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President's Page

Reflections on a Pivotal Year at the BBA

By Chinh H. Pham

A few weeks ago, when walking into 16 Beacon Street, I noticed the day's schedule on the wall; there were five different in-person events taking place throughout the day, each tailored to a different practice area, some focused on education and others on networking and socializing. I thought, at that moment, "This is what the BBA really is; this is what we're really meant to be." A year ago, this wouldn't have been the case; that screen would have been blank, as it was most days while we continued to work through the uncertainty of the pandemic and re-evaluate how we could connect with our members through a computer screen.

Around that time, I was asked how I would define a "successful" year as President of the Boston Bar Association. There were many factors I considered, but ultimately the answer came down to one simple point: I wanted to lead the BBA out of the pandemic era and back to what I knew it always could be. While that may be difficult to measure objectively and empirically, I can say without hesitation that, for the first time in years, we were able to return to a sense of normalcy, resulting in a BBA that is once again—in every sense—the hub of Boston's legal community.

There is so much to be proud of over the last calendar year. We welcomed thousands of members back into the building for a variety of social and educational programs. By the spring, hardly a day went by without an in-person program or meeting. Perhaps best of all, you could see and feel how eager our members were to meet, socialize, and learn with colleagues and friends face-to-face once again.

In particular, we have re-engaged with our youngest members—new lawyers as well as law students, many of whom had been trapped in front of a computer screen for two years, robbed of the invaluable in-person aspect of their education and first jobs. Before my presidency began, I wanted to make sure those members saw the true impact of the BBA, and the only way to do that was to engage them in-person.

Through events such as our DEI Career Fair, student study sessions and bar coaching, mentoring opportunities for new lawyers, our PILP program and community events, the BBA has become a place to nurture our next generation of lawyers and truly help them grow, personally and professionally. Perhaps the highlight of this year for me has been hearing from so many of these younger members how helpful, insightful, and valuable these opportunities have been for them, especially given how rare such opportunities were during the worst of the pandemic years.

We also saw a return to full force of our major annual events—the Beacon Awards, the Adams Benefit, and Law Day. To see the Boston legal community celebrate its accomplishments with the likes of Mayor Michelle Wu and Governor Maura Healey instilled in me both pride for what we've recaptured and hope for how much we can continue to grow as part of our city and our community.

Without the unexpected disruptions of the past few years, we were able to amplify our work as a thought leader in the Boston legal community, ensuring we were prepared for whatever came our way; from the migrant crisis on Martha's Vineyard to troubling decisions from the nation's highest court, the BBA was ready to lead. From ABA Day in Washington, DC to the annual Talk to the Hill event and our numerous amicus briefs filed, the BBA cemented itself as an authoritative voice for the community as we continue to work to advance the highest standards of excellence for the legal profession and facilitate access to justice for all.

It's been an honor serving during such a pivotal time for our Association, and the community at large. While my title may have been President, my role took on many forms: convener, guide, shepherd, educator, and leader. I know the BBA is in excellent, capable hands with President-Elect Hannah Kilson, and I have no doubt that, once again, the BBA will be in an even better place a year from now than it is today.

Thank you to our members, our Council, our hundreds of volunteers, the BBA staff, and everyone else who allowed me the chance to lead this great organization back to its full glory; it has been the honor of a lifetime.

Chinh H. Pham
President

Case Focus

Democracy, Some Assembly Required: *Barron v. Kolenda*

By Mina Makarious and Paul Kominers

Revolutionary politics were less than orderly. In 1770, a mob surrounded, yelled at, and pelted British soldiers in Boston. In 1773, tea was dumped in Boston Harbor. British officials and loyalists were verbally abused, opposed, and hung in effigy. Indeed, the right to assemble, as John and Samuel Adams "understood it, included the power to 'carry their votes and resolutions into execution, at the risque of their lives and property'-- whether through marches, effigies, boycotts, committees of correspondence, or throwing tea into the harbor." Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 YALE L.J. 1652, 1729 (2021) (quoting Proceedings of the Town of Boston (Nov. 29-30, 1773), *in* TEA LEAVES 320, 330 (Francis S. Drake, ed., Singing Tree Press 1970) (1884)). American courts, however, commonly ignore this history in favor of the era's loftier aspirations and more genteel aspects.

The Supreme Judicial Court ("SJC") recently enshrined the rough and tumble aspects of the Founding era through its recent decision in *Barron v. Kolenda*, 491 Mass. 408 (2023). Drawing on sources describing the "spirit and practice of self-government" dating to Revolutionary times, *Barron* held the right to assembly protects "discourteous, rude, disrespectful, or personal speech about government officials and governmental actions." *Id.* at 416–19.

Barron's Background

The Town of Southborough's Select Board, like many others, hosts "public comment" sessions "when town residents can bring matters before the [B]oard that are not on the official agenda." *Id.* at 411 & n.5. The Select Board held these sessions under a policy that sought to mandate civility. *Id.* at 411 n.5. The policy required that all speakers, including Select Board members, "act in a professional and courteous manner" and that "[a]ll remarks and dialogue in public meetings must be respectful and courteous, free of rude, personal or slanderous remarks." *Id.* It also declared that "[i]nappropriate language and/or shouting will not be tolerated." *Id.*

During one "public comment" session at a December 2018 Select Board meeting, a member of the public chastised the Select Board for a series of Open Meeting Law violations. *Id.* at 411–13. The Select Board's Chair interrupted to say that if the commenter was going to "slander" town officials, the Board would end public comment and recess. *Id.* at 413. As the Chair said that, the commenter responded "Look, you need to stop being a Hitler. . . . You're a Hitler. I can say what I want." *Id.* The Chair then took the meeting into recess and the broadcast of the meeting stopped. *Id.* A different video recording of the meeting showed the Chair yelling at the commenter and threatening to have her escorted out. *Id.* The commenter then left. *Id.*

The Lawsuit

The commenter, her husband, and another Southborough resident sued. *Id.* at 413–14. By the time the case reached the SJC, the plaintiffs were pressing two claims: they alleged that the civility policy violated Article 19 and Article 16 of the Massachusetts Declaration of Rights, and

that the Chair had violated the Massachusetts Civil Rights Act ("MCRA"), Mass. Gen. L. c. 12, §§ 11H–11I. *Id.* at 414.

Article 19

Because Article 19 "has not been the focus of much attention in recent case law," the SJC reviewed the "text, history, and purpose" of Article 19 to determine how to apply it. *Id.* at 414, 416, 418.

In full, Article 19 reads:

> The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.

MASS. CONST. pt. 1, art. XIX. The SJC stated that this language "expressly envisions a politically active and engaged, even aggrieved and angry, populace." *Barron*, 491 Mass. at 415.
The SJC also cited the writings and contemporary experiences of John and Samuel Adams, who drafted Article 19. *Id.* at 414–17. From those sources, and with a nod to 1830s observer Alexis de Tocqueville, the SJC found Article 19 envisioned a "critical role [for] the right of assembly in the towns in cultivating the spirit and practice of self-government," and was meant to protect "fierce opposition to governmental authority . . . even if it was rude, personal, and disrespectful to public figures, as the colonists eventually were to the king and his representatives in Massachusetts." *Id.* at 416–18.

Thus, although petition and assembly must be "peaceable and orderly," the SJC held that they need not be "respectful and courteous." *Id.* at 418. Instead, "peaceable and orderly" envisions "reasonable time, place, and manner restrictions," much like those in First Amendment jurisprudence. *Id.*

Applying these principles to the case at hand, the SJC concluded that "the town's civility code [wa]s contradicted by the letter and purpose of art. 19." *Id.* at 419. And, where the commenter "presented her grievances at the [town's] established time and place," Article 19 forbade the Town from preventing the commenter's "discourteous, rude, disrespectful, or personal speech about government officials and governmental actions." *Id.*

Article 16

The SJC then addressed Article 16. *Id.* at 420. In relevant part, Article 16 reads: "The right of free speech shall not be abridged." MASS. CONST., pt. 2, art. XVI. Under Article 16, any content-based restriction on political speech receives strict scrutiny regardless of the forum in which the restriction applies. *Barron*, 491 Mass. at 420 (quoting *Commonwealth v. Lucas*, 472 Mass. 387, 397 (2015)). The SJC concluded that the civility code restricted political speech, "as it regulates speech in a public comment session of the board," and was content-based, "as it requires [a court] to examine what was said." *Id.* at 421.

The SJC concluded that the civility code failed strict scrutiny, which requires government policy be "necessary to serve a compelling state interest and narrowly drawn to achieve that end." *Id.* (quoting *Lucas*, 472 Mass. at 398) (cleaned up). On the first prong, the SJC held that there is no "compelling need to mandate that political discourse . . . be courteous and respectful." *Id.* On the latter, the SJC decided that because the civility code was "extraordinarily broad," it was "certainly not narrowly tailored." *Id.*

Lastly, the SJC observed a viewpoint-discrimination problem. *Id.* The Select Board's policy required "speech directed at government officials 'be respectful and courteous, [and] free of rude remarks,'" which "appears to . . . allow[] lavish praise but disallow[] harsh criticism of government officials." *Id.* This, according to the SJC, was "the essence of viewpoint discrimination," and another constitutional problem with the policy. *Id.* at 422 (quoting *Matal v. Tam*, 582 U.S. 218, 249 (2017)).

The MCRA and Qualified Immunity

The MCRA proscribes interference with constitutional rights via "threats, intimidation or coercion." In a brief analysis, the SJC held that the commenter could potentially prove an MCRA violation at trial. *Id.* at 423-25. She was exercising her Article 16 and 19 rights, and her allegations that the Chair instructed her to stop speaking, yelled at her, and threatened to have her removed could constitute intimidation or coercion. *Id.* at 423–24.

The SJC further held that the Chair could not claim qualified immunity. *Id.* at 424. A government official may not claim qualified immunity for violating a "clearly established" right, one whose contours are "sufficiently definite so that a reasonable official would appreciate that the conduct in question was unlawful." *Id.* (quoting *LaChance v. Comm'r of Corr.*, 463 Mass. 767, 777 (2012)). The Court found that the plaintiff's rights were clearly established: the Article 19 right to "'full and free discussion' in town meetings" by a "long and distinguished history in Massachusetts," and the Article 16 right to be free of content-based restrictions on political speech by case law. *Id.* at 425 (quoting *Fuller v. Mayor of Medford*, 224 Mass. 176, 178 (1916))).

Thus, "[a]t a public comment session[,] . . . a resident of the town thus clearly has the right to accurately complain about violations of law committed by town officials and object to other town actions . . . and to express her view vehemently, critically, and personally to the government officials involved." *Id.* In turn, the Chair should have known that responding by "accusing her of slandering the board, screaming at her, and threatening her physical removal . . . is unlawful." *Id.*

Implications

Speech Restrictions: The Permissible, the Debatable, and the Doubtful

Throughout its opinion, the SJC took pains to make clear that future public comment sessions will not be free-for-alls. *Id.* at 410, 419 & n.10, 422–23. It stated repeatedly that reasonable time, place, and manner restrictions, such as "designating when public comments shall be allowed in the governmental meeting, the time limits for each person speaking, and rules preventing speakers from disrupting others, and removing those speakers if they do," are acceptable. *Id.* at 410.

