-being to qualify for law school certification. Heeding the call, Suffolk University Law School Professors Shalini George and Leslie Baker developed a course specifically for 1L students, entitled "Preparing for Professional Success." The course, which spans the 1L academic year and

uses Professor George's book, *The Law Student's Guide to Doing Well and Being Well*, as the foundation of the syllabus, encourages the use of mindfulness and stress-management techniques in coping with the legal profession's high-pressure environment. The course prioritizes the importance of discussing these topics and integrating reflection of one's own experiences to foster a sense of validation and remind students that they are not alone – their peers are sharing similar difficulties. These classroom conversations encourage students to interact, support one another, and share practical coping skills that they have found successful.

The decision to "discuss the quiet part out loud" has proven successful outside of the law school environment. On platforms such as TikTok and LinkedIn, lawyers have begun addressing mental health concerns by means of cheeky humor and viral trends. By tackling subjects that students may not feel comfortable discussing with their professors, potential employers, or practicing lawyers, social media provides a forum to unpack the toll of such experiences and to build an empathetic community of legal professionals. Popular topics include the overcompetitive culture of law school, imposter syndrome, the pressure to pursue a career in BigLaw, underrepresentation of minorities in the field, and the overwhelming anxiety that students feel from their academic environment.

Julian Sarafian is a content creator who has become a prominent figure in the legal community after sharing his own mental health challenges in a blog on LinkedIn. He begins his post by listing the credentials on his resume – including a White House internship, Harvard Law degree, and postgraduate position at a prestigious firm but then details the physical and psychological symptoms that he experienced during that same period. He admits that despite appearing successful "on paper," behind closed doors he was struggling to maintain his baseline health and experiencing suicidal ideation. After seeking professional help and prioritizing his mental health, Sarafian ultimately chose to leave his firm position and became a mental health advocate for law students while also starting his own law firm, For Creators, By Creators. Sarafian regularly posts resources to current law students and encourages those with shared experiences to seek support from the legal and psychological communities.

Sarafian's story has resonated with law students across the country and contributed to the greater push for transparency in the field. Current and prospective students often comment on videos, asking for specific advice on stress management, exam strategies, and navigating the job market. This is indicative that students are open and receptive to advice but may not be receiving the practical support they need within the law school environment.

Increased visibility for these topics on social media is helpful, but law schools remain in the best position to address and navigate these issues within the classroom. Professor George's class, along with a handful of classes at other law schools, are a step in the right direction. To achieve a noticeable impact, however, such courses would likely require widespread adoption across law school curriculum and need to be mandatory for students.

Moreover, as law schools move to implement mental health resources, it is important that administrators bear in mind the long-term goal of such action: instilling healthier coping mechanisms for law students at the beginning of their career. Ultimately, students will graduate into a variety of legal environments – some of which may not have the resources in place to champion efforts such as mental health advocacy. If law schools prioritize educating students on the role of well-being and leveraging such skills in the workplace, students will be better

positioned for healthier professional development and career sustainability.

Raashi Sharma is a second-year student at Suffolk University Law School and has a strong interest in intellectual property law and white-collar crime. She serves as the Vice President of the Sports and Entertainment Law Association and the Secretary of the Middle Eastern and South Asian Law Student Association.

Legal Analysis

Ensuring Justice, Equity, and Accountability Through the New Massachusetts Peace Officer Standards and Training (POST) Commission

By Randall E. Ravitz

Events in 2020 focused public attention squarely on the practices of law enforcement and issues of racial justice. Responding to calls for action, the Massachusetts Legislature passed, and Governor Charles D. Baker signed, An Act Relative to Justice, Equity and Accountability in Law Enforcement in the Commonwealth. The legislation changed the rules of policing and reformed the criminal justice system in numerous ways. At its heart was the creation of a permanent state agency to oversee law enforcement in Massachusetts. Designated the Massachusetts Peace Officer Standards and Training (POST) Commission, the agency has been given broad authority and weighty responsibilities. The Commission has made substantial progress in fulfilling its statutory charge, but more work remains before the Legislature's vision for law enforcement in the Bay State can be realized.

Addressing Important Issues Through Sweeping Legislation

In enacting the 2020 legislation, lawmakers emphasized several important themes. Legislators stated that the overwhelming majority of officers serve with good intentions and perform their jobs well, and expressed an appreciation for the sacrifices officers make in the line of duty. They stressed that law enforcement agencies can benefit from measures that ensure officers have clean professional backgrounds, are thoroughly trained, and meet high standards. Such agencies can then be more effective in hiring qualified officers, securing the public's confidence, and keeping communities safe.

At the same time, lawmakers emphasized the need to address misconduct and racial justice in policing. The Act's sponsors spoke of a small percentage of officers who have engaged in impropriety, to the point of demeaning, injuring, or even killing members of the public. Such officers, they explained, harm their colleagues and civilians, destroy trust between law enforcement and communities, and render the public less safe. They lamented that communities of color have suffered disproportionately, as evidenced most starkly by the killing of George Floyd and similar recent events. Thus, they contended, there must be mechanisms to address these issues such as suspending officers, ordering them to be retrained, and, when warranted, ending their law enforcement careers, provided they are judged through procedures that are fair and protective of their rights.

Legislators also insisted that special attention be given to particular forms of conduct by officers, including the use of firearms, rubber pellets, stun guns, tear gas, pepper spray, canines, chokeholds, other forms of force, and actions motivated by bias or involving dishonesty. Lawmakers contended that such conduct should be monitored, restricted, prohibited, or subject to special consequences. They added that officers should be required to intervene when witnessing any misuse of force by their colleagues.

A related priority of lawmakers was breaking the "school to prison pipeline" —preventing young people from becoming involved in the criminal justice system. Achieving this goal, in their view, depended in part on controlling the involvement of the police in schools and the exchange of information between the two.

The Act reflected a balancing of these themes. It regulated the conduct of law enforcement in new ways, including by restricting the use of force and potentially dangerous techniques by officers; requiring officers to intervene when force is improperly used by others; restricting the use of facial-recognition technology; limiting the exchange of information between officers and schools regarding students; banning racial profiling; prohibiting officers from having sexual relations with those in custody; and restricting the use of no-knock warrants. The Act further provided direction regarding the oversight of law enforcement personnel by establishing qualifications for cadets, officers, and the State Police Colonel; requiring new forms of training; prescribing procedures for promotion and discipline; revising the school resource officer program; and requiring added forms of data collection and reporting. The Act also made it easier for members of the public to access information about the police, secure civil-rights judgments against officers, and have criminal records expunged.**[1]**

Overseeing Law Enforcement Through a New Agency

A major component of the 2020 legislation was the establishment of the POST Commission — an independent agency charged with overseeing law enforcement departments and officers throughout the Commonwealth.

The new agency, which began operating in mid-2021, is guided by nine Commissioners, each of whom is appointed by the Governor, the Attorney General, or those two officials together. The body of nine must be diverse in terms of gender, race, hometown, party affiliation, law enforcement experience, and nominating organization. There must be three law enforcement officials, including a police chief and a labor union representative. The remaining six members must be civilians and include a retired Superior Court judge, a lawyer, and a social worker. Each civilian member must have experience or expertise in a relevant discipline.**[2]**

The agency is managed by an Executive Director. The certification functions described below are administered by a Division of Police Certification, and the disciplinary work described herein is carried out by a Division of Police Standards. The statute precludes a former law enforcement officer or police department employee from serving as Executive Director or a member of the Standards unit.**[3]**

The Act additionally calls for the Commission to collaborate with the Municipal Police Training Committee (MPTC) in performing various certification, regulatory, and information-maintenance functions described below. The MPTC is an existing agency within the Executive Office of Public Safety and Security (EOPSS). It is charged with setting policies and standards with respect to officer training, the screening of law enforcement academy applicants, background investigations of prospective officers, and the maintenance of training records.**[4]** The Commission has been given a wide range of powers and duties, including certifying officers and their departments; regulating law enforcement; maintaining, analyzing, and disseminating information regarding law enforcement; and imposing discipline.

Certifying Officers and Their Departments

The Commission and the MPTC are required to establish standards for officer certification jointly. The standards must at least include twelve statutorily enumerated requirements related to age, education, training, moral character, fitness for employment in law enforcement, and adherence to legal and professional norms. An individual needs to be certified in order to be appointed or employed as a law enforcement officer.**[5]**

The Commission supplemented the statutory provisions with regulations and protocols concerning the certification process. Among other things, they prescribe procedures for assessing individuals' character and fitness for employment in law enforcement, make accommodations where external factors prevent an individual from satisfying certain requirements, and afford individuals the ability to respond and seek further review upon receiving adverse certification decisions.**[6]**

The Act granted most serving officers an automatic certification as of July 1, 2021. It then assigned certification periods of one, two, or three years to those officers, based on their last names. As a result, close to 9,000 officers with last names beginning with A through H were required to apply for recertification by July 1, 2022, in order to continue serving. To successfully evaluate those applications, the Commission implemented its new regulations and protocols, enlisted the aid of supervisors in police departments, and relied upon automation and officer cooperation.**[7]**

The Commission is further charged with issuing specialized certifications for school resource officers. Massachusetts law delegates responsibility for other aspects of the school resource officer program to the MPTC, EOPSS, the Department of Elementary and Secondary Education (DESE), and local school districts and police departments.**[8]**

Additionally, the Commission is required to develop standards for certifying law enforcement agencies, in consultation with the MPTC. Such standards must, at a minimum, provide for the establishment and implementation of departmental policies in eight specified areas. Those areas relate to how officers interact with suspects and other members of the public, conduct investigations, and are subject to discipline.**[9]**

