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President's Page

Remembering Richard Soden

The Boston Bar Association joined the entire legal and Greater Boston community in mourning the passing of Richard A. Soden on Christmas Day 2023. Richard joined Goodwin Procter in 1969, where he became a partner in 1979 before transition to of counsel in 2006. He was a past-President of both the Boston Bar Association (BBA) and Boston Bar Foundation (BBF).

As part of our commitment to honor Richard's legacy, we've chosen to dedicate this edition's President's Page to him. During his tenure as BBA President from 1994 to 1995, Richard's words graced the Boston Bar Journal's President's Page five times; we invite you to read his words from that time:

- September/October, 1994
- November/December, 1994
- January/February, 1995
- March/April 1995
- May/June 1995

Richard touched the lives of many within the Boston Bar and greater legal communities; in the days following his passing, many of his friends and colleagues shared their stories of the impact Richard had on their personal and professional lives.

We invite you to read a few of those remembrances below:

Hon. Margaret H. Marshall, Chief Justice, Massachusetts Supreme Judicial Court (Ret.); BBA President, 1991-92

We were neighbors first, almost 50 years ago, on a narrow one-block street in Boston's South End. The street was a gathering place, where Richard and Marcia's two toddlers pedaled their "big wheels" from one end to the other. Soon our legal paths kept crossing, at the Boston Lawyers' Committee for Civil Rights Under Law, later at BBA Council meetings or other bar events, local and national. My memories tumble from one decade to another, with one constant: Richard was driven, his quiet energy relentless. A highly successful, sophisticated corporate lawyer, he wanted most to make ours a better profession in order to make ours a better world. He wanted, in words he loved, a legal profession respected "not for the foes we vanquished but for the people we helped and the lives we improved."

It is hard now to remember the hostile barriers facing black lawyers when Richard graduated from law school in 1969. A lonely pioneer, he could have sought only to advance his own career. He had other plans: Richard wanted to make a difference, to challenge the pervasive racism of the time, to improve the lives of those who needed help. And what a difference he made. He was leader, role model, mentor, hand-holder, guru, teacher…. for colleagues, for friends, for generations of lawyers, a lawyer always helping other lawyers. Civility was his calling card, action his operational mode. He never raised his voice, even when opinions were deeply divided,

the issues difficult to resolve. And he always, always pushed toward action, leaving his mark again and again.

My lasting image: Richard in black tie at some large function with Marcia, his beautiful wife he loved so deeply standing next to him, embracing each person with his wide inclusive smile, a natural candle around which an eclipse of moths always gathered. Ours is a far better world because of Richard Soden.

Mary K. Ryan, BBA President, 1997-98

Richard's legacy can be found both in what he did and what he meant to his friends and colleagues. He was a recognized leader in multiple areas—what I particularly remember from the time we worked closely together in the mid- to late-90s was his dedication to scouting and to his service as a Trustee of Boston University, both of which he enjoyed immensely. But above all, I will remember his belief in the power of service to and through the bar and legal organizations, which—happily for us—most notably included the Boston Bar Association and the Boston Bar Foundation.

For as long as I knew him, he dedicated his considerable talents and time to the American Bar Association, from its top leadership positions as a member of the Board of Governors and House of Delegates to his steadfast commitment and dedication as a member and officer of the Civil Rights and Social Justice Section (still better known to some of us as the Individual Rights and Responsibilities Section) and the Bar Services Committee, among many others.

On a personal level, Richard's faith, confidence and loyalty to his friends and colleagues was invaluable—Richard always knew you could meet the next challenge, even when you doubted it. And while he may have been the epitome of the proper corporate lawyer, even down to the bow tie, he was not pretentious—far from it. He had a dry wit and cut to the chase; I found him to be a straight shooter, also an invaluable quality as a friend and mentor. May he rest in peace and may his memory be a comfort to his bereaved family and friends.

John D. Donovan, Jr., BBF President 2010-2012

Richard recruited me to be a Trustee of the Boston Bar Foundation with a mixture of flattery and enthusiasm for the work of the BBF. He persuaded me by touting a grant the Foundation made to place a legal services clinic inside the Boston Medical Center. That hospital serves the downtrodden, the homeless, substance abusers, patients without resources, and people mired in the red tape of the health care and social service systems—in other words, clients with immediate legal needs on multiple levels who are simultaneously confronting pressing medical issues. Richard envisioned the immediate impact the grant would have, and his passion for the project was infectious. Thanks to Richard, I caught the bug.

Somebody once said that service to others is the rent we pay for our room here on earth. Richard left us too early. But his rent was fully paid up.

To hear more from Richard's friends and colleagues, and for more on his life and career, click here.