The opinion was more mixed on whether local governments may restrict public discussion to certain topics. *See id.* at 419 n.10, 420 n.12. The SJC recognized that "in order to function efficiently, towns must be able to hold public meetings limited to a particular subject without violating art. 19" or 16, but also that towns that do so must "provide[] other opportunities to exercise" petition and assembly rights, as the Southborough Select Board did by offering a "public comment" session. *Id.* at 419 n.10. "Germaneness" restrictions may generate future litigation.**[1]**

Similarly, the SJC gave no substantive guidance on "manner" restrictions, such as those limiting "the size of signs or the volume of audio." *Id.* at 410, 418–19 & n.9. It acknowledged that reasonable manner regulations are compatible with "orderly and peaceable" petition and assembly but did not elaborate on which restrictions are reasonable. *Id.* at 410.

Finally, the SJC frowned on, but did not proscribe, restrictions on slander and fighting words. It declined to review the civility policy's restrictions on slander, but pointed out that "slander directed at public officials requires actual malice." *Id.* at 418 n.8. Later, it recognized that fighting words are not protected speech, but reiterated its prior holding that the exemption is "extremely narrow," and "emphasize[d] that elected officials" should "respond to insulting comments about their job performance without violence." *Id.* at 423 n.15.

Unresolved Issues

Other difficult legal questions about speech, assembly, and petition remain.

First, although the SJC held that towns must provide some opportunities for citizens to exercise rights of petition and assembly, it did not explain whether opportunities other than "public comment" sessions would suffice, how much is enough, or which municipal bodies are required to offer those opportunities. *Id.* at 419 n.10, 420 n.12. In 1980, when a group of plaintiffs argued that "some deliberation is constitutionally required when one or more persons wish to speak on a warrant article" at Town Meeting, the SJC rejected their argument in part because of "serious questions as to how much discussion or debate would be necessary to meet the asserted constitutional standard . . . ." *MacKeen* v. *Town of Canton*, 379 Mass. 514, 521 (1980). *Barron* may inspire similar questions.

Second, the SJC did not address whether government entities other than municipalities have the same affirmative obligation. *See Barron*, 419 Mass. at 419 n.10, 420 n.12. *Barron* draws not only on New England's storied tradition of local self-governance, but also on Article 19's roots in Revolutionary-era politics. *Id.* at 416–17. Revolutionary-era Massachusetts citizens certainly sought redress of grievances directly from the colonial government, and in a manner as vehement as anything seen in town politics.

Third, the question of when a town official may seek qualified immunity for restricting public comment may prove fraught. The denial of qualified immunity in *Barron* rests on three distinct acts by the Chair: "accusing [the plaintiff] of slandering the board, screaming at her, and threatening her physical removal . . . ." *Id.* at 425. But the decision does not explain whether any one of those three acts, taken independently, would have violated the plaintiff's clearly-established rights. *See id.*

This question is important because the first two of those three acts were in part speech, and elected officials have their own free-speech rights. *See, e.g.*, *Houston Cmty. Coll. Sys. v. Wilson*, 142 S. Ct. 1253, 1261 (2022) (addressing elected officials' free speech rights to respond to criticism and speak on policy); *Sahli v. Bull HN Info. Sys., Inc.*, 437 Mass. 696, 701 (2002) (describing mayor's First Amendment right to defend city government from allegations against it). This part of *Barron* may be confined to its facts. The Chair's "accusing" the commenter and "screaming at her" were part of the Chair's efforts to prevent her from speaking. 491 Mass. at 425. Had the Chair merely rebutted her after she finished, *Barron*'s qualified-immunity analysis might have come out differently. The SJC's focus on the plaintiff's free speech rights over the Chair's is also consistent with its treatment of slander and fighting words: understandably, it demands more from public officials than the public. *See id.* at 418 n.8, 423 n.15.

That brings up a final question: how *Barron* applies when one official speaks uncivilly to another. In *Barron*, the line between citizen and government was clear. But that line is often blurred by the same "spirit and practice of self-government" that *Barron* relies on and protects. *Id.* at 417. If one member of a public body is unusually sharp with another, that could be intimidation proscribed by the MCRA. Or it could be protected expression. The problem becomes even harder at Town Meeting, where every participant is a legislator. *See Curnin v. Town of Egremont*, 510 F.3d 24, 26 (1st Cir. 2007).

Final Takeaways

Some of *Barron*'s implications for public bodies, officials chairing public meetings, and other local officials are straightforward:

- Public bodies should rely on the kinds of rules that *Barron* approves: time limits, rules against one speaker disrupting another, and requirements that comments be germane.
- Officials chairing meetings should be careful to enforce those rules with an even temper and equally to all.
- All local officials should be ready to grin and bear "discourteous, rude, disrespectful, or personal speech." *Barron*, 419 Mass. at 419.

For many, this last point will not be news. Still, it is important to remember that *Barron* is about what the government can and cannot proscribe. Public bodies may still promote civility without requiring it. Even in *Barron*, the Court recognized that "civility, of course, is to be encouraged." *Id.* at 410.

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[1] A case just decided in Nantucket Superior Court, *Barros v. Nantucket Select Board*, No. 2175-cv-00004 (Mass. Super. Ct. July 5, 2023) presented that question, as did *Spaulding v. Town of Natick School Committee*, MICV2018-01115 (Mass. Super. Ct. Nov. 21, 2018) (Kirpilani, J.) a few years ago. We discussed *Spaulding* in "Spaulding v. Town of Natick School Committee: Allowing Free Speech while Accomplishing Municipal Work," 63.2 BOS. B.J., , at 9 (Spring 2019), *available at https://bostonbar.org/journal/spaulding-v-town-of-natick-school-committee-allowing-free-speech-while-accomplishing-municipal-work/.* In that case, the court decided that because "[t]he School Committee exercised no direct control over personnel other than the superintendent, [it] could properly bar personal complaints against personnel other than the superintendent from Public Speak." *Id.* at 10.

Heads Up

JFF Cecilia LLC v. Weiner Ventures LLC: Is There Finally Clarity on the Legal Standard for When the Duty to Preserve Evidence Begins and When Spoliation Sanctions May Be Imposed?

By Payal Salsburg and Alexis Theriault

The importance of the duty to preserve evidence in the context of litigation cannot be overstated: an error can lead to the imposition of draconian sanctions for spoliation of evidence, including instructing the jury that it may draw the inference that the evidence destroyed was unfavorable to the party responsible for its destruction. The initial – and critical – question for businesses and their counsel is "when does the duty to preserve arise?" A recent unpublished, single-justice order from the Appeals Court attempts to shed light on that query.

The Supreme Judicial Court ("SJC") has been consistently inconsistent in its description of when the duty arises, which is the major factor in determining when spoliation sanctions may be imposed.

Most recently, the SJC stated that the duty to preserve arises when a party "knows or reasonably should know that it *might be relevant to a possible action*." *Scott v. Garfield*, 454 Mass. 790, 798 (2009) (citing *Kippenhan v. Chaulk Servs., Inc.*, 428 Mass. 124, 127 (1998)) (emphasis added). However, in *Kippenhan*, the SJC also stated that the threat of a lawsuit "must be *sufficiently apparent* to a reasonable person in the spoliator's position. . .." 428 Mass. at 127 (emphasis added). Yet, the SJC in *Scott* did not overturn its prior decisions on this issue. 454 Mass. at 798.

In other pre-*Scott* decisions, the SJC has held that the duty to preserve arises only when the person is "*actually involved* in litigation (or know that they will *likely* be involved)." *Fletcher v. Dorchester Mut. Ins. Co.*, 437 Mass. 544, 549-550 (2002) (emphasis added); *see also Keene v. Brigham and Women's Hosp., Inc.*, 439 Mass. 223, 234 (2003) ("[D]efendant should have been aware of a *likely* claim at least as early as . . . the time it filed a notice [with its insurer] of a potential claim on the plaintiff's injuries.") (emphasis added).

Further confusion has resulted from decisions holding that there must be knowledge of a "possible" action citing decisions holding that litigation must be "likely," and at times equating the two standards. In *Scott*, the SJC acknowledged that while there may be a discrepancy between the standards stated in *Kippenhan* and *Keene*, it did not need resolve any discrepancy because the trial court judges found that the defendant's conduct satisfied both standards. *See* 454 Mass. at 798 n. 10.

Trial courts and attorneys have tried to make sense of these decisions to determine whether there is a distinction between when litigation is "possible" vs. "likely."

JFF Cecilia LLC, et al. v. Weiner Ventures LLC, et al.

In January 2023, after remand from the single justice after an interlocutory appeal, the Massachusetts Superior Court Business Litigation Session (Salinger, J.) issued a decision that for the time being clarifies the standard to use for spoliation sanctions under Massachusetts law. In *JFF Cecilia LLC, et al. v. Weiner Ventures, LLC et al.*, C.A. No. 1984CV03317-BLS2, 2023 WL

1804375 (Mass. Super. Ct. Jan. 30, 2023). Judge Salinger held that, as a result of a defendant's failure to preserve communications that might have been relevant to a *possible* lawsuit and prejudice to the plaintiffs, that plaintiffs were permitted to offer evidence of spoliation at trial and were entitled to a jury instruction that "the jury may but are not required to, infer that . . . the deletion of emails and texts that the message contents were unfavorable to the defendants." *Id*. at *3. The decision when read in connection with Judge Salinger's earlier decision denying plaintiffs' motion for spoliation sanctions, *JFF Cecilia LLC, et al. v. Weiner Ventures LLC at al.*, C.A. No. 1984CV03317-BLS2, 2023 WL 1804376 (Mass. Super. Ct. Jan. 6, 2023) which was reversed following interlocutory review also sheds some light on the distinction between when litigation is "possible" vs. when it is "likely."

Background - A Construction Project Comes to a Halt

The *JFF Cecilia* case arose from a project between a construction company and a real estate development firm to build a luxury condominium high-rise over the Massachusetts Turnpike. After the developers pulled out of the project, counsel for the construction company, pursuant to the parties' contract, sent a dispute letter to the developers accusing the developers of violating the parties' agreement and reserving the construction company's legal rights. The dispute letter did not specifically mention pursuing litigation.

Two months later, the construction company filed suit. It sought discovery of relevant communications, including those sent during the time period between the developers' receipt of the dispute notice and the filing of the complaint. Noticing gaps in the production caused by the developers' failure to preserve those communications, the construction company moved for spoliation sanctions. The developers claimed that there were additional communications after the dispute letter to suggest that actual litigation was not yet likely, and thus no duty arose.