Regulating Law Enforcement

The new law enables the Commission to regulate law enforcement officers and agencies in a variety of ways. The Commission may, for example, take certain steps to ensure that officers satisfy training requirements, refrain from using excessive force, and otherwise adhere to sound protocols. Accordingly, and consistent with the governing statute, the Commission and the MPTC have jointly promulgated regulations that ban certain restraint procedures, restrict the use of deadly and non-deadly force, and limit certain crowd-control practices. The regulations additionally require officers to intervene when others use excessive force, provide for more extensive reporting regarding uses of force, and require agencies to protect their personnel against retaliation for reporting abuse. The Commission has also issued a "Guidance on Developmentally Appropriate De-escalation and Disengagement Tactics, Techniques and Procedures and Other Alternatives to the Use of Force for Minor Children." The advisory recommends ways to de-escalate situations involving juveniles and thus avoid making arrests, identifies youth-related subjects in which officers should be trained, and offers suggestions for addressing trauma and for enhancing relationships between law enforcement and communities.**[10]**

Maintaining, Analyzing, and Disseminating Information Regarding Law Enforcement

The Commission is responsible for collecting, maintaining, and publishing certain information regarding officers. Publication is to be made through one or more public-facing databases and by the issuance of reports. The agency is also expected to analyze information that it collects in

order to identify patterns of misconduct, situations warranting referral to prosecuting offices, and policy recommendations that can be offered to other governmental bodies.**[11]**

Imposing Discipline Based on Misconduct

In addition to the powers and duties discussed above, the Commission has authority to investigate complaints against officers, suspend or revoke their certifications based on misconduct, and order them to be retrained. The Commission may take such actions where officers engage in conduct involving excessive force, dishonesty, bias, criminality, and other types of wrongdoing. The statute contemplates that Commission disciplinary action will ordinarily follow an internal investigation by the officer's department. The Commission has supplemented the statutory provisions with regulations that aim to ensure that investigations, adjudications, and impositions of discipline in response to allegations of officer misconduct are thorough, orderly, and fair.**[12]**

When an officer's certification is revoked — that is, when the officer is "decertified" — the consequences are serious. By statute, the Commission must publish the revocation on its website, report it to the National Decertification Index, and work with other jurisdictions to ensure that the person does not rejoin law enforcement. The individual is also precluded from challenging any resulting employment consequences with the Civil Service Commission, and may have enhanced exposure to civil liability. Additionally, the officer is permanently barred from applying for training or recertification, and from working in any capacity for a Massachusetts law enforcement agency, a sheriff's office, or EOPSS.**[13]**

Conclusion

The Commission has made great progress in building a new agency, promulgating regulations, certifying officers, processing complaints, and developing automated systems. Much work lies ahead in order for the Commission to achieve the Legislature's ultimate goal of ensuring that law enforcement in the Commonwealth is characterized by justice, equity, and accountability.

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[1] The themes discussed above were reflected in floor statements by legislators, video-recordings of which are available on the Legislature's website, and a message from the Governor to the Legislature. E.g., 2020 Senate Doc. 2963, House Floor Debates, Dec. 1, 2020 (statements of Reps. Cronin, Gonzalez, Miranda, and Tyler), Dec. 22, 2020 (statements of Reps. Cronin and Gonzalez); 2020 Senate Doc. 2963, Senate Floor Debates, Dec. 1, 2020 (statements of Sens. Brownsberger, Chang-Diaz, and Creem), Dec. 21, 2020 (statements of Sen. Chang-Diaz); 2020 Senate Doc. 2975, Dec. 10, 2020 (message of Gov. Baker to Legislature).
[2] G.L. c. 6E, § 2(a)-(c) (establishing Commission and prescribing its composition and structure); Mass. POST Comm'n, Meet the POST Commissioners (biographies of current Commissioners).
[3] G.L. c. 6E, §§ 2(g)-(i), 3(a), 4, 8 (setting forth powers and duties of Commission, Executive Director, and Divisions of Police Certification and Police Standards; and barring former law enforcement personnel from serving in certain roles).
[4] G.L. c. 6, § 116 (establishing MPTC's powers and duties, requiring MPTC and Commission

jointly to develop minimum officer certification standards and regulations on the use of force, and mandating provision of training records to Commission); G.L. c. 6E, §§ 3(a), 4(f)(1), 4(h), 5(b), 14(a), § 15(d) (providing for collaboration between MPTC and Commission in developing officer and agency certification standards, use-of-force regulations, and maintenance of information).
[5] G.L. c. 6, § 116 (providing for MPTC and Commission jointly to establish minimum officer certification standards); G.L. c. 6E, §§ 3(a), 4 (providing for Commission to develop standards with MPTC and certify officers, and requiring certification for individual to be employed as officer); G.L. c. 22C, §§ 63, 64, 68 (confirming certification requirement for certain officers).
[6] 555 CMR 7.00 (recertification regulations).
[7] St. 2020, c. 253, § 102 (providing for automatic certification and staggered expiration deadlines); 555 CMR 7.00 (recertification regulations).
[8] G.L. c. 6E, § 3(a)-(b) (granting Commission certification powers; authorizing Commission to provide specialized certification for school resource officers; and requiring such certification for service); G.L. c. 6, § 116H (requiring MPTC to develop training program for school resource officers covering eight specified topics, in consultation with experts in certain areas); G.L. c. 71, § 37P (governing selection, functioning, supervision and review of school resource officers; certain aspects of their training; memoranda of understanding and operating procedures governing their service; reporting of related information; and certain responsibilities of EOPSS and DESE).
[9] G.L. c. 6E, §§ 3(a), 5 (granting Commission certification powers, and providing for Commission to certify law enforcement agencies based on enumerated and any additional standards).
[10] G.L. c. 6, § 116 (requiring use-of-force regulations); G.L. c. 6E, §§ 1, 3(a), 4, 5, 8-9, 10, 14, 15 (granting Commission various investigatory, auditing, certification, disciplinary, regulatory, and enforcement powers; requiring officers and law enforcement agencies to make certain reports and comply with Commission rules or regulations); St. 2020, c. 253, § 119 (requiring guidance regarding use of force upon minors); 550 CMR 6.00 (MPTC version of use-of-force regulations); 555 CMR 6.00 (Commission version of use-of-force regulations).
[11] G.L. c. 6, § 116 (requiring MPTC to provide records of completed training to Commission); G.L. c. 6E, §§ 3(a), 4(h), 4(j), 8(c)(2), 8(e)-(f), 10(b), 10(d), 10(g), 13(a), 16 (governing Commission powers and responsibilities regarding investigation, auditing, recordkeeping, referring matters to prosecutors, maintaining databases, analyzing data, reporting and publishing information, promulgating regulations, and recommending policies); St. 2020, c. 253, § 99 (requiring law enforcement agencies to provide certain disciplinary information to Commission).
[12] G.L. c. 6E, §§ 1, 3(a), 8, 9, 10 (granting Commission powers regarding investigation, discipline, and enforcement; prescribing procedures for departmental and Commission investigations of alleged misconduct, suspension and revocation of certification, orders for retraining, recordkeeping, and publication of information); 555 CMR 1.00 (regulations on investigations and adjudications).
[13] G.L. c. 6E, §§ 1, 4, 8, 10, 11 (equating revocation and decertification; prescribing grounds and procedures for decertification; precluding academy admission, appointment, employment, or certification for decertified individual; requiring notification and recordkeeping regarding decertification); G.L. c. 12, § 11H(b) (providing for enhanced civil liability for decertified officers); G.L. c. 31, §§ 42, 43 (precluding Civil Service Commission review of decertification decisions); G.L. c. 41, § 96A (precluding appointment of decertified individual as municipal officer).

Guest Voice of the Judiciary

Passing the Baton in the Federal Defender's Office: An Interview with Miriam Conrad and Kyana Givens

By Hon. Debra Squires-Lee, Miriam Conrad, and Kyana Givens

I had the opportunity to interview Miriam Conrad, the recently-retired Federal Defender for the Districts of Massachusetts, New Hampshire, and Rhode Island, and her successor, Kyana Givens, about their careers and their perspectives on the office. The following is an excerpt of our discussion, condensed and edited for clarity. – Hon. Debra A. Squires-Lee

Q: One of my favorite poems ends with the line that a person cries for "work that is real." I think one could not dispute that the work that you chose to do for so many years, Miriam, and the work that you are doing now, Kyana, is so real and so important. So, thank you for that. I want to start, with you, Miriam, what have you been working on since you left the office?

Conrad: I have been working a little bit with the Greater Boston Interfaith Organization on their committee for returning citizens. I had participated in a working group back during the Obama Administration with then Vice President Biden's staff on issues regarding reentry. I also just went through a training to hopefully start representing juveniles convicted of first-degree murder before the state parole board. That's going to be the first dipping of my toe in the water of actually representing individuals again. I am also working with something called the International Legal Foundation which sets up public defenders' offices in other countries.

Q: As you look back on your time as the Federal Defender, what have been the accomplishments of which you have been the most proud?

Conrad: The groundwork for this was laid by my predecessor, Owen Walker, but I am most proud of building an office that is filled with talented, committed people at all levels who are committed to providing the highest quality legal representation to indigent defendants and also ensuring that they treat our clients with respect and empathy. I am also proud of trying to ensure that the staff had sufficient resources to support their work. In 2013, right around the time of the Boston Marathon bombing, there was a federal sequester which cut our funding; people had to be furloughed and there was a real sense of crisis. We got through that making sure that our high standard of representation remained the same throughout that time.

Q: Defender Givens, how are you liking being back in New England?