Viewpoint

From Lab Scandals to Police Scandals: Lessons in Resolving Government Misconduct in Criminal Cases

By Matthew Segal and Jessica Lewis

Just over a decade ago, the arrests of two state chemists who helped prosecute thousands of people for drug crimes—Annie Dookhan and Sonja Farak—rocked the Massachusetts justice system. The fallout from those scandals has been extraordinary. Litigation overturned some 61,000 tainted drug charges across more than 35,000 cases. A lawsuit has secured the return of $14 million in fines and fees extracted from criminal defendants in affected cases. And three former state prosecutors have now been disciplined—one with disbarment.

This is an embarrassing chapter in the Commonwealth's history, and it is tempting to put it behind us. But we should not do that.

When resolving the lab scandals, the Massachusetts Supreme Judicial Court ("SJC") crafted powerful legal tools for addressing misconduct in criminal cases. The SJC has returned to those tools repeatedly, and it did so most recently in January, in a case challenging the Hampden County District Attorney Office's response to damning allegations of misconduct within the Springfield Police Department. If advocates and courts continue to use these tools to address government misconduct—whether by chemists, prosecutors, or police officers—we might remedy, or even prevent, future wrongful convictions.

The Drug Lab Litigation

The Dookhan and Farak scandals have been described in numerous venues—from a Task Force convened by the Boston Bar Association to a Netflix docuseries. The following overview highlights the remedies the SJC developed to address the fallout.

For many years, Dookhan invented test results by "eyeballing" samples instead of testing them. That is, she fabricated evidence. Farak, meanwhile, was seemingly living with an addiction that she likely shared with many people she helped prosecute. Farak stole, used, and even manufactured drugs while working at a state lab.

But after Dookhan and Farak were arrested, in late 2012 and early 2013 respectively, justice came very slowly for the people they helped prosecute. That is because these scandals, which started with bad science, were exacerbated by bad law—law that makes it hard for wrongfully convicted people to get justice.

Legal rules typically make wrongfully convicted people bear the burden of undoing their convictions. After the Dookhan and Farak scandals broke, no one notified the defendants convicted and imprisoned based on the chemists' test results. No one made sure that all those defendants had lawyers. And the defendants who had the wherewithal to challenge their prior convictions had to grapple with the fact that successful challenges could revive charges that had previously been dismissed. If courts had allowed that to happen, the people who dared to challenge their Dookhan convictions could have wound up spending even more time behind bars.

This was a recipe for keeping all those wrongful convictions in place, making it harder for impacted people to find jobs and housing, and to move on with their lives. So public defenders, criminal defense lawyers, and the American Civil Liberties Union of Massachusetts ("ACLUM") litigated cases to shift the burden to *the state* to prove the integrity of the convictions.

Over the years, the SJC did exactly that. In 2014, the court announced a "conclusive presumption" of government misconduct in all Dookhan cases, which was pivotal because Dookhan could not recall which cases she had tainted, and defendants could not possibly identify them. The presumption applied in every case where Dookhan had certified that the substance at issue was an illegal drug.

In 2015, the court called on prosecutors to identify Dookhan's cases, and created an "exposure cap." Under the exposure cap, if a defendant successfully challenged their prior guilty plea in a Dookhan case, and the Commonwealth chose to re-prosecute them, the Commonwealth was barred from securing harsher punishment than was imposed after the initial (tainted) plea. The cap meant that defendants could challenge their Dookhan-tainted convictions without having to worry that they could wind up worse off if they got re-convicted.

In 2016, prosecutors finally delivered a list of over 20,000 still-unresolved Dookhan cases. ACLUM then showed that in 62% of those cases, the only drug conviction was for possession.

In 2017, the Court called on prosecutors to dismiss "large numbers" of Dookhan's cases. Prosecutors responded with lists that led to the court-ordered dismissal of drug charges in more than 20,000 cases—the largest single dismissal of wrongful convictions in U.S. history.

In 2018, the court ordered the dismissal of every case where Farak signed a drug certificate, plus numerous other cases involving drug samples processed at the lab where Farak had worked. An earlier SJC decision, calling on the Commonwealth to investigate the true scope of Farak's misconduct—which, remarkably, the Commonwealth had failed to do—paved the way for those dismissals.

This series of decisions and dismissals share an important theme: they resulted from the SJC placing the burden of identifying and undoing wrongful convictions—on the state—instead of on wrongfully convicted people.

Broader Implications: Extending the Drug Lab Precedents

These drug lab precedents can and should be applied more broadly to address misconduct in the criminal justice system. In the past year or so, the SJC issued two monumental decisions that begin to show us how to do just that.

In December 2022, the SJC took a page from the drug lab playbook when it was asked to help resolve cases involving misconduct committed by the Office of Alcohol Testing ("OAT") relating to breath tests used in drunk driving prosecutions. As in the drug lab scandals, it was impossible for defendants to prove how the misconduct unfolded in their specific cases. So the SJC used a tool it fashioned in the drug lab litigation: it held that defendants affected by the OAT scandal—all 27,000 of them—were entitled to a conclusive presumption of government misconduct.