The Superior Court's First Spoliation Decision: The Dispute Letter Did Not Trigger the Duty to Preserve

The Superior Court denied the motion for spoliation sanctions, finding that based on the additional communications received after the dispute letter, a reasonable person in the developers' position prior to the filing of the lawsuit would not have thought it *very likely* that they would be sued. *See* 2023 WL 1804376, at *1 ("The 'will likely be involved' standard [… means that for a duty to preserve evidence to arise 'the potential litigation must be probable . . . and not merely possible.'" (quoting *Diamondrock Boston Owner LLC v. Suffolk Constr. Co.*, Suffolk Sup. Ct. No. 1284CV00307-BLS1 slip op. at 12 (Feb. 10, 2014) (ellipses in original) (internal quotations omitted).

The construction company filed an interlocutory appeal.

On Interlocutory Review, the Single Justice Directs the Superior Court to Apply a Different Standard

A single justice of the Appeals Court (Henry, J.) could not determine whether the Superior Court applied the correct standard in deciding the motion for sanctions. *JFF Cecilia, et al. v. Weiner Ventures LLC, et al.*, No. 2023-J-0037 (Mass. App. Ct. Jan. 30, 2023) (Single Justice Order). The Appeals Court remanded with the instruction that the Superior Court "determine if the [developers] knew or reasonably should have known that evidence *might have been relevant to a*

possible action," the standard articulated in *Scott. Id.* (emphasis added). The single justice stated she could not tell if Judge Salinger applied the correct standard, because the decision stated the correct standard—*i.e.,* the possibility of litigation standard in the decision, but held that the developers did not have an obligation to preserve evidence by applying the other standard—*i.e.,* the likelihood of litigation standard. *Id.* On remand, the Superior Court was to determine if, at the time the developers destroyed relevant evidence, they "knew or reasonably should have known that [the] evidence might have been relevant to a possible action." *Id.*

The Superior Court's Revised Spoliation Decision: The Dispute Letter Did Trigger the Duty to Preserve

After remand, the Superior Court, in a revised decision reversing its original denial of plaintiffs' motion, found that a reasonable person in the developers' position would have known at the time that the construction company's counsel sent the dispute notice, there was a *possibility* of litigation.

Judge Salinger construed a "possible action" as materially different from a "likely action." The judge noted that "a future lawsuit is 'possible' if it is within the limits of ability capacity or realization [and that] in contrast, litigation is 'likely' only if it has a high probability of occurring." 2023 WL 1804375, at *2 (quoting *Webster's Ninth New Collegiate Dictionary* at 918, 962 (1991)). Thus, Judge Salinger held that a party may be subject to spoliation sanctions if it destroyed relevant evidence at a time when it "knew or reasonably should have known that litigation with the plaintiffs was possible, even if a reasonable person would not have considered it likely or probable." *Id.* at *2. Defined in this way, the trial court found that while litigation may not have been likely upon receipt of the notice, a lawsuit nonetheless was "possible" and by failing to preserve the communications at issue, the developers breached their duty to preserve evidence. A reasonable person who received the dispute notice would have made anyone in the developers' position "fear that they were likely to be sued" by the construction company. *Id.* at *3.

Considering the developers' intentional or negligent spoliation, the court permitted the construction company to offer evidence at trial of the "alleged spoliation of emails and text messages" and ordered that it was entitled to a jury instruction that the jury that it could (but did not have to) infer that the contents of those communications were unfavorable to the developers. *Id*.

Key Takeaways

JFF Cecilia has, for the time being, clarified for practitioners that in Massachusetts even the mere possibility of a lawsuit will kickstart a would-be party's duty to preserve relevant evidence. While some may question the precedential value of an unpublished single justice decision from the Massachusetts Appeals Court, *JFF Cecilia* suggests that practitioners should look to *Scott* for the standard to apply to determine when the duty to preserve evidence begins.

Though counsel involved in litigation that has commenced may find themselves confronted with a situation when the horse already is out of the barn because the deletion already has occurred – whether by negligence or otherwise – they still should undertake efforts to learn what their clients did (and when). And, if it has not already issued, implement a litigation hold for any

existing electronic or other documents or information that are relevant to the litigation. Counsel may also wish to consider available methods to attempt to retrieve electronically deleted material if possible.

What about scenarios in which litigation has not commenced? Practitioners should advise clients, and particularly clients who regularly engage in litigation, not to attempt to distinguish between what is possible vs. what is probable in terms of the commencement of a lawsuit and preserve all relevant communications whenever there is the slightest possibility of a legal dispute (and certainly whenever they receive correspondence from an attorney about a business dispute). The ubiquitous nature of electronic communications transmitted in the normal course of business can result in the preservation endeavor becoming unwieldy and, at times, astronomically expensive. *JFF Cecilia* provides useful guidance for in-house counsel, e-discovery, and IT departments in reviewing record retention and litigation hold policies to ensure they will not run afoul of the duty to preserve most recently articulated in *JFF Cecilia*. Where preservation and management of electronically stored information is prohibitively expensive, businesses should consult with counsel on undertaking cost-effective measures to preserve electronic communications. If the materials are emails, then a low-cost measure could include archiving emails of relevant individuals and disabling automatic deletion policies. For documents other than emails, businesses may wish to put a hold on the destruction of potentially relevant documents that may otherwise be destroyed pursuant to their record retention policies.

While *JFF Cecilia* can be viewed as a cautionary tale, it also should be viewed as a useful tool for practitioners.

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Practice Tips

Boston Celtics' Suspension of Former Head Coach Offers Stark Reminder of Challenges of Workplace Disciplinary Issues

By Dayana Donisca

In his first season as Head Coach, fans revered Ime Udoka for leading the Boston Celtics team to the brink of the 2021 NBA Championship.**[1]** However, news of Udoka's suspension at the start of his second year – and ultimate termination – landed him in the news for different reasons. The Celtics declined to make public the details uncovered from an investigation by an independent law firm; but stated that Udoka's termination was due to allegedly improper behavior. While the public may never know the full details, this high-profile workplace disciplinary matter serves as an excellent reminder to employers of all sizes and in all industries to have policies and procedures in place to deal with complex employee disputes. Below are a few tips for organization leaders, general counsel, and employment attorneys to keep in mind when deciding/advising clients to cut ties with an employee.

Company Policies: When possible, look to internal policies and precedent to guide decisions about discipline.

While employee handbooks cannot anticipate every possible workplace issue, having a handbook with key policies addressing basic employee conduct and disciplinary procedures can help ensure consistency and control for employers, as well as transparency and fairness for employees.

For example, depending on the workplace environment and employee dynamics, an employer may need to consider having detailed and express policies regarding fraternization. Consider an environment like the NBA, where staff members, coaches, and players frequently travel and work together in close quarters. In this type of workplace, establishing guidelines to encourage appropriate and safe interactions between employees may be prudent, especially among supervisors and subordinates. Having these policies in place can also help guide any disciplinary action in the event of a violation. Before terminating employees, make sure to review your company policies to ensure that the termination is aligned with those policies.

Timing & Public Relations Considerations: When taking action against a high-profile employee, consider the range of impacts for your organization, anticipate negative press, and plan accordingly.

Just before Udoka's suspension, the NBA fined Phoenix Suns owner Robert Sarver $10 million and suspended him for one year, in light of an investigative report documenting repeated incidents of racist, misogynistic, and harassing behavior that was corroborated by more than 70 former and current Suns' employees. On the heels of the #BlackLivesMatter and #MeToo movements, Sarver's penalties were applauded as an ongoing move to purge the NBA of systemic racism and misogyny. In contrast to the Sarver situation, the disclosure of Udoka's suspension lacked important context which led to some backlash. In particular, the lack of

detailed information disclosed about Udoka's suspension by the Celtics caused some commentators to speculate that Udoka was treated unfairly due to his race, and brought criticism to the Celtics' front door.

As such, it is important that employers adequately and appropriately convey information, when necessary, to avoid such public criticism. For even when an employer may have a valid reason for terminating an employee, public relations and other business-related considerations can factor into the management of employment disputes just as much as legal considerations. Having reliable legal, business, and public relations advisors on your team when a crisis arises can be critically important. For instance, if an organization penalizes similarly situated employees for violating company policies differently, this is a red flag to the courts and, the court of public opinion.

Legal Claims: Understand the possible legal exposure in involuntary employee separations.

Most employees are "at will" and therefore can be terminated at any time for any reason. Involuntary employee separations can be stressful and emotional, and if not handled appropriately, employees can react by pursuing legal claims against their employer. Thus, employers contemplating adverse actions against an employee, such as suspension or termination, should make these decisions carefully and ensure that any proposed action is consistent with the employer's own policies, and with its treatment of similarly situated employees.

a) **Discrimination**: Always consider federal and state-specific antidiscrimination laws including Title VII, Title IX, and Mass. Gen. L. c. 151B in involuntary separation situations.

Generally, disparate treatment of employees in disciplinary actions should be avoided to prevent claims of discrimination. Employers should consider whether a person is in a protected class when making a termination. Doing so mitigates a potential legal claim from an employee that the employee was treated differently because of membership in a protected class (e.g. race, gender, age, disability). Employers should also be aware of anti-retaliation laws, and tread lightly when contemplating adverse action against employees who have made complaints about unlawful workplace conduct.

b) **Wages**: Always consider federal and state specific wage laws and make sure that the employee has received their final wages.

Generally, employers should consider federal and state-specific wage laws, including whether the employee in question is paid on a salary or hourly basis, when considering any cut or reduction in compensation. Under the Massachusetts Wage Act (Mass. Gen. L. c. 149 § 148), employers cannot refuse employees any wages or compensation (including vacation time) they

have already earned. Massachusetts Wage Act violations potentially expose employers to attorneys' fees and treble damages on top of any unpaid wages.

Contracts and Agreements: Consider contractual restrictions, separation agreements, and/or post-employment covenants.

Some high-level employees work pursuant to an employment agreement that contains specific severance provisions or conditions around termination. Even employees who are at-will may be subject to other contractual restrictions, such as non-competition or non-solicitation agreements. Employers who are terminating employees subject to any contracts should be sure to review all relevant terms so that they properly understand their rights and obligations if they decide to terminate the employee.

In situations where an employee is terminated, employers may consider memorializing the parties' understanding in a written severance agreement. A severance agreement offers an employee a monetary benefit in exchange for a release of claims against the employer, thereby providing a sense of finality and closure to all parties. When contemplating severance agreements, employers should consider: (1) whether an agreement is necessary; (2) what compensation it is willing to offer the employee; (3) what clauses are important to it (and the employee); and (4) when to present the separation agreement and begin the termination process. While a severance agreement can be an excellent tool for employers, businesses would be well-advised to discuss the decision to offer a severance agreement, the terms of the agreement, and the drafting of the agreement with legal counsel.

Issues related to employee discipline and termination are complex and multifaceted. In sum, when considering the involuntary termination of an employee, at a minimum, employers and employees should review and consider: (1) company policies, (2) timing, (3) potential legal claims, and (4) contracts and agreements. When considering these issues, employers who take a team approach (pun intended) and take care in the process, particularly when faced with a difficult employee dispute or disciplinary issue, are more likely to reach a favorable outcome.