Givens: I love being back in New England. I have two young children, so they are reminding me how fun it is to be in the city and seeing it through their eyes. Obviously, it is a totally different perspective than the twenty-year-old me. It has been deeply meaningful too; I think where you go to law school is where your mind opens up to what you could do with your career and remains a special place. I had some of best mentors here in law school, so to come back and lead the office means a lot to me in my heart.

Q: What brought you to this work and what made you want to take this position?

Givens: I have always done public defense right out of law school. I had the opportunity to do a fellowship that focused on defense in the Harvard Criminal Justice Institute Clinic where I met two of the best mentors who really had a huge impact on me. I knew this was what I was going to do with my life. And then, luckily, I have just been at really good offices where I learned not only how to represent people who are facing criminal charges, but also the structure of criminal defense, how it has grown and changed nationally. For me, a big part of accepting this job was really loving the idea of exploring where we could go next and what the future of federal public defense looks like in a well-resourced office. I was very interested in pushing the expectations.

Q: What are your major priorities for the future of the office?

Givens: My priority right now is leading through a big transition. Obviously, we lost a giant in Miriam. Sitting in her chair, I can now appreciate even more how she did everything, and did everything well, so, one of my big priorities is implementing a hiring plan. I am also focused on inviting people into the office from discipline areas that we haven't traditionally had: we just hired a mitigation specialist with an M.S.W.; we would like to grow a social work intern program alongside of the already very good legal intern program that attracts a lot of people from the local schools; we are in the middle of hiring an e-discovery coordinator because one of the seismic shifts in our practice is the amount of digitized discovery. I've partnered with the UC Berkley Center for Law & Technology to have a group of law students and a professor survey all three of our districts to learn about the barriers to access to justice for in-custody clients; they just finished that project and gave us a great report. E-discovery is also a priority of Chief Judge Saylor, so I am also sitting on his e-discovery working group with other court stakeholders that are tackling this problem together.

Q: Miriam, what work do you view as unfinished in terms of federal defenders' offices or the federal criminal justice system?

Conrad: In terms of the federal criminal justice system, there are still incredible obstacles; one of the biggest ones is mandatory minimum sentencing and that has not gone away despite the campaign promises of the current President and Vice President. It puts enormous power in the hands of prosecutors and it greatly adds to mass incarceration, particularly of people of color. I think another challenge is the funding and even structural side. The U.S. Courts convened the Cardone Committee that studied the structure of both defender offices and privately appointed counsel, which is largely under the aegis of the judiciary, and noted how that creates some real problems. It recommended a new structure that would take some of that power over the defenders away from the judiciary, but that has not been implemented. David Patton, the Defender in the Southern District of New York, wrote a law review article advocating for new funding formulas that would address these issues.

Givens: That hits the nail on the head: the funding and the mandatory minimums are key. I

have spoken out strongly about mandatory minimums when I testified before Congress. I recently also wrote an article about the Safe Communities Act and what that is going to do our young people charged with crimes federally. Mandatory minimums, to me, quite simply, wipe out generations of Black and Brown people from communities.

I think most of us who love this work and are engaged in this work would like to see systemic change. As far as the big structure, I think one example that brings it real close to our own backyard is growing the restorative justice program. Judge Sorokin is very invested in this, but because of this difference in funding, the U.S. attorneys can devote three people full-time to it, whereas I don't have the same type of funding and we know that restorative justice is better with a balanced set of facilitators. That differential has real, practical impact. Restorative justice is transformational, and we're saying we don't want to see them recidivate, and we know statistically that it reduces recidivism, but because I don't have the funding, I can't fully jump into that pool even if my court and the prosecutor have the energy behind it.

Q: Defender Givens, what have you found most surprising about your tenure so far?

Givens: One of my great joys about coming to the district is I have been surprised how much I really love engaging with all the stakeholders. When you're a line attorney, you're fighting with the prosecutor, with probation, even with judges. This role requires a problem-solving attitude and I'm oriented to that and really enjoying it. I think we enjoy a level of camaraderie and innovation in the First Circuit. We're willing to stand out in ways that maybe the rest of the country is not; that makes it exciting to be here. And of course there's just no place on earth where you have an African-American federal defender and an African-American U.S. attorney, both women from the same law school. So, this is a conversation that we openly engage in with each other, and I couldn't be more pleased to be across the aisle from such a good leader. I really enjoy the conversation that we're having and the ways that I'm able to take it to a national level as well.

Q: What do you want the bar to know about Kyana Givens and the office right now?

Givens: That the office is a place that is very excited about change. Miriam, and Owen before her, set such a good foundation so that I get to walk into an office with my full self. I'm a visionary. I have big ideas. I want to implement them. I want to see us be out in front in changing the way public defense occurs. Being with a group of people who are open to that and building an office around those ideas with our clients and our mission as front and center is the goal. Change is hard, but it's also very exciting. I've been in three other jurisdictions. I've had the opportunity to work across the aisle and with other judges. I sit on the Federal Defender Sentencing Guidelines Committee and they were teasing me because they said, "You're coming to us all of a sudden very happy with your bench." And I said, "I am. They're very supportive and they are really let us make the fight that we think is worthy," and that's not the case everywhere.

Case Focus

Adoption of Arlene: Addressing a Putative Father's Right to Notice

By Lisa J. Marino

The Appeals Court highlighted some of the deficiencies in the Massachusetts statutory scheme for adoptions when it decided *Adoption of Arlene*, 101 Mass. App. Ct. 326 (2022). The central question presented in this case was whether a putative father (that is, an alleged biological father) is entitled to notice of adoption proceedings. The Court wrestled with whether G. L. c. 210, § 4 specifically requires notice to be provided to a putative father, and ultimately determined that the statute does not explicitly require that every putative father be given notice of a pending adoption. However, the Court went on to recognize that the statute includes a further provision, permitting judges to "require additional notice and consent" to persons not specifically enumerated, and construed that provision to require notice to "any person having a due process right to notice under the United States Constitution." After reviewing the Supreme Court's decision in *Lehr v. Robertson*, 463 U.S. 248, 262 (1983), the Court concluded that a putative father must be given notice and a meaningful opportunity to be heard before a child is adopted if he "has previously established a 'significant custodial, personal, or financial relationship with [the child],'" and remanded the case for further proceedings. *Adoption of Arlene,* 101 Mass. App. Ct. at 333-34, 336.

Factual Background in *Adoption of Arlene*

In 2012, the mother informed the putative father "we are pregnant," and the couple told their families and agreed the child would bear the putative father's last name. When the child was born in 2013, the putative father was present though he was not listed on the birth certificate (at the mother's request, in keeping with her other children's birth certificates), and his name was used as one of the child's middle names. After the child's birth, the parties lived together and the putative father was fully integrated into the child's life for more than four years – providing financial support, taking her to medical appointments, and participating in parent-child activities. The child called the putative father "father" and the putative father's parents "grandmother" and "grandfather." In 2017, the parties and the child moved to Alaska and the parties' relationship ended. The putative father last saw the child in March of 2018, after which the mother prevented the putative father from seeing the child. In April of 2018, the mother and the child moved to Massachusetts, and the mother subsequently married another man. *Adoption of Arlene,* 101 Mass. App. Ct. at 326-28.

Procedural History

On May 11, 2018, the putative father filed a complaint to establish paternity in Alaska, where he continued to reside. In June or July of 2018, pursuant to G. L. c. 210, § 4A, the putative father filed a parental responsibility claim with the Department of Children and Families ("DCF") in Massachusetts, receipt of which was confirmed in a letter from DCF dated July 30, 2018. According to G.L.c.210, §4A, "[s]uch filing shall constitute an acknowledgment and admission of paternity." *Id.* at 328.

On July 11, 2018, the mother and the mother's husband filed a petition for adoption in Massachusetts. When filing a petition for adoption, a petitioner must also file an Affidavit Disclosing Care or Custody Proceedings, which in this case was signed by the mother's husband. The required affidavit in this case, however, was insufficient, as it was neither signed nor updated by the mother to include the pending paternity action filed by the putative father in

Alaska. The petitioners also motioned the Probate and Family Court to waive statutory notice to DCF, which was allowed. Had this motion been denied and notice sent to DCF, the agency would have seen that the putative father had filed a parental responsibility claim and sent notice to him of the action, thereby affording him time to intervene in the petition for adoption. The mother's procedural violation allowed the adoption to proceed and on December 27, 2018, the adoption decree entered. *Id.* at 328-29.

Notice Requirements in a Massachusetts Adoption

G. L. c. 210, § 2 identifies the individuals who must be notified when a petition for adoption is filed. Those individuals include the child, if s/he is older than 12 years of age, the child's spouse, and the lawful parents, or only the mother if the child was "born out of wedlock and not previously adopted." This putative father did not meet the criteria for any of these categories and was therefore not entitled to notice pursuant to § 2 of the statute. *Id.* at 331.

G. L. c. 210, § 4 states, "the court may require additional notice and consent." In *Adoption of Arlene*, the Court focused upon this language and went beyond the dicta of *Adoption of a Minor*, 471 Mass. 373, 375 (2015), wherein the Supreme Judicial Court ("SJC") stated that "a person who does not fit into one of the statutory categories is not entitled to notice." *Id.* at 332, quoting *Adoption of Minor*, 471 Mass. at 375. The *Arlene* Court explained that it did not interpret the language of *Adoption of a Minor* to eliminate additional notice to individuals who would be entitled to notice under the United States Constitution. *Id.* The Court held, "we construe G. L. c. 210, § 4, as requiring notice not only to the persons specifically identified in § 2, but also to any person having a due process right to notice under the United States Constitution." *Id.* at 333.