As in the drug lab cases, this conclusive presumption means that defendants in these cases need not prove that the OAT's misconduct occurred in their individual case. Instead, courts will

presume that their cases involved flawed breath test evidence, and those breath tests results will be excluded from use at any subsequent trial.

The drug lab and OAT decisions also demonstrate the importance of the court tailoring each solution to the problem at hand. With Dookhan's cases, the court allowed prosecutors to re-prosecute some cases. With Farak's cases, due to the presence of attorney misconduct, the court dismissed all impacted cases. And with the OAT scandal, the court did not order any mass exonerations, and instead allowed case-by-case litigation to proceed against the backdrop of presumptive government misconduct. But with every scandal, the Court made sure of one thing: that the burden of systemic misconduct by government actors would not be shouldered by the criminal defendants against whom that misconduct was perpetrated.

Logically, the same principles should apply when government misconduct of undetermined scope and gravity is committed, as it sometimes is, by police officers. And the SJC recently confirmed that this logic is correct.

In the Field: Remedying Police Misconduct

In Massachusetts and nationwide, there have been important discussions about police misconduct and its impact on judicial proceedings. Like a rogue chemist, a rogue police officer or department can raise questions about whether they have arrested and helped to secure convictions against people who may be innocent—for example, with a provable pattern of providing false testimony, a demonstrated history of systematically withholding evidence of the use of excessive force, or by repeatedly losing or destroying evidence.

Public discussions about police misconduct often ask whether police departments can or will reform themselves. But one lesson of the Massachusetts drug lab scandals is that when a member of a prosecution team commits misconduct of unknown scope and scale, *the state*—not just the wrongdoer's supervisor or department—must investigate. And police officers, no less than chemists, are members of prosecution teams. Just as a chemist who falsely certifies test results can cause people to be wrongfully convicted of drug crimes, police officers who make false allegations against the people they encounter can cause them to be wrongfully convicted of crimes. If, for example, a police officer uses excessive force against an arrestee, they might be tempted to justify that force by falsely alleging that the arrestee resisted arrest or assaulted the police.

And so, faced with evidence that Springfield Police Department ("SPD") officers committed systemic misconduct that may have impacted the judicial process, the SJC has fashioned a remedy designed to start the work of removing the taint of that misconduct from criminal convictions. In so doing, it confirmed that the obligation to act to remedy government misconduct impacting judicial proceedings is triggered not only by misbehaving chemists but by misbehaving police officers as well.

The case, *Graham v. District Attorney for the Hampden District*, concerned the legal system's muted response to evidence of misconduct within the SPD. In July 2020, the U.S. Department of Justice (DOJ) issued a report alleging a pattern or practice of excessive force by the SPD's Narcotics Bureau, which was covered up by false reporting. As the *Graham* briefing laid out, in the three and a half years since the DOJ report's release, no one on behalf of the Commonwealth

investigated the DOJ's allegations. And unlike Dookhan and Farak, the officers implicated by the report largely remained employed by the SPD.

So, in April 2021, the Committee for Public Counsel Services, the law firm Goulston & Storrs, the ACLUM, and the national ACLU sued the Hampden County District Attorney's Office (HDAO), which prosecutes people with the help of SPD officers. The lawsuit alleged that officers may have facilitated wrongful convictions to conceal their own misconduct.

But the lawsuit did not seek mass exonerations. Instead, it pointed to some of the more tailored remedies imposed during the drug lab cases, particularly the SJC's holding that the Commonwealth had a legal duty to "thoroughly investigate the timing and scope of Farak's misconduct." Plaintiffs argued that the Commonwealth similarly had such a duty as concerns the potential misconduct by SPD officers alleged in the DOJ report.

The Court agreed. The SJC held that "the duty of the district attorney's office to investigate unquestionably was triggered by the DOJ report's findings." And the Court further held that the HCDAO violated that duty by "failing to gain access to all documents known to have been reviewed by the DOJ." Expressly relying on its drug lab cases, the SJC explained that the duty to conduct a thorough investigation arises whenever the prosecution "learn[s] that a member of the prosecution team has been accused of misconduct."

To remedy the HCDAO's violation of its duty to investigate, the SJC ordered the HDAO to obtain and disclose, "in an electronic format with optical character recognition," all SPD records known to have been reviewed by the DOJ. That is more than 100,000 pages.

Beyond demonstrating that the HCDAO had fallen short of its duty to investigate police misconduct, the proceedings in *Graham* also revealed two other troubling aspects of the HCDAO's approach to evidence of police misconduct, according to the SJC's ruling. First, when judges found that police officers gave untruthful testimony in cases handled by the HCDAO, the HCDAO did not disclose those findings in other cases against the implicated officers unless the HCDAO *agreed* that the officers had been untruthful. Second, when the HCDAO learned of evidence that a police officer had committed misconduct, but the HCDAO wasn't sure which of two or more officers committed the misconduct, the HCDAO simply withheld the evidence in cases involving *all* of the officers under suspicion. The SJC held that both of these practices violated the HCDAO's duty to disclose potentially exculpatory evidence.