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[1] Tim Bontemps, Boston Celtics Owner Wyc Grousbeck Says Suspension Of Coach Ime Udoka The Result Of Monthslong Investigation, ESPN, (Sept. 30, 2022), https://www.espn.com/nba/story/_/id/34650147/boston-celtics-owner-wyc-grousbeck-says-suspension-coach-ime-udoka-result-months-long-investigation. .

Point/Counterpoint

Cutting the Gordian Covenant: A Case for the FTC New Proposed Rule on Non-Competes (Mostly)

By Spencer Thompson and Patricia Washienko

Introduction

Non-competes hit individuals hard. The collective damage, however, is even greater. If one were to apply the traditional common law balancing test for non-competes, which looks to weigh the burden of their restriction against the legitimate need for them, on a macro- rather than micro-level, the legitimate interests of companies would be outweighed not just by the harm to individuals, but by the burden on our local and national economies. As research shows, companies' legitimate interests in protecting confidential information, most pronounced at the highest level of corporate organization (and the relatively few executives at such levels), are outweighed by the economic costs borne by the millions of people subject to non-competes who do not possess confidential information which could pose a significant risk to their employers, but nevertheless suffer from depressed wages and limited economic mobility.

Recently, the Federal Trade Commission proposed a new rule seeking to ban non-competes across the country.**[1]** This rule would both prohibit the use of non-competes and their functional equivalents and mandate the recission of existing non-competes.**[2]** The agency estimates, echoing a growing number of government reports expressing concern with the macroeconomic externalities of non-competes (which cover approximately 18% of all workers), that increased employee mobility will help increase Americans' wages by "nearly $300 billion per year and expand career opportunities for about 30 million Americans."**[3]** The agency also estimates that this will help reduce racial and gender wage gaps by 3.6 to 9.1% -- substantial progress toward promoting equity in the workplace.**[4]**

Nevertheless, the proposed rule has been criticized, with opponents often claiming it will increase the risk of confidentiality breaches.**[5]** While a reasonable concern, we argue that risk is outweighed by the benefits of a (largely) categorical ban which would serve to eliminate workers' uncertainty about non-competes more effectively than piecemeal approaches by providing an administrable solution at a national scale. Moreover, companies' legitimate interest in protecting confidential information can be protected through other means, without the economic costs that the present laws create. With increasing research showing the harm of these covenants, now is the time to enact a nationwide, blanket ban – at least on non-competes below the executive level.

A (Brief) History of Non-Compete Law

The "covenant not to compete" or "non-compete" has a storied history. Courts have alternated between disapproval and acceptance of non-compete agreements, largely in response to economic policy concerns. Under early English common law, the non-compete was barred as an unlawful restraint on a worker's right to practice his trade.**[6]** The courts made no secret of their disfavor of such clauses; when one 15th century court was asked to enforce an early non-

compete, it replied, "the obligation is void because the condition is against the Common Law, and by God, if the plaintiff were present he should rot in gaeol [jail] till he paid a fine to the King."**[7]**

Over time, however, the law, in both England and America, evolved to accommodate the emerging interests of businesses as the modern economy began to take shape.**[8]** The common test that emerged, and persists today in common law, is one that looks to see first if the non-compete protects a *legitimate business interest* and then, if it does, examines if the restraint is reasonable in geographical scope and time.**[9]** In Massachusetts, by the early 20th century, courts settled on three core interests which they recognized may be protected as legitimate business interests: (1) trade secrets, (2) goodwill, and (3) confidential information beyond trade secrets, the disclosure of which could cause harm to a company.**[10]**

State Laws (Including Massachusetts') Are Not Sufficient

In 2018, after Massachusetts legislators became increasingly concerned with non-competes' potential negative economic effects, especially with respect to the competitiveness of Bay State start-ups in the national marketplace,**[11]** the state enacted a new non-compete law, the "Massachusetts Noncompetition Agreement Act" (Mass. Gen. L. c. 149, § 24L). It requires new non-compete agreements to either provide a period of "garden leave," where the former employee receives at least 50% of their salary in exchange for sitting out for up to 12 months (i.e., tending their garden) or "other mutually-agreed upon consideration."

However, no state law, including Massachusetts', resolves the national patchwork of often inconsistent state non-compete laws (relevant to a highly mobile national workforce). Moreover, Massachusetts' law is not even sufficient intrastate, for a number of reasons. It does not include a minimum salary, unlike the non-compete laws of several other states, which likely disparately impacts lower income workers less able to afford legal representation.**[12]** Because it does not apply retroactively, the law results in disparate treatment between longer-term (often older) workers and more recent (often younger) hires in the same workplace. In addition, the lack of any guidance in the law as to what constitutes "other agreed upon consideration" sufficient to render a non-compete enforceable gives no clarity to workers considering changing jobs.**[13]**

These intra- and inter-state complexities create a difficult situation for workers. Indeed, scholarship indicates that even in states that do not enforce non-competes, employees (up to 40%) frequently cite them as reasons not to change positions.**[14]** This arises from the fear that they may be enforceable, or even when they know they are likely not enforceable, that they will have to spend significant economic resources defending against a potential lawsuit and suffer reputational harm as well.**[15]**

Balancing the Ban

The effects of a non-compete ban on corporate interests are likely not as dire as many non-compete proponents claim. Even if non-competes are banned, companies have many other ways to protect their confidential information. For example, companies can still enforce non-disclosure

clauses and rely on the robust protections provided by state and federal laws (like the Defend Trade Secrets Act of 2016 and various state Uniform Trade Secrets Act laws) and the common law. In addition, there are many practical steps – like requiring the execution of confidentiality agreements, restricting access to trade secret and confidential information to those with a business need-to-know, conducting audits, and implementing training programs and employee departure policies – that companies can (and should) take to protect their trade secrets and other confidential information, whether or not the FTC bars non-compete agreements. There are also creative solutions; for instance, economic modeling suggests that equity-sharing programs are likely to encourage employee loyalty and reduce the risk of the spread of confidential information.**[16]**

Conclusion

The FTC's new proposed rule provides an administrable solution which functions, at its core, to eliminate the negative externalities associated with the diffusion of non-competes below the executive level. It cuts through the ambiguity, fear, and uncertainty associated with them, which all serve to limit employees' mobility, and instead provides clarity and definiteness allowing for decision-making based on the most rational economic opportunities available to employees. And after all, if the sky has not fallen in California – where non-competes have been banned for over 150 years but which nevertheless is poised to overtake Germany as the world's fourth largest economy**[17]** – it seems doubtful the sky will fall in the other 49 states.

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[1] Federal Trade Commission, *Non-Compete Clause Rulemaking*, FTC.GOV (Jan. 5, 2023), https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking.

[2] *See id.* In determining whether a contractual provision is a functional equivalent to a non-compete, the FTC has proposed a test which will examine if the provision "has the effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer."

[3] *See* Federal Trade Commission, *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, FTC.GOV (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition ; *see also Fact Sheet: Executive Order on Promoting Competition in the American Economy,* WHITEHOUSE.GOV (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/.

[4] *See* Federal Trade Commission, *supra* note 3. Additionally, it appears that the American public largely approves of this proposed ban, with 61% of Americans surveyed by Ipsos reporting approval of the FTC's proposed rule. Ipsos, *Most Americans Support Banning Non-Compete Agreements for Workers,* IPSOS.COM (Jan. 6., 2023), https://www.ipsos.com/en-us/news-polls/most-americans-support-banning-noncompete-agreements.

[5] *See, e.g.,* Ani Huang, *FTC's Blanket Non-Compete Ban is Solving the Wrong Problem*, THEHILL.COM (Jan. 29, 2023), https://thehill.com/opinion/congress-blog/3835378-ftcs-blanket-non-compete-ban-is-solving-the-wrong-problem/.
[6] *See generally Hess v. Gebhard & Co.*, 570 Pa. 148 (2002) for a judicial exploration of the history of non-compete law.
[7] Cited by *Hess*, *supra* note 6, at 158.
[8] *See Hess*, *supra* note 6, at 158-59; *see also* Cristin T. Kist, *Blocked Airwaves: Using Legislation to Make Non-Compete Clauses Unenforceable in the Broadcast Industry and the Potential Effects of Proposed Legislation in Pennsylvania*, 13 JEFFREY S. MOORAD SPORTS L.J. 391, 395-96 (2006) (discussing the history of non-compete law).
[9] *See Hess*, *supra* note 6, at 158-59; *Boulanger v. Dunkin' Donuts, Inc.*, 442 Mass. 635, 639 (2004).
[10] *See Club Aluminum Co. v. Young*, 263 Mass. 223, 226, 160 N.E. 804, 806 (1928), discussing *Edgecomb v. Edmonston*, 257 Mass. 12 (1926), *Bos. & Suburban Laundry Co. v. O'Reilly*, 253 Mass. 94 (1925), *Farrell v. Chandler, Gardner & Williams*, 252 Mass. 347 (1925), *Chandler, Gardner & Williams v. Reynolds*, 250 Mass. 309 (1924) ("In all these cases there was not only the element of using for the benefit of another employer information confidentially acquired as to details of business, but also the element of protection to the good will of an established business . . . [t]he use of trade or business secrets gained through employment may properly be made the subject of restrictive agreements."); *see also* Meredith Gramann, *"Garden" Against Competition: Codification of Garden Leave and Non-Compete Reform*, 36 A.B.A. J. LAB. & EMP. L. 147, 152 (2022) (writing that the legitimate interest balancing test was settled law in Massachusetts by 1940).
[11] *See* Meredith Gramann, *"Garden" Against Competition: Codification of Garden Leave and Non-Compete Reform*, 36 A.B.A. J. LAB. & EMP. L. 147, 148-50 (2022).
[12] Washington's law, for example, provides that non-competes are void unless the employee's annual earnings exceed $100,000, adjusted annually for inflation. Wash. Rev. Code § 49.62.020. Illinois, Maine, Maryland, New Hampshire, New York, and Rhode Island also have enacted laws banning competes for workers falling below certain income thresholds. See Andrew Boling, William Dugan and Colton Long, "The Delicate Nuances in New State Compete Laws," Baker McKenzie, LAW360, December 2019.
[13] *See* M.G.L. c.149, § 24L.
[14] Evan Starr, JJ Prescott, Norman Bishara, *The Behavioral Effects of (Unenforceable) Contracts*, 36 J. L. ECON. & ORG. 633, 666 (2020) ("In turn, the offer response analysis demonstrates that—in both enforcing and nonenforcing states—approximately 40% of employees with noncompete identify their noncompete as a factor in turning down job offers from competitors.").
[15] *See id.*
[16] *See* Yifat Aran, *Beyond Covenants Not to Compete: Equilibrium in High-Tech Startup Labor Markets*, 70 STAN. L. REV. 1235, 1267-72 (2018) (laying out a series of four scenarios gauging the likelihood of retention based on the intersection of human capital and the appreciation of company stock). Retention, under this model, will occur if human capital has appreciated, that is an employee's skills and support systems have developed, and their stock values have appreciated as well, or to a lesser extent, if their human capital has not appreciated but their stock options have, as the employee will have an economic incentive to remain with the employer in order to realize their stock options.
[17] *See* Matthew Winkler, *California Poised to Overtake Germany as World's No. 4 Economy*, BLOOMBERG (Oct. 25, 2022), https://www.bloomberg.com/opinion/articles/2022-10-24/california-poised-to-overtake-germany-as-world-s-no-4-economy.