To determine whether the putative father in this case would have such a due process right to notice, the Court turned to *Lehr v. Robertson*, 463 U.S. 248, 262 (1983), in which the answer hinged on "whether the putative father has previously established a 'significant custodial, personal, or financial relationship with [the child].'" *Id.* In distinguishing the putative father in *Adoption of Arlene* from the putative father in *Lehr*, the Court highlighted that Arlene's putative father fully demonstrated his significant relationship with the child, as evidenced by living with the mother and the child for four years, being present at the birth of the baby, having his surname as the child's middle name, providing financial support, taking the child to medical appointments, and being involved in activities with the child, all before the petition for adoption was filed. *Id.* at 335. As a result, the Court concluded that this "putative father should have received notice, and a meaningful opportunity to be heard." *Id.* The Court further ordered the lower court to confirm the child's paternity through genetic testing and held that if the putative father's paternity is established then the adoption proceedings must be reopened so that the putative father can participate in them. *Id.* at 336. In the end, the Court interpreted the adoption statutes strictly as they are written, while recognizing that a putative father who had established a parental relationship with his child needed some route to challenge an adoption.

As a result of our parentage code not being revised since the mid-1980s, the Court was once again called on to resolve issues of competing claims to parentage in *Adoption of Arlene*. Although *Arlene* presented in the adoption context, the SJC heard arguments on December 7, 2022, in another case involving competing parentage claims, this time between a putative father and an acknowledged father. In lieu of a comprehensive parentage code, Massachusetts courts have addressed gaps in the Commonwealth's adoption statutes by focusing on a child's established relationships to chart a path forward, rather than relying on biological connection

alone. However, the Legislature is overdue to update parentage laws to clarify the paths to parentage for all children and to set guidelines for resolving competing claims of parentage. The Massachusetts Parentage Act, based on the Uniform Parentage Act of 2017, provides a model scheme like ones that exist in other states, and is expected to be filed again in the upcoming legislative session.

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Practice Tips

Labeling Documents as Protected from Disclosure: Why Bother?

By Philip A. O'Connell Jr. and Tony K. Lu

Most lawyers routinely handle printed and electronic communications marked "Privileged," "Confidential Attorney-Client Communication," "Work Product," etc. Yet case law from across the country indicates that when litigation arises, those labels alone do not protect a document from disclosure. *See, e.g., Henderson v. Newport County Regional YMCA*, 966 A. 2d 1242, 1248 (R.I. 2009) ("[A] party cannot create work product solely by the nomenclature used to entitle documents."); *Blumenthal v. Kimber Mfg., Inc.*, 265 Conn. 1, 15 (2003) ("Whether a document expressly is marked as 'confidential' is not dispositive . . ."); *Kobluk v. University of Minnesota*, 574 N.W. 2d 436, 441 (Minn. 1998) ("[A] document is not cloaked with the privilege merely because it bears the label 'privileged' or 'confidential'"); *Spectrum Systems Int'l Corp. v. Chemical Bank*, 78 N.Y. 2d 371, 381 (1991) ("A party's own labels are obviously not determinative of work product . . ."). Nor does the absence of such notations make privileged documents any less privileged. *Rico v. Mitsubishi Motors Corp.*, 68 Cal. Rptr. 3d 758, 767 (Cal. 2007). *Accord, McDermott Will & Emery LLP v. Superior Court*, 10 Cal. App. 5th 1083, 1106 (2017) ("but the absence of any marking does not require the conclusion the holder waived the privilege").

So, why bother using such labels? While the utility of this practice may vary based on the type of document at issue (*e.g.*, an email, an internal case analysis, a draft agreement), there are several compelling reasons to use them.

1. **Notice to Recipients Concerning Proper Maintenance of the Document.** Once created, a document takes on a life of its own. It may be relevant for years to come. Persons handling the document in the future may have no direct connection to the author and little knowledge of the context in which the document was created. However, to retain its protectable character, a document must be maintained in confidence. *See Cavallaro v. United States*, 284 F.3d 236, 246 (1st Cir. 2002). Those who receive or handle such a document need to know whether it should be maintained in confidence. A label included in the document by the author provides such direction and evidences an effort to maintain confidentiality or privilege. *See, e.g., McKnight v. Honeywell Safety Prod. USA, Inc.*, No. CV 16-132WES, 2019 WL 452741, at *3 (D. R. I. Feb. 5, 2019) ("[T]hese [d]ocuments reflect the steps Honeywell took to protect the confidentiality of the privileged communications in them . . .").

2. **Notice to Others Concerning Production or Withholding of the Document.** In addition to informing recipients and others who handle confidential documents, labeling assists those making decisions about their subsequent production in litigation (or inclusion on a privilege log). Persons making production decisions may lack knowledge about the origin of the document, its authors, or its recipients. Labeling a document highlights its potentially protectable character for those persons, making it much less likely they will inadvertently produce a document that should be withheld. This is especially significant in the context of the review and potential production of potentially thousands or millions of pages of documents.

3. **Less-Than-Conclusive Evidence That A Document Is Protected From Disclosure Still Matters.** While a label is not *conclusive* evidence that a document is protectable, it may still serve as *some* evidence bearing on the protectable character of the document. *See, e.g., United States ex rel. Wollman v. Massachusetts General Hospital*, 475 F. Supp. 3d 45, 64-65 (D. Mass. 2020) (labels "Confidential Attorney Client Communication," "confidential" and "privileged" were evidence supporting conclusion that investigation was for purpose of providing legal advice); *Jaiyeola v. Garmin Int'l, Inc.*, No. 20-2068-HLT, 2021 WL 492654, at *4 (D. Kan. Feb. 10, 2021) ("The email was labeled 'Privileged and Confidential,' which, while not dispositive, supports the conclusion that the e-mail was prepared as part of the investigation"); *Craig v. Rite Aid Corp.*, No. 4:08-CV-2317, 2012 WL 426275, at *9-11 (M. D. Pa. Feb. 9, 2012) (labeling repeatedly cited as factor in holding documents privileged). In fact, the absence of such labeling has been cited as a factor in holding that a document is *not* privileged. *See, e.g., Wartell v. Purdue Univ.*, No. 1:13-CV-99 RLM-APR, 2014 WL 4261205, at *7 (N.D. Ind. August 28, 2014).

4. **Triggering Opponent's Duty Not To Use Privileged Documents.** In most jurisdictions, opposing counsel who inadvertently receives a document that is evidently privileged, has, at minimum, a duty to promptly advise the sending party of its receipt. *See, e.g.*, Massachusetts Rule of Professional Conduct 4.4(b); *Rico v. Mitsubishi Motors Corp.*, 68 Cal. Rptr. 3d 758, 766-67 (Cal. 2007). The easiest way to trigger that duty is to conspicuously label documents that are protected from disclosure at the time they are prepared. *See, e.g., Alers v. City of Philadelphia*, No. CIV. A. 08-4745, 2011 WL 6000602, at *1 (E.D. Pa. Nov. 29, 2011) (magistrate's opinion) ("[P]laintiff's counsel had an obligation to do more here, so as to unambiguously inform defense counsel of the inadvertent disclosure, as the document at issue was clearly and emphatically marked 'PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION'").

5. **The Rhetorical Benefits of Labeling.** As a practical matter, labeling a document as protectable may stack the deck against any party later arguing for disclosure. Every time the judge refers to the privilege log (which would, if properly prepared, note the labeling) or document in dispute (if submitted *in camera*), that judge is reminded of the labeling. Thus, so long as there is any plausible basis for asserting that the document should be protected from disclosure, the labeling may create a *de facto* presumption in the mind of the decision-maker that the text is indeed protectable.

Those who counsel against labeling of protectable communications generally contend that: (i) such labeling is superfluous because it does not make a document protectable; and (ii) inconsistent or erroneous labeling will harm the chances of protecting truly protectable documents (*see, e.g., Chevron Pipe Line Com., v. Pacificorp*, No. 2:12-CV-287-TC-BCW, 2016 WL 10520301, at *3 (D. Utah Feb. 22, 2016) (magistrate's opinion) (inconsistent labeling cited as factor in denying motion for return of allegedly privileged document)).

In our view, and as explained above, even though labeling does not conclusively establish protectable character, labeling may nevertheless be helpful.

First, the argument that labeling is "superfluous" is strongest in the context of emails, which

usually automatically identify the sender and recipients, and often include generic notices of potential confidentiality. However, non-generic, additional labels can be helpful for emails. Because some attorney-client emails may contain purely business advice, labeling may clarify that a message was intended to be a confidential legal communication. Labeling may also indicate that the body of the email, even if the sender and recipients are not counsel, contains previously communicated legal advice. Non-generic labels will also assist those subsequently deciding whether to produce it in discovery.

Second, inconsistency and errors in labeling are within the control of the author or sender of a document. Care and attention can help reduce these risks. The potential benefits of consistent labeling, where warranted and not indiscriminate, outweigh the risks of deciding not to label at all. The effort of maintaining a document as confidential, even if upon a later review it is determined to be not protected from disclosure, is worthwhile.

In conclusion, labeling protectable documents as such at the time of preparation can help minimize the risks associated with their subsequent handling. Any risks created by such labeling are generally limited compared to the risks of foregoing such labeling.

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Heads Up

Massachusetts Attorney General Rules: Criminal Law Enforcement Against Those Sleeping Outside with Nowhere to Go Is Unconstitutional

By Kevin Prussia and Ruth Bourquin

The Massachusetts Attorney General's Office (AGO) recently issued an important decision regarding government treatment of unhoused individuals who sleep outside in the Commonwealth. The decision concludes that criminal law enforcement strategies aimed at prohibiting unhoused individuals from sleeping outside are unconstitutional**,** unless the government can ensure that those affected have access to another adequate shelter option.