In the wake of the SJC's decision in *Graham* and the disclosures that will result from it, the defense bar can work to determine the impact of the SPD's misconduct. But the lessons of the SJC's cases, from the drug lab litigation through *Graham*, go beyond any one scandal. And they need to be learned by all stakeholders in the criminal legal system, preferably before being sued. The SJC has created an important legacy: a range of tools for remedying, and possibly even deterring, wrongful convictions by any and all members of a prosecution team.

The question is: Will we use them?

Matthew Segal, a senior staff attorney with the ACLU's State Supreme Court Initiative, previously served as Legal Director of the ACLU of Massachusetts and was counsel in the cases leading to the Dookhan and Farak mass exonerations. Jessica Lewis is a staff attorney at the ACLU of Massachusetts. Both are counsel in Graham v. District Attorney for the Hampden District.

Viewpoint

Supervisory Liability After Foster: Tips for Public and Private Lawyers

By Jessica Gray Kelly and Katherine Chenail

In *Matter of Foster*, 492 Mass. 724 (2023), ("*Foster*") the Supreme Judicial Court ("SJC") imposed professional discipline on three Assistant Attorneys General ("AAGs") in connection with their failure to turn over exculpatory evidence to criminal defendants affected by the misconduct of former state drug lab chemist Sonja Farak. The case is remarkable, not only because of how rarely Bar Counsel charges government lawyers with disciplinary violations, but also because of the disparity in sanctions: The Court ordered the disbarment of AAG Anne Kaczmarek and suspended AAG Kris Foster for one year and a day, but subjected their supervisor, AAG John Verner, to only a public reprimand. This article explores the difference in punishments among the AAGs involved in the underlying matters and the various factors that the Board of Bar Overseers ("BBO") and the SJC will consider when deciding on those punishments.

Under Massachusetts Rule of Professional Conduct 5.1, a supervisor may be liable for the conduct of supervisees if the supervisor (a) orders or ratifies the misconduct, or (b) knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action. In *Foster*, the SJC found that Verner reasonably relied on Kaczmarek to turn over the exculpatory evidence, which was a special mitigating factor warranting a lesser sanction.

Ultimately, *Foster* serves as guidance to government and private lawyers alike on how to properly supervise less experienced attorneys. While supervisors cannot be expected to check every action or decision made by their colleagues, their reliance on others must be reasonable in light of the circumstances. Having provided this guidance, the Board and the SJC may not be as forgiving to lawyers in the future who do not heed their recommendations as they were to Verner. Public and private entities should establish systems to ensure all attorneys assigned to a case follow ethical procedures.

Relevant Background of *Foster* Case

The disciplinary action arose from the role of the Attorney General's Office ("AGO") in prosecuting Sonja Farak, a state drug lab chemist accused of tampering with drug samples used as evidence to prosecute drug crimes. Verner was the Chief of the AGO's criminal bureau at the time and assigned Kaczmarek as lead prosecutor on Farak's case, partly because of her work on the case against Annie Dookhan, another state chemist who falsified drug evidence.

During the investigation, the State Police found evidence suggesting Farak's misconduct began in 2005. They provided this evidence to Verner and Kaczmarek, who decided not to present it to the grand jury as they considered whether to indict Farak. Instead, they asked the grand jury to consider her actions in tampering with evidence that had begun in 2012.

In August 2013, the AGO assigned AAG Foster to respond to subpoenas from criminal defendants whose cases might have been affected by Farak's misconduct. Foster had only worked for the AGO for one month and had no prior experience responding to subpoenas.

Another AAG supervised Foster and advised her to talk to the investigator and Kaczmarek about what had or had not been produced, telling her it would be helpful to look at the file herself. Foster did not look at the file, and her supervisor never confirmed the content of her responses to the subpoena requests or whether she had complied with the subpoenas.

Subsequently, Foster, on behalf of the AGO, made statements to the court managing the subpoena proceedings in which she implied that the AGO had turned over all relevant, exculpatory evidence in the AGO's possession. The court made several rulings based upon Foster's statements—statements that were not accurate, as the evidence from the State Police demonstrating possible misconduct by Farak as early as 2005, among other things, had not been produced.

Farak ultimately pled guilty to numerous charges in January 2014, which concluded the active prosecution of her case. Thereafter, the AGO could not object to producing documents based on the open criminal case. In October 2014, the AGO gave defense counsel access to the physical evidence file. The AGO ultimately turned over an additional 289 documents. Lead defense counsel discovered the state police evidence indicating that Farak's tampering may have started in 2005. In light of this discovery, in October 2018, the SJC entered an order dismissing all convictions that resulted from evidence tested at the Amherst lab after January 1, 2009, as well as all convictions based on methamphetamines tested while Farak was employed at the lab. *Foster*, 492 Mass. at 742.