Point/Counterpoint

Against The FTC's Proposed Rule on Non-Competes

By Russell Beck and Sarah Tishler

The Federal Trade Commission (FTC) has proposed a rule that, if passed, would ban virtually all non-compete clauses ("non-competes") throughout its jurisdiction (the "Proposed Rule"). The FTC states admirable goals of increasing worker mobility and earnings. In reality, the Proposed Rule would apply a mallet to an intricate area of the law where a scalpel is far more appropriate. We argue that the Proposed Rule goes too far, with potential unintended consequences that would eclipse any benefits. Instead, we recommend that the FTC leave policy-making on non-competes to the states, where more nuanced and localized approaches to non-competes can develop.

The Proposed Rule: Overbroad and Unclear

We begin by reviewing what the Proposed Rule entails. The text of the Proposed Rule is as follows:

> *It is an unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker; maintain with a worker a non-compete clause; or represent to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe that the worker is subject to an enforceable non-compete clause.*

The breadth of the Proposed Rule is plain on its face. It goes so far as to eliminate even existing non-compete clauses, even though companies may have already provided substantial consideration for that non-compete clause, perhaps in the form of additional wages, a bonus, stock, options, or a promotion.

After the text quoted above, the Proposed Rule sets forth a proposed "functional test" for defining what qualifies as a non-compete. That test would consider a contractual term to be

> *"a de facto non-compete clause because it has the effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer."*

This test is so broad that virtually any restrictive covenant could satisfy it. The FTC itself concedes that broad nondisclosure agreements may fail this test. Nonsolicitation agreements (no soliciting former customers) and no-service agreements (no working for former customers) for workers who are expected to bring a book of business with them also could fall under the "*de facto*" rule.

While the Proposed Rule contains a narrow carveout for non-competes in connection with the sale of a business or ownership interest in a business, it applies only if the person to be bound owns at least 25 percent of the business. And finally, the Proposed Rule would completely

displace state law on this subject, unless state law affords the employee greater protection than the Proposed Rule.

Unintended and Detrimental Consequences of the Proposed Rule

There is no question that the FTC's twin goals of increasing worker mobility and supporting worker earnings are commendable. But the academic research on which the FTC relies is flawed and inconsistent, and could result in precisely the opposite result for many workers as well as consumers. Further, the Proposed Rule would result in several unintended and detrimental consequences.

First, as businesses and workers have already seen in California (which banned non-compete clauses in 1872 under what is now California Business and Professions Code § 16600), outright bans of non-compete clauses result in more trade secret litigation. Indeed, trade secret litigation in California outpaces any other state, which many practitioners attribute to the lack of non-compete clauses as a straightforward tool for protecting trade secrets in the first place.**[1]**

Second, the functional test will call into question other restrictive covenants (*e.g.*, nonsolicitation agreements, no-service agreements, nondisclosure agreements) and spur additional litigation over whether those fall under the Proposed Rule.

Third, some academic studies reveal that non-competes actually aid innovation because companies are more willing to invest in training and research when they have safeguards against their investments being used to further a competitor's efforts. Similarly, though studies vary on whether non-competes result in fewer or more startups, the literature suggests that non-competes promote *better* startups, *i.e.*, startups more likely to survive and thrive.**[2]**

Fourth, the narrow exception for the sale of businesses would harm the small-business merger and acquisition environment. Instead of buying, potential acquirers would be able to simply hire away key personnel and directly compete.

Finally, while the FTC relies on several academic studies for its proposition that banning non-competes will benefit consumers, the research on this subject is actually quite mixed. There are several studies that suggest the opposite. To take just one example, some research suggests that consumers were more likely to be harmed when non-competes were not enforced in the mutual fund industry, as fund managers were more inclined to engage in behavior that increased risks to clients.**[3]** Conversely, when non-competes were enforced at higher rates, fund managers' investments were found to be more secure and predictable.

Allow the States to Continue Tinkering with the Right Fit

Above all, the Proposed Rule would bring to a screeching halt the state-level activity on non-competes, depriving the states of their function as the laboratories of democracy (to paraphrase Justice Brandeis). In the last decade alone, nearly two-thirds of U.S. states have made changes to their laws on non-competes. State legislatures are able to tinker with the specific policies that

work best for their unique economic environments; a policy that may work well in Boston may not be the right fit for Bangor. Examples of this tailored approach abound: some states have established varying wage thresholds. Some states have exempted certain professions. And some states have limited the duration of non-competes by statute. These are just a few different policy choices that states can make to fit the needs of their particular economies, taking into account their workforce, major industries, and demand for services. As states learn from the experience of others, more nuanced and creative policy measures will appear in state legislatures.

The approach taken by the Massachusetts legislature in 2018 in the Massachusetts Noncompetition Agreement Act (MNAA) (Mass. Gen. L. c. 149, § 24L), reflects a decade-long process that ultimately rejected the bludgeon of a ban in favor of a localized scalpel approach. The MNAA explicitly only applies to non-compete agreements, and specific categories of workers are exempted (including undergraduate or graduate interns, employees 18 years old or younger, and employees classified as nonexempt under the Fair Labor Standards Act). The MNAA requires appropriate protections so that employees are informed about what they are signing. It requires that non-competes must be supported by garden leave or other mutually agreed upon consideration. It creates a 12-month cap on non-competes with a possible one-year extension. It does not have retroactive effect. And since its passage in 2018, a handful of opinions from state and federal courts in Massachusetts have provided additional guidance to interpret its terms, providing even more clarity and certainty for businesses, workers, and practitioners alike.**[4]**

Conclusion

The MNAA is exactly the type of legislation that would be completely displaced by the Proposed Rule. Such an intrusion into the states' localized regulation is not only unnecessary, but it is entirely unjustified in light of the severe unintended consequences of the Proposed Rule. The Proposed Rule would not achieve the FTC's stated goals, it would divest the states of their ability to fashion tailored laws that are best suited for their economies, and it would stifle the creative and nuanced lawmaking happening around the country in this area. For all of these reasons, we believe the Proposed Rule should be rejected.

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[1] *See California Trade Secrets Litigation Supplants Noncompete Litigation*, *available at* https://www.faircompetitionlaw.com/2017/06/25/california-trade-secrets-litigation-supplants-noncompete-litigation/.
[2] Though many have pointed to California's ban on non-competes and Silicon Valley's success as proof of the opposite, there are flaws with that analysis. For example, as a threshold matter, research shows that workers in California are nonetheless subject to non-competes at the same rate as workers outside California (suggesting that the impacts of a ban are not as clear-cut as they may appear superficially). Further, companies in California have historically used intercompany no-poach agreements as an alternative, with a similar effect, further raising questions about what the actual impact of the ban really is. There are many other flaws. *See* Non-Compete Clause Rule, 88 Fed. Reg. at 3485 (NPRM at 16); *see also Correlation Does Not Imply Causation: The False Comparison of Silicon Valley and Boston's Route 128, available at https://faircompetitionlaw.com/2019/07/09/correlation-does-not-imply-causation-the-false-comparison-of-silicon-valley-and-bostons-route-128/*.
[3] Gjergji Cici, Mario Hendriock, & Alexander Kempf, *The Impact of Labor Mobility Restrictions on Managerial Actions: Evidence from the Mutual Fund Industry* (University of Cologne) at 2, 5 (March 28, 2018) ("Our first set of results shows unambiguously that increased enforceability of NCCs [*i.e.*, non-competes] leads to better fund performance. . . . Our empirical results show that fund managers increase effort even more in large fund families after NCC enforceability becomes stricter."), *available at* https://www.econstor.eu/bitstream/10419/177385/1/1017934355.pdf.
[4] *See, e.g.*, *Cynosure LLC v. Reveal Lasers LLC*, No. CV 22-11176-PBS, 2022 WL 18033055, at *8-10 (D. Mass. Nov. 9, 2022) (interpreting the MNAA's right to consult with an attorney requirement); *KPM Analytics N. Am. Corp. v. Blue Sun Sci., LLC*, No. 4:21-CV-10572-TSH, 2021 WL 2982866, at *32 (D. Mass. July 15, 2021) (same, and also interpreting the consideration/garden leave requirement); *Carroll v. Mitsubishi Chem. Am.*, No. CV 21-11801-JCB, 2022 WL 16573974, at *3 (D. Mass. May 19, 2022) (same, and also interpreting the sale exception); *Vicarious Surgical Inc. v. Tragakis*, No. 2284CV02321-BLS2, 2023 WL 3304305, at *1-2 (Mass. Super. Apr. 27, 2023) (affirming the MNAA does not apply retroactively); *Genzyme Corp. v. Melvin*, No. 2384CV00664-BLS2, 2023 WL 3173131, at *2 (Mass.Super. Apr. 4, 2023) (reforming a non-compete clause to make its geographic scope reasonable).

Legal Analysis

Recent Litigation Provides Guidance as Schools Await New Title IX Regulations

By Seth B. Orkand and Sabrina M. Galli

The legal evolution of how secondary schools, colleges, and universities must address allegations of sexual harassment has led to significant changes over the last two decades. The U.S. Department of Education has provided guidance through a series of "Dear Colleague Letters," and issued regulations effective in August 2020. The Biden administration is expected to issue revisions to these regulations in October 2023. In the meantime, aggrieved participants in Title IX proceedings continue to bring cases in federal court alleging that schools improperly handled claims of sexual misconduct. Approximately fourteen Title IX cases have been filed in the District of Massachusetts since the Boston Bar Journal's last update on Title IX litigation in 2020, and the First Circuit has decided approximately seven such cases.

While Title IX guidance and regulations continue to fluctuate, the basis of Title IX legal claims remains the same: "[n]o person in the United States shall, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving [f]ederal financial assistance." 20 U.S.C. § 1681(a). There are two theories a plaintiff may assert under Title IX: selective enforcement and erroneous outcome. Regardless of which theory a plaintiff pursues, both require a showing of gender bias.**[1]**

To succeed with a "selective enforcement" claim under Title IX, a plaintiff must demonstrate that "the severity of the penalty and/or the decision to initiate the proceeding was affected by the student's gender."**[2]** To succeed on an erroneous outcome claim, a plaintiff must show: "(1) particular facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding" and (2) "a causal connection between the flawed outcome and gender bias."**[3]** Regardless of which theory is pursued, plaintiffs must show specific evidence that "gender bias was a motivating factor in the disciplinary process."**[4]**

Adequately pleading and proving gender bias have been challenging hurdles that most plaintiffs in Massachusetts fail to overcome. Nevertheless, the remedies available to Title IX claimants in addition to compensatory damages, such as injunctive relief implementing school-wide changes, punitive damages, and attorneys' fees, motivate claimants to continue pursuing Title IX claims. In the cases below, all of the plaintiffs sought redress from a school's disciplinary action. By asserting Title IX claims, they sought to reverse those actions and expunge their records.