State and local government officials, including law enforcement agencies, should take heed—both to avoid running afoul of the law and, more importantly, to address the public health and safety imperatives of homelessness in the Commonwealth effectively and humanely.

Background

Hundreds of thousands of people, in Massachusetts and across the country, have no access to housing. This humanitarian crisis can be attributed to several factors, including skyrocketing housing prices; barriers to creating more affordable housing, including opposition from members of communities where housing would be sited; the impact of mental health, substance use and other disability challenges; and the negative effect of criminal history on access to housing. Communities frequently lack the resources to address this crisis**;** and local shelters are frequently full or cannot accommodate individual medical or disability needs.

As a result, many unhoused people are forced to sleep outside, including on public streets and other public property. Unhoused individuals living outside often seek to protect themselves from the elements by erecting tents or other forms of temporary shelter. In the cold climates of the Northeast, such measures can be necessary for survival.

In October 2021, the City of Boston, under then-Acting Mayor Janey, issued orders that included the threat of criminal sanctions against unhoused individuals who stay on public property in Boston and erect or maintain tents or other forms of temporary shelter. Pursuant to these orders, unhoused people with nowhere else safe to stay were forced to leave encampments in and around the area at Massachusetts Avenue and Melnea Cass Boulevard (commonly referred to as "Mass. and Cass"). The displaced included those who, due to medical needs and disabilities, could not safely reside in Boston's congregate shelters.

In response, the American Civil Liberties Union (ACLU) of Massachusetts, together with WilmerHale, filed a class action lawsuit on behalf of several unhoused people. The suit challenged these forced removals as violations of the cruel and unusual punishment protections in our state and federal Constitutions. At the same time, a group of medical and public health experts issued a set of policy proposals for public health-focused solutions to the crisis, de-emphasizing criminal prosecution.

Soon thereafter, effective January 2022, the City adopted procedures requiring that, before displacing individuals from Mass. & Cass, the City had to offer shelter or other housing options that accommodated those individuals' disability needs.

The Attorney General's October 2022 Ruling

In April 2022, the Town of Scituate, adopting a similar approach to that set forth in the October 2021 Boston orders—enacted a by-law that would have barred any person from setting up a tent or camp, sleeping in a vehicle, or sleeping in the open between the hours of 8 p.m. and 8 a.m. without the permission of the Town's Select Board. The by-law created no mechanism by which individuals could seek such "permission."

Before the by-law could take effect, it had to be reviewed and approved by the Attorney General's Office (AGO) Municipal Law Unit. The ACLU of Massachusetts submitted a letter asking that the AGO not approve the by-law**,** because it constituted cruel and unusual punishment and violated the equal protection rights of unhoused persons.

In a development that should serve as a caution to other communities relying on law enforcement-centered approaches to these public health issues, on October 11, 2022, the AGO concluded that the proposed Scituate by-law violated the cruel and unusual punishment clause of the Eighth Amendment. The decision carefully reviewed and summarized federal court decisions from around the country, including a recent opinion from the U.S. Court of Appeals for the Ninth Circuit, holding that government "cannot, consistent with the Eighth Amendment, enforce […] anti-camping ordinances against homeless persons for the mere act of sleeping outside with rudimentary protection from the elements, or for sleeping in their car at night, when there is no other place in the City for them to go." *Johnson v. City of Grants Pass*, 50 F.4th 787, 813 (9th Cir. 2022) (formerly *Blake v. City of Grants Pass*).

The Attorney General concluded, as the Ninth Circuit had in *City of Grants Pass*, that the fact that a by-law or similar measure may initially be enforced through "non-criminal" disposition procedures does not mean that the law is not a criminal law enforcement measure where criminal enforcement may follow.

The Attorney General's recent decision emphasizes that:

> The Supreme Judicial Court has repeatedly affirmed that the law of Massachusetts "does not permit punishment of the homeless simply for being homeless." *Commonwealth v. Magadini*, 474 Mass. 593, 601-02 (2016) (citing *Commonwealth v. Canadyan*, 458 Mass. 574, 579 (2010) …. The Scituate by-law, in its current form, does just that.

It concludes:

> Because the by-law imposes criminal punishment for sleeping in public spaces, with no required assessment of whether an unhoused person subject to the by-law has adequate alternative shelter, it violates the Eighth Amendment, and we disapprove it on this basis.

Other Massachusetts communities should pay attention. The chief law enforcement officer of the Commonwealth has made clear that criminal law enforcement against unhoused individuals, merely for sleeping on public land, is unconstitutional—unless the community can ensure that impacted unhoused individuals have an alternative and appropriate sheltering arrangement actually available to them.

Looking forward

In the words of local experts, "Public health crises require public health solutions." Law enforcement approaches targeting unhoused persons are not only legally suspect; they are ineffective and short-sighted. State and local officials—including our former attorney general and now governor-elect—should work together to develop more humane and effective long-term solutions. Such solutions include more affordable long-term housing, more temporary shelters that accommodate the needs of those with disability challenges, more voluntary treatment programs for those with substance use disorders, and greater employment and income support options for those facing housing instability.

Massachusetts can and should be a leader in developing such solutions. Public health and safety demand them. Our state and federal Constitutions require them.

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Ruth Bourquin is the Senior & Managing Attorney at the ACLU of Massachusetts and a member of the Boston Bar Association. Prior to joining ACLUM in 2017, she worked for legal services organizations in MA for approximately 20 years, focusing on the needs of families with children living in poverty and experiencing homelessness. After graduating from Harvard Law School in 1982, she clerked on the United States Court of Appeals for the 11th Circuit, served as an Assistant Attorney General and then the Deputy General Counsel to the MA Senate Committee on Ways and Means, and practiced plaintiffs' side employment law. Ruth was co-counsel in the case of Geddes v. City of Boston *and co-authored the letter to the Attorney General's Office concerning the Scituate ordinance discussed in this article.*

Case Focus

Commonwealth v. DeJesus: The Abandonment of Separate Standing Under Article 14

By Eric A. Haskell

The guarantee against unreasonable searches and seizures that appears in both the Fourth Amendment of the federal Constitution and article 14 of the Massachusetts Declaration of Rights is a personal right. Its benefit inures to—and, typically, only to—the person who is searched. Accordingly, exclusion of evidence as a remedy for an unconstitutional search has historically been available only if the defendant has standing to challenge that search.

The notion that a criminal defendant must have standing to bring a motion to suppress, even before a court even reaches the merits of the search's constitutionality, is known as "separate standing." In *Commonwealth v. DeJesus*, 489 Mass. 292 (2022), the Supreme Judicial Court abandoned the separate standing requirement under article 14, some 44 years after the U.S. Supreme Court had done so under the Fourth Amendment. This article explores the SJC's path to *DeJesus*.

The Rise and Fall of Separate Standing Under the Fourth Amendment

In 1960, the Supreme Court held that, "to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." *Jones v. United States*, 362 U.S. 257, 262 (1960). The Court later specified that a defendant has standing if he alleges a proprietary or possessory interest in the premises searched, or was present for the search. *Brown v. United States*, 411 U.S. 223, 229 (1973).

Nearly simultaneously, however, the law of the Fourth Amendment underwent a sea change. Prior to 1967, a search accomplished without any physical intrusion on person or property was viewed as beyond the scope of the Fourth Amendment. *E.g.*, *Olmstead v. United States*, 277 U.S. 438, 466 (1928). In 1967, however, it was established that any search that violates the "reasonable expectation of privacy" of the person searched also violates the Fourth Amendment. *Katz v. United States*, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring).

Separate standing, as defined in *Jones* and *Brown*, might have served some useful purpose before *Katz*. But the post-*Katz* analytical focus on expectation of privacy raised the question of whether standing was truly separate from the substantive constitutionality of the search.

The *Jones/Brown* analytical framework came to an end in 1978, when the Supreme Court concluded that there was no meaningful distinction between the scope of a defendant's Fourth Amendment rights and the "invariably intertwined concept of [his] standing." *Rakas v. Illinois*, 439 U.S. 128, 139 (1978). And, in *United States v. Salvucci*, 448 U.S. 83, 89-93 (1980), the Court further cast doubt on whether separate standing was necessary to avert the defendant's "dilemma" between admitting possession of contraband (i.e., to establish standing) and disputing possession of the contraband (i.e., to avoid establishing guilt), after the Court held in *Simmons v. United States*, 390 U.S. 377 (1968), that the government cannot use the defendant's testimony at a suppression hearing as evidence during its trial case-in-chief.

The Rise of Separate Standing Under Article 14

The SJC had followed the Fourth Amendment's separate standing requirement during the *Jones*/*Brown* era and, after *Rakas*, issued a series of opinions that avoided the need to decide whether such a requirement persisted under article 14. In 1990, however, the SJC embraced separate standing under article 14, criticizing "reasonable expectation of privacy" as a "manipulable standard," and expressing concern that *Simmons* did not obviate the need for a separate standing analysis because a defendant's testimony at a suppression hearing could still be used to impeach him at trial. *Commonwealth v. Amendola*, 406 Mass. 592, 599-601 (1990). But separate standing under article 14 coexisted uneasily with the reasonable expectation of privacy standard. In one decision, the SJC appeared to conflate the two concepts. *Commonwealth v. Mubdi*, 456 Mass. 385, 392-93 (2010). Further, by the mid-2010s, Massachusetts courts increasingly were adjudicating searches of digital information held by third parties. The circumstances of these digital searches fit poorly with the SJC's lingering requirement that, to have standing to challenge a search, a defendant must have "either a possessory interest in the place searched . . . or [have been] present when the search occurred." *Commonwealth v. Williams*, 453 Mass. 203, 208 (2009).