In June 2019, Bar Counsel brought disciplinary proceedings against Verner, Kaczmarek, and Foster charging them with failing to disclose exculpatory evidence. The charges against Kaczmarek focused on her misrepresentations regarding the evidence produced; the charges against Verner focused on his failure to adequately supervise; and the charges against Foster focused on her failure of competence and diligence in responding to the subpoenas. *Id*. at 743. The Board's Special Hearing Officer ("SHO") specifically found that Verner instructed Kaczmarek to turn over all exculpatory evidence of Farak's drug tampering, and that Kaczmarek misrepresented to Verner and her AGO colleagues what had been produced. The SHO found that Foster lacked diligence and competence in responding to the subpoena but that she did not make intentional misrepresentations to the Court.

The Board recommended a three-month suspension for Verner, disbarment for Kaczmarek, and a year and a day suspension for Foster, which will require her to reapply for her license. The Court agreed with the discipline for Kaczmarek and Foster, but reduced Verner's discipline to a public reprimand. *Id.* at 756, 764, 770.

The Court's Analysis of the AAGs' Conduct

Why did Verner receive a public reprimand while Kaczmarek and Foster received potentially career-ending sanctions? While there is clear precedent for certain violations of the disciplinary rules, oftentimes it is difficult to predict how or why the Board will determine a particular sanction. This is especially true for sanctions involving failure to supervise.

Indeed, violations of Rule 5.1 have resulted in discipline ranging from a private admonition to a term suspension. The cases suggest the Board will focus on the measures taken by the attorney to give "reasonable assurance that all lawyers [assigned to tasks] conformed to the Rules of Professional Conduct." *See* Admonition No. 22-14, 2022 WL 5058413 (Ma. St. Bar. Disp. Bd. 2022). The severity of the discipline for failure to supervise is often tied to whether the attorney committed other rule violations and/or the extent of the harm to the client. *See* Admonition No. 17-16, 2017 WL 7051164 (Ma. St. Bar. Disp. Bd. 2017) (private admonition against partner for failing to supervise associate, leading to detention of client but no additional prejudice); *Matter of Gleason*, 28 Mass. Att'y Discipline Rep. 352, 354-55 (2012) (reprimand entered for failing to supervise associate in filing claim within statute of limitations); *Matter of Perrault*, 29 Mass. Att'y Discipline Rep. 531, 532-34 (2013) (three-month suspension for failing to supervise associate over period of years); *Matter of Rainer*, BD-2013-099, 2013 WL 7085679 (Ma. St. Bar. Disp. Bd. 2013) (six-month suspended suspension for failing to supervise transition of client cases to another attorney); *see also Matter of Ablitt*, 486 Mass. 1011, 1017 (2021) (citing cases where term suspensions entered for failing to supervise nonlawyer employees resulting in pecuniary loss to clients). The Board also does not look favorably upon a supervising attorney's attempt to blame less experienced colleagues for misconduct. *See Matter of Cammarano*, No. BD-2013-040, 2011 WL 11557905, at *12 (Ma. St. Bar. Disp. Bd. 2011) (indefinite suspension imposed for attorney for multiple instances of misconduct aggravated by attorney's attempt "to place all blame for his actions on a much less experienced attorney whom he supervised").

In *Foster*, the court focused on Verner's reliance upon Kaczmarek's statements to him about what had been produced during the subpoena proceedings. 492 Mass. at 747-49. *See Matter of McDonald,* 18 Mass. Att'y Discipline Rep. 382, 388 (2002) (reliance not reasonable where respondent attorney placed "too much trust in his friend and colleague" about "his representations as to the progress of the case"). While not absolving Verner of all responsibility for the AGO's failure to produce all exculpatory evidence in response to the subpoenas, the SJC gave Verner the benefit of the doubt at almost every point at which he could have – in theory – mitigated the harm from the non-disclosure had he probed beyond Kaczmarek's statements to him or followed-up with her about what had been produced. The court held Verner's reasonable and good faith reliance on Kaczmarek to produce the evidence was a "special" mitigating factor, which weighed in favor of lesser discipline for Verner. Ironically, while the court held that Kaczmarek's ten years of practice and her work on another drug lab scandal to be an aggravating factor against her, those same factors helped Verner, as the court deemed his reliance on Kaczmarek more reasonable because of her experience.