One Example of a Successful Title IX Claim

Farzinpour v. Berklee College of Music, 616 F. Supp. 3d 98 (D. Mass. 2022) is a rare exception to the string of recent District of Massachusetts cases denying Title IX claims. In this case, the plaintiff, a former college professor, claimed his university terminated him because of gender bias after a student claimed that he sexually harassed her. After the student made allegations and the investigation began, the school put the professor on paid administrative leave due to the

severity of the allegations. Based on the totality of the circumstances, including that the student admitted to "feigning interest" in order to test the professor, the university allowed the professor to return after a 30-day suspension. After he repeatedly used class time to talk about the investigation, however, the university ultimately terminated him. The plaintiff sought an injunction enjoining enforcement of the suspension and his employment termination, and expungement of his disciplinary records. When analyzing the plaintiff's Title IX claim, the Court held:

> gender bias may be inferred when the following four factors are all met: the school made findings against the accused male that were incorrect and contrary to the weight of the evidence; failed to follow its procedures to protect the accused; failed to seek out potential witnesses; and faced criticism for not addressing female complaints against males.**[5]**

Based on these factors, the Court found that the plaintiff had offered sufficient facts to survive a motion for summary judgment on the claim that the university acted based on gender bias as a motivating factor, particularly because the student admitted that she "tested" the plaintiff to determine his sexual intent and admitted that her actions "looked questionable."***[6]**

Title IX Claims Are Frequently Dismissed, While Breach of Contract Claims Proceed

The plaintiff's success in *Farzinpour* is notable because proving gender bias has been challenging for most litigants in recent Title IX cases in the First Circuit. Indeed, most recent Title IX claims in the First Circuit and District of Massachusetts have been dismissed for a failure to plead or prove gender bias. For example, in *Doe v. Stonehill College*, 55 F.4th 302 (1st Cir. 2022), the allegations of gender bias were deemed insufficient. The plaintiff brought Title IX, breach of contract, and other claims based on the school's handling of a disciplinary proceeding that resulted in the plaintiff's expulsion. The First Circuit affirmed the denial of the plaintiff's Title IX claim, finding that "deference to [the complainant], without more, does not show that [the complainant's] treatment -- or [respondent's] -- is attributable to sex rather than to some other reason, such as Roe's status as the complainant."**[7]** The Court discounted the plaintiff's conclusory allegations, stating, "[b]eyond his unsupported allegation that Stonehill penalizes men for sexual misconduct more severely than women, Doe does not allege that Stonehill has treated sexual assault claims brought by men differently from such claims brought by women."**[8]** However, the First Circuit permitted the plaintiff's breach of contract claim to proceed. Although the school's policy promised students an opportunity to review any relevant facts obtained through the investigation before submitting the case to the decisionmaker, the plaintiff alleged that Stonehill included interview statements in the final investigatory report that it did not provide to the plaintiff with the draft report, denying him the opportunity to respond. Additionally, the Court found that the school breached its policy by not informing the plaintiff that it was re-interviewing one of the complainants, and the decisionmaker's rubber-stamp of the investigator's recommendations breached the school's policy requiring the decisionmaker's independent review of the case. In making its decision, the First Circuit relied upon Stonehill's contractual promise to ensure "fair and thorough" investigation.

Similarly, in *Doe v. Williams College*, 530 F. Supp. 3d 92 (D. Mass. 2021), the District Court dismissed the plaintiff's Title IX claim because his allegation that the college treated him less favorably in the disciplinary process than it would have treated a similarly situated female student was insufficient to demonstrate gender bias. The Court allowed the plaintiff to proceed with his complaint against the school based only on his claim that the school's dean "improperly influenced the hearing panel's decision" in violation of the contract created by the school's code of conduct procedures.**[9]** The court opined that "evidence that [a dean] improperly influenced the hearing panel's decision raises questions about whether the College conducted a fair adjudication" and was enough to deny summary judgment.**[10]**

Again, in *Doe v. Harvard University*, 462 F. Supp. 3d 51 (D. Mass. 2020), the plaintiff's breach of contract claim, but not his Title IX claim, survived a motion to dismiss. There, the plaintiff sued the university after being disciplined for an alleged sexual assault. The Court found it persuasive that: (1) the university gave the complainant's claim more weight than the plaintiff's version of events despite the availability of evidence refuting her claims and despite inconsistencies in her accounts; (2) the investigator inquired into the complainant's level of intoxication without making a similar level of inquiry into the plaintiff's level of intoxication; (3) the investigator repeatedly ignored the plaintiff's claims, statements, and requests for further investigation of available evidence; (4) the defendants failed to take seriously or follow up on the plaintiff's allegations of witness bias; and (5) the final report included discussion of the impact of the incident on only the complainant, and not on the plaintiff. The Court, however, found that these facts did not implicate gender bias and dismissed the Title IX claim.**[11]** These allegations supported a claim that "Harvard's denial of an opportunity to meaningfully respond to information obtained during the disciplinary investigation process" constituted a breach of contract, where plaintiff alleged that he was given neither a follow-up interview before the investigation concluded, nor an opportunity to meaningfully respond to information obtained during the investigation – both provided for in the school's policy.**[12]**

Breach of Contract Is Not Always a Viable Alternative to a Title IX Claim

Although plaintiffs have recently been more successful in asserting contract claims than Title IX claims, even breach of contract claims in these circumstances can be difficult to prove. In *Dismukes v. Brandeis University*, Civil No. 19-11049-LTS, 2021 WL 1518828 (D. Mass. Apr. 16, 2021), the Court granted the school summary judgment on both categories of claims. The plaintiff's claims arose from protective measures implemented against him based on allegations that he harassed and physically assaulted a female graduate student. On the Title IX claim, the court found no evidence of gender bias on the mere allegation that plaintiff is male, the accuser is female, and the individuals who conducted the informal investigation were women. Without more, such allegations were not enough to meet the gender bias standard.**[13]** The Court noted that if plaintiff "had even a shred of evidence supporting an inference of gender bias, his claim of selective enforcement still would fail because he has identified no similarly situated comparator of another gender who was treated differently."**[14]** On the breach of contract claim, the District Court found that "the reasonable expectations of the parties" based on the policy in the student handbook were met and "the procedures followed [by Brandeis] were conducted with basic

fairness."**[15]** The court found that Brandeis "implement[ed] [the] process as it is described" and implemented "protective measures expressly identified in the handbook's description of the informal process."**[16]** The First Circuit upheld the District Court's dismissal of the claims.

The Court also rejected Title IX and breach of contract claims in *Doe v. Williams College*, Civil No. 3:20-cv-30024, 2022 WL 4096916 (D. Mass. Sept. 7, 2022). The Court rejected the plaintiff's challenge to a disciplinary proceeding that resulted in a one semester suspension for sexual misconduct involving a fellow student, for lack of evidence of bias or that the college treated female students differently than males. The Court rejected the plaintiff's argument that the school's training materials "advanced a gender-biased view of male students as sexual predators" because they reference "hostile masculinity" and depicted a male as the assaulter, because he established no causal connection between the training materials and the decision against him.**[17]** The District Court also found that the plaintiff's breach of contract claim failed because the allegations did not establish that "the academic institution failed to meet the accused student's reasonable expectations under the terms of the contract" and the college procedures were "conducted with basic fairness."**[18]**

Some Plaintiffs Forego Title IX Claims Altogether

In an apparent effort to streamline their complaints and avoid the challenges of pleading or proving Title IX claims, some plaintiffs have asserted only breach of contract claims in circumstances where others have sought relief under Title IX. In *Sonoiki v. Harvard University*, 37 F.4th 691 (1st Cir. 2022), the First Circuit revived the plaintiff's breach of contract claim after the District Court's dismissal. The First Circuit found five theories upon which the plaintiff's allegations supported a breach of contract claim.**[19]** The allegations were that: (1) Harvard improperly withheld the plaintiff's diploma without a formal charge of sexual misconduct; (2) the plaintiff's Board Representative failed to fulfill her duty of advocating on the plaintiff's behalf; (3) the Board Representative breached her duty of confidentiality; (4) Harvard failed to provide the plaintiff with the names of the witnesses used against him; and (5) Harvard failed to include the Board Representative and/or plaintiff in meetings about the complaints.**[20]** The case is back in the District Court and Harvard has once again moved for summary judgment (as of May 31, 2023) arguing that it followed all procedures.

Conclusion

Plaintiffs have struggled to gain traction with Title IX claims because of difficulties in proving gender bias beyond asserting conclusory allegations that female complainants' allegations were credited over male respondents' statements, that men are penalized for sexual misconduct more severely than women, or that schools have pro-complainant biases. Breach of contract claims often see higher chances of success, particularly when schools stray from their own procedures. Yet plaintiffs continue to assert Title IX claims in the hopes of obtaining attorneys' fees and injunctive relief to reverse disciplinary actions. Despite the difficulty in pursuing Title IX claims, litigants are likely to continue to pursue the protections and remedies that Title IX provides. As schools revise their Title IX policies in the wake of new Title IX regulations expected in October 2023, courts can be expected to require schools to follow their procedures, provide

respondents the opportunity to appropriately review or respond to evidence, and avoid undue influence by staff who are not decisionmakers in the Title IX processes.

**Correction: an earlier version of this article implied that the decision had found certain facts; the sentence has been clarified to indicate that the decision found that the plaintiff had offered sufficient facts to survive summary judgment.*

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[1] *See Doe v. Stonehill Coll., Inc.*, No. 20-cv-10468-LTS, 2021 WL 706228, at *6-7 (D. Mass. Feb. 23, 2021) (noting both types of Title IX claims require evidence that the decision to investigate and/or the outcome were motivated by plaintiff's gender).
[2] *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 74 (1st Cir. 2019) (quoting *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994)).
[3] *Yusuf*, 35 F.3d at 715.
[4] *Haidak*, 933 F.3d at 74 (quoting *Trs. of Bos. Coll.*, 892 F.3d 67, 90 (1st Cir. 2018)).
[5] *Farzinpour*, 616 F. Supp. 3d at 111 (quoting *Vengalattore v. Cornell Univ*. 36 F.4th 87, 106 (2d Cir. 2022)).
[6] *Id.* at 112.
[7] *Doe*, 55 F.4th at 62.
[8] *Id.*
[9] *Doe,* 530 F. Supp. 3d 92
[10] *Id.* at 122. *See also Doe v. Brandeis Univ.,* No. 20-CV-12162-AK, 2023 WL 1822785 (D. Mass. Feb. 8, 2023) (finding that the Director of the Office of Equal Opportunity's alleged influence in the adjudication process was sufficient to support a breach of contract claim, but dismissing the Title IX claim as insufficient because there was no "connection between the outcome of his disciplinary proceedings and gender bias").
[11] *Doe, 462 F. Supp. 3d* at 60-61. The Court allowed plaintiff to proceed on his § 1981 claim of racial bias, where he alleged that the denial of the informal resolution requested by himself and Jane Roe was pretextual and racially motivated. Plaintiff made allegations that white students have been permitted to resolve complaints of sexual misconduct informally and that his request was handled differently than the requests by white students. By providing a comparator group and allegations that that group was treated differently, Plaintiff's allegations were sufficient to proceed.
[12] *Id.* at 65.
[13] *Dismukes,* 2021 WL 1518828 at *8.
[14] *Id.*
[15] *Id.* at *10.
[16] *Id.* at *13.
[17] *Doe*, 2022 WL 4096916 at *46-47.
[18] *Id.* at *3, 44. *See id.* at *33 (for example, the Court found plaintiff's allegation that the college failed to interview an identified witness insufficient because the witness failed to appear for an interview despite repeated attempts by the investigator).
[19] *Sonoiki*, 37 F.4th at 704–07, 710–13.
[20] *See id.* at 704–07, 710–13.