These analytical challenges came to the fore in *Commonwealth v. Delgado-Rivera*, 487 Mass. 551 (2021), a case in which the defendant's inculpatory text messages were recovered through a search of the mobile telephone of a confederate to whom he had sent those messages. The SJC unsurprisingly concluded that the defendant had no expectation of privacy in messages shared with his confederate. In reaching that conclusion, though, the SJC acknowledged "well-founded skepticism regarding the continued utility and applicability of the discrete, preliminary standing analysis set forth in our earlier jurisprudence." And a strong concurrence by Justice Cypher emphasized that, "as digital searches become more common, the standing analysis, which encompasses the traditional notions of physical possession, may become strained." *Id*. at 564.

The SJC Abolishes Separate Standing

After *Delgado-Rivera*, it came as little surprise that the SJC abolished the separate standing requirement less than one year later, in *DeJesus*.

In *DeJesus*, police observed on social media a depiction of the defendant brandishing a firearm. That led the police to the basement of a multifamily dwelling, where the firearm was found inside an open backpack. he defendant, who was also at the scene, was arrested and charged with possession of the firearm based on the social media depiction.

In affirming the defendant's conviction, the SJC reiterated a point made in *Delgado-Rivera*: The separate standing requirement "poses a potential constitutional dilemma," in that a defendant might lack standing to challenge the search of a place in which he enjoys a reasonable expectation of privacy. That dilemma, the SJC further observed, "is most likely to arise in the context of electronic data," where "[a] defendant with a reasonable expectation of privacy in such data might have a difficult time asserting possession of it or presence at the time of the search." In view of that dilemma, the SJC abandoned the separate standing requirement under article 14 and concluded, as had the U.S. Supreme Court in *Rakas*, that "a defendant need show only a reasonable expectation of privacy in the place searched to contest a search or seizure." *DeJesus* did, however, identify one limited circumstance in which a defendant may rely on another person's expectation of privacy: Where the defendant is charged with a possessory

offense but, at the time of the search, the contraband was in the actual possession of a confederate. This rule—a vestige of the old "automatic standing" rule, which *DeJesus* otherwise rendered obsolete—ensures that a defendant charged with a possessory offense may challenge the search that yielded the contraband.

Implications of *DeJesus*

DeJesus largely aligns the standing requirement of article 14 with that of the Fourth Amendment, a development that promises to streamline analysis of search and seizure issues. One aspect of *DeJesus*, however, promises to generate future debate. In a brief footnote that cited no authority, the SJC stated that defendants who, after *DeJesus*, "now will have to present a reasonable expectation of privacy in [a Criminal Rule 13] affidavit, may not be impeached with that affidavit at trial." 489 Mass. at 293 n.4.

This "no impeachment" aspect of *DeJesus* is questionable. At the threshold, there is the odd question of whether that "no impeachment" rule applies only to defendants who are required to file a Rule 13 affidavit *as a result of DeJesus*, or whether it applies to *all defendants who file such an affidavit* going-forward. But, whatever the scope of its application, *DeJesus*' "no impeachment" rule is inconsistent with the SJC's own precedent, which holds that a defendant can indeed be impeached with inconsistent testimony given in an affidavit filed in connection with a motion to suppress. *Commonwealth v. Rivera*, 425 Mass. 633, 637-38 (1997) ("[B]ecause a defendant has no right to commit perjury, he or she cannot expect to give trial testimony markedly different from pretrial testimony with impunity."). *DeJesus*' "no impeachment" rule is also inconsistent with the weight of federal decisions, thus setting up a fresh disconnect between article 14 and the Fourth Amendment. *See, e.g.*, *United States v. Phillipos*, 866 F.3d 62, 66 n.4 (1st Cir. 2017) (Thompson, J., dissenting from denial of rehearing *en banc*) (collecting cases). And *DeJesus*' "no impeachment" rule raises concerns about the "integrity of the judicial process," as it risks allowing a defendant to give self-contradictory testimony at different stages of the same proceeding without being subject to impeachment. *See Rivera*, 425 Mass. at 638 ("[W]e emphasize that, if a defendant chooses to file a pretrial motion accompanied by a supporting affidavit signed by the defendant, the only burden placed on the defendant is a permissible one—that he or she tell the truth."). As such, this aspect of *DeJesus* seems likely to be the subject of future litigation.

Eric A. Haskell is a Massachusetts Assistant Attorney General. He has previously written in these pages concerning the exclusionary rule ("Applying the Exclusionary Rule in the Face of Changing Law," Winter 2017) and digital searches ("Gelfgatt, Jones, and the Future of Compelled Decryption," Summer 2019). This article represents the opinions and legal conclusions of its author and not necessarily those of the Office of the Attorney General; opinions of the Attorney General are formal documents rendered pursuant to specific statutory authority.

Practice Tips

IRAs and MassHealth: How to Mitigate Tax Consequences in Emergency Planning

By Dale Krause

Planning for long-term care has become a paramount issue for estate planning and elder law practitioners. The high cost of long-term care can pose a serious threat to clients' financial well-being as they age beyond retirement. Those clients who do not have the proper mechanisms in place to minimize the financial impact of long-term care are truly at risk of losing everything. However, practitioners can provide a solution, even if the client is already in a nursing home.

Medicaid/MassHealth

Medicaid, known as MassHealth, is a joint state and federal program meant to provide financial assistance for medical care to those in need. Concerning long-term care, MassHealth will cover a person's stay in a nursing home (or another approved facility) including room and board, pharmacy expenses, and incidentals. This makes qualifying for MassHealth desirable to individuals who, whether through error or omission, did not plan for a long-term care event.

To qualify for benefits, an individual must meet specific non-financial and financial requirements. While there is a myriad of criteria one must meet, the biggest hurdle often relates to the amount of assets an institutionalized individual and their spouse own. Generally speaking, as of January 1, 2023, an institutionalized individual may own up to $2,000 in countable assets while a spouse at home (the "community spouse") may retain up to $148,620 in countable assets. Countable assets include bank accounts, investments, IRAs (including 401k accounts and Roth IRAs), cash value insurance policies, and property other than the primary residence.

Based on these limitations, most individuals do not automatically qualify for benefits. Countable assets that exceed the applicable limit must be "spent down" for the person to qualify for benefits. Eliminating these assets is a way to accelerate an individual's eligibility without them first having to exhaust their assets on the nursing home bill. In many cases, this can be accomplished by certain asset preservation strategies including paying off a mortgage or other debts or purchasing or improving exempt assets. The use of such strategies is known as emergency MassHealth planning and is a practice area that is growing in popularity.

MassHealth Compliant Annuity and IRAs

In addition to the aforementioned common spend-down strategies used in emergency planning, those pursuing eligibility may also use tools to convert excess assets into income, often by way of a MassHealth Compliant Annuity ("MCA"). An MCA is a single premium immediate annuity whereby the institutionalized individual or the community spouse establishes a contract with an insurance company that provides regular payments in exchange for a lump sum premium.

An MCA must comply with the Deficit Reduction Act of 2005. The annuity contract must be irrevocable and non-assignable, provide equal monthly payments, have a term that is equal to or less than the owner's MassHealth life expectancy, and, with some exceptions, designate the MassHealth agency as the primary or contingent death beneficiary. Most importantly, an MCA can be funded with an IRA.

The benefit of funding an MCA with an IRA is the avoidance of tax consequences associated

with liquidating the IRA. Rather than creating a taxable event through liquidation, the funds may be transferred, tax-free, to the annuity. The funds are then taxed as payments are disbursed over the term of the annuity. All payments received within a calendar year will be taxable to the owner. This allows the owner to eliminate the IRA as an asset for MassHealth purposes, spread the tax liability over several years, and accelerate their eligibility for benefits.

How it Works

The basic concept surrounding MCA planning is simple: transfer the excess assets into the annuity to qualify for benefits. When funding MCAs with IRAs, there are several factors to be considered: ownership of the account, the health status of the applicant, and, in the case of a married couple, the health of the community spouse.

Where the community spouse owns the IRA, the strategy is straightforward. The IRA is transferred to an MCA, and the asset is eliminated for countability purposes. The owner has flexibility with respect to the term of the MCA, although, as previously noted, the annuity term must be equal to or less than the owner's Medicaid life expectancy. The goal is to choose an annuity term that is long enough for the community spouse to reap the economic benefits of the strategy, but short enough that they will likely outlive the annuity term to avoid MassHealth recovering the balance as primary beneficiary. There is no right or wrong answer when trying to determine the appropriate annuity term for a community spouse. Unexpected death or illness can derail any plan for MassHealth eligibility. It is also important to reiterate that the term of the annuity and the schedule of payments cannot be changed or accelerated. Therefore, it is essential that practitioners be diligent in explaining the possible effects of using a shorter or longer term and how those effects translate into economic consequences.

There are additional challenges to consider when the institutionalized spouse owns the IRA. Since ownership of the IRA cannot be changed without incurring immediate tax consequences, the IRA cannot be transferred to the community spouse and must be structured in the name of the institutionalized spouse , who will be the owner of the MCA and the recipient of its income.

The biggest concern under these circumstances is the MCA income becoming part of the institutionalized spouse's MassHealth co-pay. When an individual qualifies for MassHealth, their monthly income often goes toward the nursing home. There are, however, certain deductions allocated to the individual before the remaining income is paid to the nursing home. These deductions include a $72.80 Personal Needs Allowance, certain medical expenses such as insurance premiums, and any applicable shift in income owed to the community spouse under the Monthly Maintenance Needs Allowance regulations. Thus, while an institutionalized individual's income does not automatically go to the nursing home, increasing that individual's income by way of the annuity could result in a larger MassHealth co-pay depending on their allowable deductions.