The SJC noted that Verner managed over 100 people, including approximately 50 government attorneys, perhaps suggesting the difficulty of keeping close watch on so many lawyers' activities. Such grace is not likely to apply outside the public sector, where law firms generally have more resources and fewer lawyers under one supervisor. While the Court did not specifically include Verner's candor and remorse as a mitigating factor, it did note the SHO's findings that Verner "demonstrated candor, remorse, and a recognition of and responsibility for his mistakes" as compared to Kaczmarek and Foster. *Foster*, 492 Mass. at 750. The role of mitigating and aggravating factors in the imposition of discipline can be unpredictable and arbitrary. While the Board has said it will "consider and find mitigating even typical factors such as remorse and acceptance of responsibility," *Matter of Parigian*, No. BD-2015-102, 2015 WL

13687918, at *5 (Ma. St. Bar. Disp. Bd. 2015), it has also said "[e]xpressions of remorse are not considered mitigating . . . we expect all respondents to feel and convey sincere, genuine remorse for their misconduct." *Matter of Sargent*, C1-19-260146, 2023 WL 3443627, at *4 (Ma. St. Bar. Disp. Bd. 2023); *see also* *Matter of Rosin*, Public Reprimand No. 2023-12, 2023 WL 7499920 (Ma. St. Bar. Disp. Bd. 2023) (imposing public reprimand on attorney who coached deposition answers to client during Zoom deposition after considering his "immediate and candid acknowledgment of misconduct" and "his remorse"); *Matter of Corben*, No. BD-2009-113, 2015 WL 9308986, at *3 (Ma. St. Bar. Disp. Bd. 2015) ("sincere remorse, standing alone, does not equal reform"). As a general rule, however, attorneys who own their mistakes and exhibit remorse for their misconduct will fare better before the Board. The SHO's findings that Foster and Kaczmarek (neither of whom received any of the benefit of the doubt that Verner did) lacked appropriate acknowledgment and contrition for their conduct contributed to the severity of their sanctions. *Foster*, 492 Mass. at 762; *see also* *Matter of Moore*, 442 Mass. 285, 295 (2004); *Matter of Eisenhauer*, 426 Mass. 448, 455 (1998).

Supervisory Liability After *Foster*

The *Foster* decision not only sets a standard for prosecutorial misconduct in Massachusetts, it sheds light on how the BBO and the SJC will analyze supervisory liability going forward. As supervisors, attorneys must make sure that their reliance on their colleagues to handle certain tasks is reasonable in the circumstances. The Board will likely evaluate reasonableness based upon the significance of the task, the level of experience of both supervisor and supervisee, and the supervisor's efforts to ensure the supervisee is in compliance with ethical rules. *See Foster*, 492 Mass. at 755 (contrasting Verner's reliance on Kaczmarek with supervisor in *Matter of Gleason*, who did nothing to determine whether his associate was properly handling case). Supervisory attorneys should ensure their instructions to colleagues handling assigned work are clear, including instructions about discoverable evidence. Supervisors should also be involved in and ultimately responsible for any judgment calls that may involve ethical considerations, such as what materials are or are not to be turned over. Finally, while supervisors should not have to repeat or review all of their colleagues' work to confirm it was done correctly, supervisors should use their best judgment – again depending on the importance of the task and/or the experience of the attorney handling the work – to determine the level of review or follow-up needed.

In *Foster,* given the gravity of Farak's misconduct and the effect on individuals convicted of or facing charges based on tampered evidence, Verner should have paid closer attention to the AGO's disclosure obligations. If he had, he might have been able to ensure the disclosure of all exculpatory evidence. Foster's supervisor, who apparently did not face any disciplinary charges, also should have paid closer attention to the subpoena proceedings, given Foster's inexperience. *Foster*, 492 Mass. at 747-48 (holding Foster's inexperience and reliance on supervisor to be mitigating factors). Despite these failures, Verner escaped relatively unscathed because of his reliance on Kaczmarek, while Kaczmarek and Foster bore the brunt of the SHO's findings and the court's conclusions on the misconduct.

The AAGs conduct at issue in *Foster* occurred almost a decade ago. Since then, as a result of the drug lab and other police misconduct investigations, the SJC has issued several decisions on prosecutors' duty to disclose government misconduct, including most recently in *Graham v.*

Dist. Att'y for Hampden Dist., No. SJC-13386, 2024 WL 236151 (Mass. Jan. 23, 2024); *see also Comm. for Pub. Couns. Servs. v. Att'y Gen.*, 480 Mass. 700, 732 (2018) (directing standing committee to adopt *Brady* checklist procedure and holding that prosecutors should submit any questionable exculpatory evidence to the court for *in camera* review); *Bridgeman v. Dist. Att'y for Suffolk Dist.*, 476 Mass. 298, 315 (2017) ("where there is egregious misconduct attributable to the government in the investigation or prosecution of a criminal case, the government bears the burden of taking reasonable steps to remedy that misconduct"). In *Graham*, the SJC reaffirmed "the importance of a prosecutor's dual duties—to disclose and to investigate—in upholding the integrity of our criminal justice system," while also delineating a prosecutor's unique disclosure obligations in the context of government misconduct investigations. *Id*. at *2. If these decisions had existed in 2013, perhaps the AAGs would have better understood their ethical obligations and would not have suffered the individualized punishments handed down in *Foster*. Going forward, attorney supervisors, both public and private, must take appropriate steps to monitor their colleagues depending on their experience and the significance of the task at hand, in addition to ensuring compliance with the Rules of Professional Conduct. Supervising prosecutors now have significant guidance for how to monitor disclosure issues.