Practice Tips

Practice Tips for Representing Students in Title IX Proceedings

By Jessica Conklin and Emily Claire Smith

Introduction

Title IX, a federal statute prohibiting discrimination on the basis of sex, including sexual harassment, applies to virtually every educational institution that receives federal financial assistance.**[1]** This article will focus on one subset of Title IX issues, those related to post-secondary school students involved in Title IX proceedings in their educational institutions. Practitioners handling Title IX investigations and hearings should be familiar with the statute itself, the detailed regulations promulgated by the Department of Education, and additional guidance released by the Department's Office of Civil Rights. Furthermore, each educational institution promulgates its own institutional policies applying the Title IX regulations.

Unique Challenges in Title IX Proceedings

Attorneys representing students in Title IX proceedings do not act in their traditional role as counsel; rather they serve as "advisors" whose ability to be directly involved in proceedings may be limited under each school's rules. Nevertheless, an attorney's role is critical and comes with a unique set of challenges.

Title IX is a sensitive subject area. Students may be tempted to leave out certain details due to embarrassment, shame, or fear they will get in trouble. As an advisor, it is important to encourage the student to share every detail with you and to create a relationship of trust. It is also important to recognize that the student, regardless of whether they are the respondent or complainant, is likely going through a traumatic, isolating, and very stressful time. When possible, attorneys should use trauma-informed interview techniques, such as offering breaks, exhibiting open body language, refraining from interrupting, and formulating questions that do not feel accusatory or judgmental.

While the Title IX regulations set compliance requirements, they also give educational institutions flexibility to customize their policies and proceedings. Thus, important issues such as the definition of consent, the role of the advisor, and appeals standards can vary considerably among institutions. Additionally, the fact that there are no formal rules of evidence or published opinions makes each case unique.

Starting a Title IX Proceeding

A Title IX investigation starts with the filing of a formal complaint by either a complainant or a school's Title IX Coordinator. Once a formal complaint is filed, the school must provide notice to the parties that includes a statement of the allegations with sufficient detail and sufficient time to prepare a response before any initial interview.**[2]**

The parties each have the right to an advisor of their choice who may be, but is not required to be, an attorney. If the school decides to investigate additional misconduct allegations, it must provide a new notice.

Gathering Evidence and Preparing for an Investigator Interview

Next, an investigator will interview the complainant, the respondent, and witnesses to prepare an investigative report. The investigator is supposed to be a neutral factfinder whose report will provide the relevant information for the ultimate decision makers.

It is important for advisors to conduct their own factual investigation, including creating an explicit timeline of events as these inquiries are often very fact-specific. Text messages, social media posts, calendar entries, photographs, ride-share receipts, and other information can provide valuable electronic information to help fully understand what transpired. It is also important to consider evidence that may exist but that your client does not have access to, including security footage, card swipe data, and deleted text messages.

Regardless of whether your client is a respondent or complainant, this process can be very difficult. Student memories are often imperfect, especially since they are often impaired by alcohol, drugs, trauma, or the passage of time.

Prior to any interview with the school's investigator, an advisor will want to determine if there is potential for criminal exposure and carefully weigh the risks and benefits to their client of participating in the school's process. Investigators may choose to record their interviews and generate transcripts, or they may rely on notes taken during the interview. If a transcript will not be provided to the parties, advisors should take careful notes. Oftentimes, investigators will want to get background information prior to jumping into the specific allegations. Parties should be prepared to talk about how they met and the nature of their relationship.

While parties may have an advisor at these interviews, advisors generally do not have a speaking role. Complainants and respondents should be counseled to feel comfortable asking for breaks to consult with their advisor. The advisor should be familiar with the school's sexual misconduct policies.

Finally, the parties may choose to provide evidence to the investigator. As there are no rules of evidence, the process is more informal than in a court. For example, screenshots of a client's text messages or social media account are often acceptable. While the process is informal, it is still important to label the files clearly and, if the school allows, consider providing a short description of the relevance of each piece of information.

Informal Resolution

Some matters, especially those of a less serious nature, may be resolved by informal resolution. Any informal resolution process requires the consent of both the complainant and the respondent and can be initiated any time prior to the school reaching a determination on responsibility.**[3]**

The formal resolution process is paused while the parties engage in an informal resolution process. The informal process is not defined by the regulations and the form it takes is at the school's discretion. If the parties are unable to come to an agreement, either party may withdraw from the informal resolution process and resume the formal process.

Negotiating a resolution through the informal process has the benefit of allowing a complainant some control over the outcome of the proceeding without the stress of engaging in formal interviews or participating in a hearing. For the respondent, negotiating a resolution through the informal process prevents a formal finding of responsibility. Informal resolutions can be flexible and creative. For example, an agreement may require that a respondent agree to loss of leadership positions, agree to a no-contact order, engage in counseling, fulfill community service requirements, and/or issue a letter of apology.

An institution is not required to allow parties to resolve grievances through an informal process and may determine that an informal resolution is inappropriate for certain allegations.

Reviewing and Responding to the Draft Report

Once the investigation is completed, if there has not been a resolution through an informal process, the investigator will prepare a draft report. This report must be provided to the complainant and respondent at least ten days prior to any hearing.**[4]** Both parties are given the opportunity to submit comments to the draft report. Ideally, at this point in the process, most, if not all, of the evidence has been submitted and the focus can be on reviewing the report for factual inaccuracies or misinterpretations. However, if the draft report reveals new information and further witness interviews or additional questioning would produce valuable and relevant information, this should be addressed. Oftentimes, the parties' responses to the draft report will be included as exhibits to the final report.

Hearing

Post-secondary institutions are required to have a live hearing.**[5]** The decision maker(s) presiding over the Title IX hearing determine the relevance of questions and decide whether there has been a policy violation. The decision maker(s) may be a single person or a panel of individuals. Decision makers are often faculty members, but it is not uncommon for the panel to include individuals external to the institution, such as an outside attorney.

The hearing typically consists of: (1) opening statements, (2) cross-examination of both parties and witnesses, and (3) closing statements. Hearings may be conducted in person or virtually.**[6]** There are benefits and drawbacks to each. Virtual hearings provide the benefit of making parties feel more comfortable by appearing in familiar space, allow for privacy during breaks, and provide separation from administrators and the adverse party. However, it can be difficult to connect with the decision makers through a screen and it is much easier to focus on parties' facial expressions in the virtual format. This can be negative if a party has strong reactions to statements of others. Parties should also be aware that hearings are required to be recorded by the institution.**[7]**

During the hearing, the advisor is usually limited to asking cross-examination questions and providing support during breaks. Some schools may allow an advisor to object to a question, prompting the decision makers to make a relevance determination. Students are usually required to deliver their own opening and closing statements.

There are limitations to an advisor's cross-examination questions.**[8]** Questions seeking information about a party's medical or mental health are not permitted without written consent. Likewise, questions and evidence regarding a complainant's sexual predisposition or prior sexual behavior are not allowed except: (1) to prove that someone other than the respondent committed alleged conduct, or (2) to prove consent.**[9]** Practitioners should note that a complainant's prior sexual history proffered in *support* of an allegation, such as testimony that a complainant was a virgin prior to an encounter, should also be excluded as irrelevant. Interestingly, there is no corresponding limitation regarding the respondent's prior sexual history. Nevertheless, a respondent's advisor should still object to the relevance of any such inquiry.

Decision makers may rely upon statements of parties and witnesses even if they choose not to submit to cross-examination.**[10]** If one party chooses not to participate in the hearing or refuses to submit to cross-examination, the advisor for the other party will need to carefully consider the student's options. For example, if a complainant does not appear, a respondent might decide: (1) not to be cross-examined; (2) to answer questions from the board and their advisor but refuse to answer questions from the complainant's advisor; or (3) may answer all questions asked. Furthermore, the respondent may still want their cross-examination questions to be heard and considered by the board despite the complainant's failure to appear or refusal to answer.

Appeal

The appeal process is strictly regulated by each school's policies. Parties must be offered the ability to appeal based on: (a) procedural irregularity that affected the outcome of the matter; (b) new evidence; or (c) conflict of interest. Institutions may offer additional bases for appeal so long as they apply equally to both parties.**[11]** Students generally have a very limited time in which to file an appeal.

Conclusion

Title IX practitioners face a unique set of challenges – navigating policies that vary by institution; engaging in proceedings that resemble mini-trials without rules of evidence; and appearing before hearing boards often made up of non-lawyer adjudicators. Advisors also engage in important work behind the scenes, preparing young and often overwhelmed clients to advocate for themselves by delivering strong opening and closing statements and preparing them to answer cross-examination questions. Despite these challenges, the practice can be very rewarding, as advisors support and advocate for students during an especially difficult time.

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[1] Title IX, Education Amendments of 1972, 20 U.S.C. §§ 1681-1688.
[2] 34 C.F.R. 106.45(b)(2).
[3] 34 C.F.R. 106.45(b)(9).
[4] 34 C.F.R 106.45(b)(5)(vii).
[5] 34 C.F.R. 106.45(b)(6)(i).
[6] *Id.*
[7] *Id.*
[8] *See id.* and Dept. of Ed., Office for Civil Rights, *supra* Questions 46 and 48.
[9] § 34 C.F.R 106.45(b)(1)(iii), (b)(6)(i).
[10] *See Victim Rights Law Center v. Cardona,* 552 F.Supp.3d 104 (D. Mass. 2021).
[11] 34 C.F.R. § 106.45(b)(8).

Guest Voice of the Judiciary

The Administration of the Trial Courts: The Administrator's Perspective

By Thomas Ambrosino

I began my tenure as Trial Court Administrator at the end of January 2023. I am excited to join the Trial Court because I see it as an opportunity to make significant progress in improving the delivery of justice to court users. I have a strong and committed partner in Trial Court Chief Justice Jeffrey Locke.