Whereas choosing the appropriate annuity term for the community spouse is subjective, choosing one for the institutionalized spouse is clear: go long. Unless the community spouse is in very questionable health, the institutionalized spouse will likely predecease the community spouse. Therefore, the couple should reduce the amount of income the MCA produces by choosing a longer annuity term, not to exceed the owner's MassHealth life expectancy. The payments will continue being disbursed to the institutionalized spouse during their lifetime. Upon their passing, the community spouse will assume control of the funds as the primary beneficiary of the annuity.

When is an MCA *not* the Right Fit?
Although MCAs are useful vehicles to protect assets, their use may not always be appropriate. For example, when dealing with an IRA of small value, it may make more sense to liquidate the funds and transfer the net proceeds to the community spouse, as this is typically faster than transferring the funds to an MCA. In that situation, the consequences of liquidating the funds may be offset by medical expense deductions for income tax purposes when filing that year's tax returns. If the tax consequences would be minimal, the timing factor for MassHealth eligibility may be more important than keeping the IRA intact, given the high average monthly cost of the nursing home.

Conclusion
With more seniors in need of nursing home care and the majority of those individuals unprepared for the high cost of care, it is more likely than ever that estate planning and elder law attorneys, as well as attorneys of any practice area, will encounter a client that has entered a long-term care facility and is at risk of losing their life savings. The important thing to remember is they do not have to deplete their money paying the nursing home. More specifically, they do not have to liquidate their IRA to pay for care. Other options are available.

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The Profession

Point of View of a Small Firm in the "Post-COVID" Environment

By Jed DeWick

The sudden onset of the COVID-19 pandemic presented significant and unique challenges for most small firms. Most of us went from five-days-a-week in-person offices to completely remote operations literally overnight, which required that we entirely re-imagine how we ran our firms. Everything from ensuring that each employee had the appropriate technology to work from home, to making sure that the mail was opened and distributed each day, to sending out and paying bills, had to be figured out on the fly, all without the benefit of in-house IT, accounting, and back-office operations, and with the ever-present concern of keeping our employees safe. Needless to say, for those of us managing small firms during that time, there were many sleepless nights spent thinking (and worrying) about how to address these challenges.

To my surprise, once the dust had settled, we realized that our firm could actually function in this new environment, and that many of the changes we were forced to implement were for the better and are likely here to stay.

The most significant realization for our firm was that we could not only function, but thrive, while working remotely. Before the pandemic, we were the typical Boston litigation boutique, with attorneys and staff working five days a week in the office. Although all of our attorneys had the ability to work remotely, it was rare for an attorney to work from home during normal business hours. That was simply not our culture. That all changed in March of 2020.

It was a significant challenge from a technology and learning perspective to get everyone—including administrative staff—fully functional at home on an expedited basis without the help of an internal IT staff, but it became clear pretty quickly that it could work. We were all able to access remotely our client files and work product, as well as our timekeeping and other administrative applications. Like everyone, instead of in-person meetings, we transitioned to Zoom or conference calls without missing much of a beat. While a few of us took turns making regular trips to the office to tend to matters that could not be handled remotely, like opening the mail, we were for the most part operating completely remotely yet being as productive as in the past. I have spoken to a number of peers at small firms who were similarly surprised at how well they were able to operate remotely, having never done so before.

Not only did we learn that we *could* operate remotely, but what also became clear from listening to our employees was that most of them preferred working from home. For those with long commutes (which, let's face it, is everyone living in the Boston Metro area), the extra hours gained each day from not having to travel to and from the office was a revelation. For those with children at home or other family commitments that strain their time and sanity, the flexibility afforded by being at home each day made many of the complexities of balancing work and family easier to handle. Some attorneys even indicated that it was easier to complete certain projects at home without the impromptu interruptions and distractions of a busy office. Given that we were functioning well, we did not see any reason to force those who preferred working remotely to return to the office just because the restrictions imposed by COVID-19 were lessening.

In fact, we felt that providing this type of flexibility to our employees was an important factor in

retaining and attracting talented people. It was (and continues to be) our sense that for many attorneys, being able to work remotely as they see fit is a top consideration when evaluating a new position. As a small firm, we often compete with the larger firms for attorney talent but cannot match the associate compensation packages that the big firms are able to offer. Giving attorneys the flexibility to work remotely as they see fit helps keep us competitive in the talent marketplace. In speaking with peers at other small firms, this is a common refrain. Many small firms have realized that they can function remotely and have determined that doing so is critical to retaining their teams.

Currently, we have no in-office requirement for our attorneys, and everyone determines for themselves where they work on any given day. We have found that some come to the office only occasionally, while a few prefer to be at the office most days. Our administrative staff spends three days a week in the office, coordinating their schedules so that there is always some administrative presence in the office to keep things running smoothly. Making this work requires communication, coordination, and trust going in both directions, which is where being a smaller firm is an advantage. Our hope is that being more flexible in this way leads to greater job satisfaction and helps to mitigate the burnout that attorneys juggling a demanding caseload and a busy life often experience.

Having many employees working remotely is not without its challenges, however. Not being together in the office every day has made it harder to stay connected, particularly on a personal level. There are many fewer of those casual conversations in the hall about each other's families or what we have planned for the weekend. It is also particularly challenging for new attorneys to integrate into the firm culture without witnessing and being a part of those everyday interactions. Without a doubt, something has been lost in this regard, and that we have to be more conscious about creating and maintaining our connections as a firm.

To make sure we stay regularly connected, our firm has a standing informal attorney lunch via Zoom every Tuesday where we talk about everything from cases and legal issues, to who is watching what on Netflix. There is no agenda for this weekly meeting, and no one is assigned to make a presentation or anything of the sort. This gives us an opportunity to connect in a relaxed and informal way on a regular basis hopefully to maintain and continue to build those personal connections. This is another instance where our smaller size is an advantage since there is really no way to replicate this type of meeting in a larger firm environment and have everyone participate. We also make a point to have several in-person get togethers throughout the year, whether it be a summer outing, our holiday party, or a celebration in the office of a professional success or milestone. Without making an effort to maintain connections in this remote working environment, there is a risk that folks become isolated in their own silos and that a firm ceases to really be a firm. But, again, a smaller firm's size makes it possible to maintain these all-important connections in a meaningful way.

At this point, small firms that continue to adhere to the rigid paradigm of a traditional law firm structure are swimming against the tide. The key to navigating this new reality is communication and flexibility, which smaller firms are well-positioned to employ. We have the luxury of being able to listen to all of our employees about what is working and not working for them, and to adjust accordingly where appropriate. We have learned that there is more than one way to run a law firm and still maintain the constant of delivering high-quality legal services for clients. While there are certainly challenges (and there will, no doubt, be more to come), this new

environment presents a unique opportunity for smaller firms to re-imagine how they do business in a way that meets the needs and expectations of today's attorneys and staff without compromising the quality of services they deliver to clients.

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Practice Tips for Navigating the Post-Probable Cause Process at the Massachusetts Commission Against Discrimination

By Deidre Hosler

Introduction

The Massachusetts Commission Against Discrimination (MCAD) published a complete rewrite of its procedural regulations on January 24, 2020, but had less than two months to engage in outreach and education regarding the new regulations when the COVID-19 pandemic struck in March 2020. This article provides guidance on the revised post-probable cause* process for experienced and new practitioners and highlights the Commission's overriding mission to serve the public interest.

The MCAD's Clerk's Office is central to the post-probable cause process

The Clerk's Office is at the heart of the post-probable cause process and is exclusively tasked with managing all post-probable cause motion practice and case management. This is different from practice during an investigation, when the point of contact is almost always the assigned Investigator. Accordingly, every post-probable cause motion must be filed with the Clerk's Office, without exception. Conversely, pre-determination motions should **not** be filed with the Clerk's Office. *See* 804 CMR §§ 1.13(9)(c) and (d).

Similarly, all communications to the MCAD on any post-determination matter (e.g., not just post-probable cause cases but also all closed cases) should be directed to the Clerk's Office. It always suffices to direct filings or communication to the attention of the Clerk of the Commission, but litigants may direct filings and communications to either the ADR Administrative Assistant (Conciliations Clerk), Appeals Clerk, or the Hearings Clerk if the matter pertains to those parts of the process.

The Clerk's Office will reject non-compliant motions and require a corrected motion before submitting the motion to the decision-maker. For example, practitioners should be aware that the regulations now require parties represented by counsel to confer before filing any motion, and to submit a certificate affirming compliance with the requirement to confer. *See* 804 CMR § 1.13(4) (2020), as subject to exemptions in 804 CMR § 1.13(9). Should a moving party fail to confer or provide a certificate of conferral, the Clerk's Office will reject the motion, and request a corrected motion before seeking a ruling on the motion.

Special issues with appearances by counsel entered by the Clerk's Office

An attorney appearing on behalf of any party post-probable cause must be admitted to practice in Massachusetts or be admitted *pro hac vice*. See 804 CMR § 1.15(10). As a practical measure, the Commission will allow an out-of-state attorney to appear as a party's duly authorized representative (DAR) during the investigation. However, once a probable cause determination issues, an out-of-state attorney DAR must be admitted *pro hac vice* at the MCAD to continue representing their client at the agency.