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Legal Analysis

Lessons to be Learned from the First Cases of Discipline of Prosecutors for Failure to Disclose Exculpatory Material

By David M. Siegel

Systemic failures are opportunities to learn rather than anomalies to ignore. On August 31, 2023, the Supreme Judicial Court ("SJC") upheld the first bar discipline ever imposed on Massachusetts prosecutors for failure to disclose and misrepresentations concerning exculpatory material in *Matter of Foster*, 492 Mass. 724 (2023). When something "so intentional and so egregious" as to be a "system-wide failure" occurs, it is tempting to demand increased penalties. *Id.*, 492 Mass. at 752. For example, one local criminal law and ethics professor has suggested more aggressive professional discipline for supervisory prosecutors under Rule 5.1 of the Massachusetts Rules of Professional Conduct (R. Michael Cassidy, *Unleashing Rule 5.1 to Combat Prosecutorial Misconduct*, 102 Ore. L. Rev. ___ (2024) (forthcoming)). But outcomes in complex systems that should never happen rarely result from one person's action, and now that individual culpability has been determined and penalties assessed, it is time to learn from institutional failures.

The cases involved the collective failure of three lawyers to disclose information concerning the period and scope of illicit drug use by Sonya Farak, the Amherst drug lab chemist whose tampering with samples of suspected narcotics and falsification of test results ultimately led to dismissal of 33,000 drug cases. The prosecutors' multiple ethical violations included misrepresentations to a judge and counsel, failure to adequately supervise, lack of competence and diligence, and conduct prejudicial to the administration of justice.

Farak's drug use affected the reliability of everything she did at work. During consolidated post-conviction actions involving her cases, the central factual questions were: (1) when had her drug use begun and (2) what was its scope. The potential systemic impact of Farak's misconduct was immediately evident as her case broke exactly one month after Hinton Drug laboratory analyst Annie Dookhan was indicted for perjury and twenty-seven counts of tampering with evidence from falsifying tests she never conducted, contaminating samples, and submitting false laboratory reports on her analyses. The two prosecutors of record in Dookhan's case from the Attorney General's Office ("AGO") were two of the three involved in Farak's case. One of them, the supervisory prosecutor, had assigned the Assistant Attorney General ("AAG") to Farak's case *because of* her familiarity with laboratory misconduct issues from Dookhan's case. The third AAG was brought in to respond to the discovery requests. Prosecutors in the AGO recognized Farak's case as a "matter of high importance." 492 Mass. at 727.

The non-disclosures and misrepresentations by lawyers in the AGO were "sentinel events" warning of systemic risks. In safety research, events that should never occur such as surgeons operating on the wrong limb or aircraft doors opening in flight are called "unsafe acts" and can happen through unintentional behaviors ("errors") or willful disregard of rules ("violations") in environments whose supervision and organizational culture tolerate or even foster them. Systems involving human decision making require mechanisms to recognize both intentional and unintentional error, and the entities involved need to develop a culture of continuously checking their work, called a "culture of safety." Sentinel events signal the need for such a culture.

Determining how an event, which should never have happened, occurred, requires a different process than the BBO or the SJC. Sentinel event reviews have been increasingly applied to criminal justice system failures, such as convictions of innocent persons, officer-involved shootings of unarmed persons, deaths in custody, forensic laboratory failures, or loss of probative evidence. A national demonstration project for these efforts funded by the U.S. Department of Justice and based at the Quattrone Center at the University of Pennsylvania's Law School recently recommended such reviews based on a study of fifteen years of prosecutorial misconduct cases in Pennsylvania *See* "*Hidden Hazards: Prosecutorial Misconduct Claims in Pennsylvania, 2000-2016.*"

As the Quattrone Center report explains, sentinel event reviews "evaluate the impacts of upstream systems and existing policies, procedures, and cultural norms on prosecutorial misconduct while recognizing that prosecutors may often commit acts defined as misconduct unintentionally and/or in good faith pursuit of justice." *Id. at*54.

Such a process might examine questions including:

- How do prosecutors respond to cases posing systemic risk? Error by persons whose work or activities involve them in many cases, such as police officers, forensic lab analysts, or informants, necessarily pose system-wide risks. What incentives encourage prosecutors to respond by identifying the full scope of the possible risks? Do policies "err on the side of caution and disclose" as the SJC has specified prosecutors should do in cases of potential exculpatory evidence? *Matter of Grand Jury Investigation*, 485 Mass. 641, 650 (2020).

- How is responsibility allocated in system-risk cases? Responsibility in very important cases may be shifted up to senior lawyers, but individuals in organizations facing significant risk often try to avoid involvement.