My background is not steeped in court management. Instead, I have spent most of my career leading municipalities, where the delivery of essential services to the general public timely and respectfully was a key part of my mission. I spent twelve years as mayor in Revere and another seven and a half as city manager in Chelsea, guiding that community through COVID. In both positions, I stressed to my workforce the need to remember always that public employees are here for one reason—to serve the public. This "service first" mentality is just as necessary in this position and critical to accomplishing the Trial Courts' overriding goal of providing justice with dignity and speed to all.

Making change to an institution as large and as tradition-bound as the Trial Court is not easy. To do so, one must have a narrow focus: identify a few key priorities and work diligently to make progress on them.

As Trial Court Administrator, I have identified three key priorities:

- Take full advantage of the opportunity provided by the 2022 IT Bond Bill to complete my predecessors' efforts in technology and make the system a true "Digital Court";
- Ensure that our courts are welcoming, accessible, and unintimidating to all users; and
- Work closely with the Legislature and Governor Healey to fund capital improvements to our courthouses.

The Digital Courthouse

I am aware of the skepticism among the Bar and our own workforce about technological advances, but we have reason for optimism.

We have outstanding leadership in our Information Technology department, led by Chief Information Officer Steve Duncan, who joined us from Harvard University. Steve and his team are committed to, and capable of, implementing a visionary yet realistic plan for technology upgrades in each of our ninety-four court buildings. Court leadership, our judges, and staff are aligned and committed to becoming a Digital Court, and we have funding to make this possible.

The IT Bond Bill approved by the Legislature and signed by then-Governor Baker in August 2022 authorizes over $165 million for technology upgrades for the judicial branch over the next five-to-seven years, allowing for the judiciary to plan strategically for important upgrades.

Although the IT plan under this bond bill does ***not*** include replacement of our electronic case-management system, MassCourts and our physical structures will be improved by:

- Investing in foundational technology, such as network infrastructure, resulting in fewer interruptions;
- Adding eFile, eAccess, eDelivery, and interactive text, allowing for cases to be handled digitally from beginning to end;
- Engineering upgrades to reduce significantly the time to fix bugs and add new features;
- Installing modern physical security systems, providing for safer courthouses; and
- Furnishing each of our buildings with public Wi-Fi and digital signage.

Some of these improvements are already underway. Network infrastructure upgrades are ongoing in many courthouses and Wi-Fi has been activated in five courthouses. We hope to complete installation in at least a quarter of our courthouses by the end of this calendar year.

Access to Justice

Access to justice is particularly important to me. As city manager in Chelsea, I witnessed residents truly struggling with access to the court system. An overwhelming majority of residents do not speak English as their first language, almost half of the population is foreign born, and many are undocumented. I heard firsthand from many constituents that they found the court system challenging to navigate and often intimidating.

I have a passion to change this and am confident that we will succeed because there is a real commitment, both within the judicial system and among elected officials, to make it happen.

In the pending FY24 budget currently in the Legislature's Conference Committee, there are three proposals aimed at improving access to justice:

- The House approved funding for fifty-two additional full-time staff interpreters. Although this is not in the Senate version of the budget, we hope that consensus will emerge to help us increase full-time staff interpreters to better meet the needs of limited English users.
- The House and Senate have approved funding to add staffing to our Court Service Centers to expand their hours to every day rather than only twice a week. These Centers are a lifeline to self-represented litigants, helping them navigate an unfamiliar judicial landscape.
- The House and Senate have approved funding for eight new Probate & Family Court judges, which is an access to justice effort because over 80% of cases in the Probate Court have at least one self-represented litigant. Ensuring that we have enough judges in that court to expedite decision-making benefits everyone.

In addition to these funding requests, we have commenced an internal reorganization so that access to justice issues have a higher priority within the Trial Court. The new Office of Access, Diversity and Fairness launched in July, and a new Chief of the Office will advance all access to justice initiatives within the Trial Court and report directly to Chief Justice Locke and me.

Capital Projects
Addressing the deficient physical structures in which the Trial Court operates requires far more capital than the Commonwealth can reasonably expect to finance given competing capital demands throughout state government. But in the past few months, we have made good progress advancing major renovations and new buildings in some of our Gateway Cities. The new FY24–28 Capital Plan released by the Governor in late June includes $106 million for design of a new Hall of Justice complex in Springfield, full funding for the new courthouse in Quincy, funding for the start of a new regional justice center in Framingham, and $42.5 million for major renovations to the Lynn District Court. This is great news for the court system and hopefully an indication of a growing collaborative approach that will help us address the backlog of capital needs throughout the Trial Court.

There is a lot more that I hope to accomplish in the Trial Court in addition to these three priorities, including working intentionally to improve the diversity within our workforce, increasing training and advancement opportunities for our staff, and improving efficiency in our operations. For these and other issues, I am still in the listening and learning stage. But my process and method for addressing all issues are the same: I am committed to working collaboratively with our staff, clerks, judges, elected officials, and important stakeholders like the Bar to identify and implement practical solutions.

I pledge to do all that I can to fulfill our shared vision that every person who walks through our doors, regardless of personal characteristics or economic circumstances, is treated with respect, and that we in the Trial Court deliver justice with dignity and speed.

Mr. Ambrosino began serving as Administrator for the Trial Courts in January 2023. He previously served as City Manager for the City of Chelsea, and as Mayor in the City of Revere.

Voice of the Judiciary

Take A Small Step – Aspire to the Bench – Begin Your Judicial Application

By Hon. Debra Squires-Lee

"The Boston Bar Association (BBA) firmly believes that justice is best advanced when the legal community—especially the judiciary—reflects the diversity of the community it serves. With the establishment of a new Judicial Nominating Commission and many open judicial positions, including on the Superior Court, I urge all stakeholders in the appointment process to seize this moment to build upon and accelerate past efforts toward diversifying the judiciary—views I shared recently in a Letter to the Editor of the Boston Globe.

At the BBA, we continue to do our part to promote diversity on the bench; on May 30, members of the Massachusetts judiciary and JNC Chair Abim Thomas presented at an online webinar, hosted by the BBA and the Massachusetts Affinity Bar Associations, to educate members of the bar about the judicial application process and the ins and outs of being a judge. Building upon that, we welcome those interested in pursuing a career on the bench to read the following from Hon. Debra Squires-Lee, Associate Justice of the Superior Court and a member of the Board of Editors of the Boston Bar Journal, on the necessary qualities of a judge. It is our hope that, through these efforts, we will further our mission to advance the highest standards of excellence for the legal profession while fostering a diverse and inclusive professional community."

– Chinh Pham, President, Boston Bar Association

Governor Healey has established a new Judicial Nominating Commission and is accepting applications for many open judicial positions, including on my court, the Superior Court. I write to urge every member of the bar interested in becoming a judge – especially women and diverse applicants – to start filling out those applications.

Being a judge is a deeply transformative and fulfilling opportunity to serve the people of the Commonwealth and your community. And it provides the means to support yourself and your families – the legislature has recently passed judicial pay increases and there is a solid pension after some years of service. Although the application appears daunting, take the first step and work on the application a little at a time each day. As one of my favorite poets advises, "start right now take a small step you can call your own."

When you take that first step, you will see that the application asks questions intended to gain insight into the judicial candidate's goals, motivations, understanding of the role of a judge, integrity, and character. One question that I labored over -- writing, re-writing, and editing my answer many dozens of time -- asked for the top attributes of a judge. After having served five years on the bench, in both criminal and civil sessions, in Bristol, Norfolk, Plymouth, and Suffolk counties, I now know, without a doubt, that the following are four of the essential attributes of a judge.

The first is ***patience***. Parties arrive late to Court, lawyers get sick, hearings must be postponed, *pro se* defendants and civil litigants require a substantial amount of time to make their arguments and present their positions, witnesses fail to appear for trial or become belligerent or obstreperous, jurors are delayed and arrive late for trial. The list is endless. Frustration mounts because one of the core duties of a Superior Court Justice is encapsulated in our mission – to ensure justice with dignity and speed. Every judge feels a strong desire to move a case, to avoid keeping a jury waiting, to keep lawyers and parties focused and on task. But judges must keep firmly in mind that the law is a human enterprise – not just a judicial enterprise. And that every single person who enters a courtroom is often scared, sad, worried, nervous, even overwhelmed. Including the lawyers. So, with each delay, with each need to provide more time, more understanding, more listening, the judge must, by word and tone and affect, demonstrate patience. Not just being patient but exemplifying patience. Because only by manifesting patience can a judge ensure they do not compound, but rather ameliorate, the court participants' worry and overwhelm.

The second is ***diligence***. The job is difficult. It requires a broad skill set. Efficient and capable writing skills to keep up with the many written opinions that must be issued. Executive function skills to prepare for a trial as well as an afternoon motion list while continuing to draft written findings, rulings, and opinions. Management skills to keep a case moving pretrial and during trial. And, of course, people skills, a sense of humor, and a desire and ability to protect the vulnerable. To do this job well, judges must be diligent. They must squeeze efficiency out of every minute of every day. Diligence is necessary to accomplish the work necessary to deliver justice with dignity and speed.

The third is ***integrity***. Judges make tough choices every day. They rule on unresolved questions of law. They make credibility determinations. They decide issues that affect people's lives, liberty, employment, families, and property. Judges must keep front and center their personal integrity and ethics and test themselves on both constantly by asking themselves am I being fair, have I considered all the issues and precedent, have I considered contrary evidence that might weigh against my decision, am I treating the people in front of me as individuals and not as members of any particular group?

Finally, judges must be ***kind***. When we put on our robes and walk into the courtroom, everyone rises. Not for the individual judge, but for the judicial branch – a co-equal and independent branch of government and the branch of government ordinary people are most likely to encounter. We represent that branch of the government of the Commonwealth of Massachusetts. As a representative of the people's government, we must treat every person who appears in our courtrooms with kindness, dignity, and respect.

Notice that I ***did not say*** the attributes necessary for a judge include any political viewpoints or professional connections or any specific educational or professional accomplishments. The qualities necessary are inherent in the person – of every race, ethnicity, gender identity, or sexual orientation – not in what grades they got in law school, their politics, the income level of their

family of origin, whether they are first or twelfth generation college graduates, where they were born, or who they know.

I strongly urge lawyers with the above attributes who would like to serve their community and the people of the Commonwealth to start right now. Take the first step. Fill out your applications. Especially lawyers from groups underrepresented on the courts of the Commonwealth. Aspire to the bench. Reach out to a judge you know or one you respect to talk about the job and to get advice. We will answer your questions.

If you have patience, diligence, integrity, kindness, and a desire to serve, please do not wait. The application takes time to get right. And the judicial branch needs you.

Hon. Debra Squires-Lee is an Associate Justice of the Superior Court and a member of the Board of Editors of the Boston Bar Journal. This article represents only her personal opinion. Along with the Honorable Valerie Yarashus, Judge Squires-Lee serves as co-chair of the Superior Court's Race and Anti-Bias Committee. She is happy to talk with applicants and potential applicants and find other judges willing to do so as well.