Attorneys appearing on behalf of their clients at the MCAD may only enter a general appearance. The Commission requires formal withdrawal of all appearances, but it freely allows an attorney for any party to withdraw as of right, with or without successor counsel, up to the conciliation conference (i.e., the MCAD proceeding mandated by G.L. c. 151B, § 5, requiring the MCAD to

"immediately endeavor to eliminate the unlawful practice"). *See* 804 CMR § 1.15(7)(a) (prior to a conciliation conference an attorney may withdraw without leave of the Commission by filing a notice of withdrawal together with proof of service on their client and all other parties). Once a conciliation conference is initiated, an attorney must seek leave of the Commission to withdraw their appearance if there is no successor counsel. 804 CMR § 1.15(7)(b). The MCAD does not have rules for limited assistance representation and court rules on the subject do not apply to the MCAD.

New certification process managed by the Clerk's Office via use of the JCQ

Discovery orders issued after an unsuccessful conciliation contain a deadline for the service of all discovery, not the completion of all discovery. 804 CMR § 1.10(2). As of November 2021, the Clerk of the Commission's practice is to send a Joint Certification Questionnaire (JCQ) to counsel for the parties in every active case that is 15 months past its conciliation date. Prior to the 15-month mark, practitioners are encouraged to reach out to the Clerk of the Commission to either request a JCQ if discovery has been completed, inform the Clerk of an expected discovery completion date, or jointly move to extend discovery. In response, the Commission may extend deadlines for service or completion of discovery.

The JCQ serves several other important purposes, and practitioners are advised to consider it carefully and return it to the Clerk on time. It enables parties to advise the Commission if there is disagreement about the identity of the parties or the claims or issues to be certified to public hearing. Depending on the parties' responses, the Clerk of the Commission may schedule a certification conference to clarify what claims or issues will be certified to public hearing, among other things. *See* 804 CMR § 1.11(3) (detailing requirements of certification memoranda to be filed in advance of a certification conference).

If held, the certification conference is the final opportunity for a respondent to argue that certifying the case to public hearing is not in the public interest or that the probable cause finding should be reconsidered. *See* 804 CMR § 1.08(4)(a)(1) (motions for reconsideration of probable cause determination may be filed at any time prior to a certification conference or within 45 days of certification to public hearing if no certification conference is held). Counsel should note that any motion for reconsideration of a probable cause determination based on the absence of a genuine issue of material fact must be filed after discovery is complete and, although disfavored, cases may be certified to public hearing before discovery is complete. Accordingly, counsel for respondents should consider that a certification conference held before discovery is complete will preclude the filing of such motion for reconsideration.

Lastly, the JCQ allows the parties to jointly request mediation, which will be considered by the MCAD's Alternative Dispute Resolution (ADR) Unit. The MCAD offers mediation at its discretion (*see* 804 CMR § 1.06(1)), and mediation will not automatically be scheduled by request of the parties in the JCQ. Parties jointly requesting mediation in the JCQ (or otherwise, post-probable cause) should realistically consider whether mediation is likely to result in resolution of the case and should be prepared to explain to the ADR Unit why granting the request for mediation is in the public interest.

The MCAD disfavors certain settlement terms as a matter of public policy because its paramount concern is the public interest

When participating in an MCAD mediation or conciliation, MCAD mediators and conciliators

are designees of the Investigating Commissioner (if not the Investigating Commissioner themselves), and the Investigating Commissioner's paramount concern with any MCAD complaint is the public interest. *See* 804 CMR § 1.06(a), (b), and (d). MCAD mediators and conciliators are otherwise neutrals, and parties should rest assured that information submitted during a conciliation cannot be disclosed in any judicial or administrative proceeding, including a public hearing, unless it is otherwise discoverable. *See* 804 CMR §§ 1.06(1)(c) and 1.09(8).

Given that the public interest is of paramount concern in any mediation or conciliation, the MCAD disfavors the following settlement terms as a matter of public policy:

- Liquidated damages clauses.
- Non-disclosure clauses in sexual harassment cases.
- No re-application / rehire clauses.
- General releases.

Conciliation agreements can be made subject to the approval of the Investigating Commissioner. *See* 804 CMR § 1.09(10). The MCAD retains the authority to pursue a complaint in the public interest regardless of whether the parties have settled their private interests. *See*, *e.g.*, *Joule, Inc. v. Simmons*, 459 Mass. 88, 95 (2011) (MCAD not bound by arbitration agreements between respondents and complainants, and retains authority to investigate, prosecute and adjudicate complaints of discrimination in the public interest); 804 CMR § 1.09(10) (conciliation agreements are between the respondent and the complainant, not the MCAD). The Investigating Commissioner may also administratively dismiss a complaint if a complainant fails to accept a reasonable settlement offer. *See* 804 CMR § 1.09(11).

For all these reasons, complainant's counsel should consider their duty to represent the public interest post-probable cause when negotiating a settlement (*see* 804 CMR § 1.15(5) and (6)) and counsel should, therefore, consider seeking provisions in the public interest, which are detailed in a non-exhaustive list in 804 CMR § 1.09(5).

Guidance regarding public hearings

An MCAD public hearing is less formal than a trial largely because the MCAD is not bound by the rules of evidence (although it is bound by the rules of privilege, under 804 CMR § 1.12(13)). Practitioners should understand that public hearings are *de novo* proceedings, separate and apart from the investigative and discovery process, and that the evidence in a public hearing is only that which the parties submit to the Hearing Commissioner or Officer, as they allow in their discretion.

Practitioners should know their burdens and prepare their witnesses for both direct and cross examination, and present detailed evidence with respect to damages. When a complainant receives public or other benefits, the Commission applies the collateral source rule unless, in the discretion of the factfinder, countervailing circumstances would render its application unjust. *See Schillace v. Enos Home Oxygen Therapy, Inc., et al.*, 39 MDLR 59 (2017).

The MCAD has resumed holding public hearings in-person, with public livestreaming of the proceeding. For any remote public hearing, practitioners should review the MCAD's remote public hearing protocols and virtual proceedings guidance from the Clerk's Office. *See* 804 CMR § 1.12(4).

Important process changes regarding the finality of Full Commission decisions
Counsel for complainants and the Commission are entitled to recover attorney's fees when they prevail on one or more claims at public hearing or at the Full Commission. The revised regulations spell out when fees must be requested (within 15 days of receipt of a decision), and the process for deciding fee petitions. 804 CMR § 1.12(19); 804 CMR § 1.23(12).

Because the final order by the Full Commission now addresses both an underlying appeal and a petition for fees, if any, the Commission makes time for a complainant who has prevailed at the Full Commission to petition for fees before issuing the final order. If a complainant who prevails at the Full Commission does not file a petition for attorney's fees within 15 days, the Commission will issue a Notice of Entry of Final Decision and Order indicating that the decision on the underlying appeal is now final. Alternatively, if a complainant who prevails at the Full Commission does timely petition for attorneys' fees, the Commission issues a Notice of Entry of Final Decision and Order with the decision on the fees petition, indicating that the fees decision, together with the Full Commission decision, constituted the final order of the Commission for purpose of judicial review under M.G.L. c. 30A and M.G.L. c. 151B, § 6.

The Lightning Round
The following is a short list of additional best practices and specific requirements when practicing before the MCAD:

- Although not required by 804 CMR § 1.10, objections to written discovery must be detailed and specific, general objections do not suffice.
- Motions to compel written discovery responses and oppositions thereto should reproduce the document request or interrogatory and response at issue.
- The Investigating Commissioner may require the filing of any deposition transcript (804 CMR § 1.10(6)(f)).
- Pay close attention to motion practice requirements in 804 CMR § 1.13, specifically:
    - If one or more parties is not *pro se*, all post-probable cause motions and oppositions, together with any replies or sur-replies, must be filed with the Clerk of the Commission in a package (similar to that which is required by Superior Court Rule 9A) under detailed cover letter by the moving party (804 CMR § 1.13(5)); and
    - Motions (i) must contain a statement of the reasons for the motion with supporting authorities as well as a proposed order, (ii) may request a motion hearing, and (iii) should contain affidavits and other documents evidencing facts on which the motion is based (804 CMR § 1.13(1)).
- The Clerk's Office requires a withdrawal form for every complaint withdrawn, regardless of the reason for the withdrawal. Forms are available on the MCAD's website.
- Notify the Clerk's Office of withdrawal to court and provide a copy of the complaint to the MCAD General Counsel (804 CMR §§ 1.04(12)(c) and 1.04(13)).
- Parties must redact all personal data identifiers (804 CMR § 1.21(4)). Non-conforming filings will be rejected by the Clerk's Office.
- Recordings are never permitted at conciliations or mediations and are not typically allowed at any other post-probable cause proceeding except for the public hearing.

- Public hearings are either recorded by a stenographer paid for by the parties, in which case the stenographer's transcript becomes the official record of the proceeding, or else electronically recorded by the MCAD (804 CMR § 1.12(11)).

Conclusion

The MCAD's post-probable cause process is managed by the Clerk's Office and guided by the public interest. Practitioners should follow the regulations carefully and embrace the formality built into the process, as well as the flexibility. Whenever in doubt, practitioners should contact the Clerk's Office for guidance with respect to the post-probable cause process. Additionally, the Office of the General Counsel welcomes constructive feedback on the operation of the procedural regulations, as the MCAD continues to refine practices for their enforcement.

*Cases at the MCAD are described in the procedural regulations as either "pre-determination" or "post-determination," meaning that the investigation of the complaint is either open or closed. See 804 CMR § 1.02 (defining both terms). Any case that receives a probable cause determination is "post-determination," but such cases are referred to herein more specifically as "post-probable cause." The distinction is particularly important because cases closed after a lack of probable cause determination are also "post-determination."

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