- Is there diffusion of responsibility through group management of system-risk cases? Many veteran lawyers in the AGO with decades of combined experience regularly discussed issues arising from the Amherst lab. Did anyone "own" the responsibility? A group of like-minded people can foster "groupthink" in which dissenting, or minority views are implicitly discouraged to maintain consensus. Are these views sought in systemic risk cases?

- How do prosecutors measure their performance in disclosure of exculpatory material? Policies and training are important, but testing shows how a policy is implemented. Line personnel in complex systems who must perform routine tasks are often tested by being given material that should trigger an atypical response. Users of organizational IT systems are occasionally "tested" with fake spear-phishing emails. Couldn't a supervisory prosecutor collaborate with the head of the principal law enforcement agency to include an item that should unquestionably be subject to disclosure in some police department files provided to the office?

- How do prosecutors avoid motivated reasoning in their decision-making about exculpatory material? Humans subconsciously process information to avoid undesirable outcomes, and disclosing information that helps the opposing side is counter-intuitive to lawyers operating in an adversarial system. While this information processing happens without conscious action, knowing about it, testing for it, and measuring it can help.

- What is the organizational culture surrounding disclosure of exculpatory material? Is it celebrated or are prosecutors who convince a judge that certain information is not exculpatory celebrated?

These lessons require a process focused on learning and systems improvements rather than judging. The more learning and improvement, the less risk there will be a need for judging in the future.

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Voice of the Judiciary

Federal Judicial Roundtable: Getting to Know Judges Kelley, Guzman, and Joun

Interviewed by Elizabeth Gardon

The Boston Bar Journal *held a roundtable discussion with three recent additions to the U.S. District Court in Massachusetts: Judges Margaret R. Guzman, Angel Kelley, and Myong J. Joun. In this lively interview, which has been edited and condensed, the judges reflected on their paths to the bench. The second portion of their discussion will be published in the Spring Edition.*

Gardon: Thank you Judge Guzman, Judge Joun, and Judge Kelley for participating in this interview. Congratulations on your appointment to the U.S. District Court. I look forward to talking about your experiences in both state and federal court. Each of you were state court judges before being appointed to the U.S. District Court. Why did you apply to become a state court judge?

Judge Guzman: After nearly 15 years as a full-time public defender, I was looking forward to the challenge of private practice. And despite the welcome challenge of working on new areas of law, I continued to feel that I was at a transition point and decided to apply to the state judiciary. My appointment as a state District Court judge in Worcester was unusual in so many ways. I was only the second woman ever appointed at that level in Worcester. I was from Worcester and had primarily practiced in the Worcester area. The closeness of the legal and regional community, and the legacy of my career as a high-profile criminal defense attorney presented challenges, and I struggled for those first few years. It took me years to transition my mind from that of an advocate to a neutral fact finder. Soon after my appointment, I remember receiving advice from a seasoned and well-respected judge who encouraged me during this transition to take heart that around year 5, I would one day just take the bench, do the job, and know that I was in the right place. And almost to the day, in my fifth year, I experienced that level of comfort. I received enormous satisfaction in bringing my decades of trial experience to the thousands of cases I dealt with daily, having great empathy, but also recognizing the need for fair and timely decisions. It was really gratifying to be able to see justice even at the level of traffic tickets and misdemeanor cases. So, what was a hard transition turned out to be a very important experience in my life which brought me great joy.

Judge Kelley: I applied to the state court because the federal court wouldn't take me initially. I had applied to the federal court after having practiced in New York in federal court. I also was at the U.S. Attorney's Office in Boston. That was the level that I wanted to be at. That didn't happen, so I applied to the state court bench knowing that I wanted to be a judge, believing that it was the highest form of public service in the legal profession. Fortunately, I was given an opportunity to serve on the state District Court. At that time, I wanted to be on the Superior Court, but I was offered the District Court seat. Several years later, I applied again to the Superior Court. I had to take steps to get to the Superior Court, and then ultimately here, which is where I always wanted to be. I feel like I made some good contributions to the state court system, but I always had my eyes on the federal court. One might say I took the long route to the federal court.

Gardon: So how was your state District Court experience? Did you have experience practicing in district court?

Judge Kelley: I did not. Through my students at Harvard, I had experience with the state court system in the Probate and Family Court. But I never actually practiced in the state district or superior court. It was a learning experience like any other. If you look at my background, I made big jumps each time, to different areas of law, different locations, and different types of practice. It was a learning curve like any other, and it was a wonderful experience, but not quite what I wanted for my judicial career. I am grateful for the opportunity to serve in the state court system in two different trial court departments. It helped to prepare me for my new position in the federal court.

Gardon: Thank you. Judge Joun, why did you apply to be a state court judge?

Judge Joun: Some people know, have known, since the first day of law school, that they want to be a judge. I was not one of those people. I never thought about applying to be a judge until friends started becoming judges, and they started talking about their job and encouraging me to think about it. It took me a couple of years before I finally put in an application. Sometimes it just takes somebody to plant that seed, because you don't think that you can be one until somebody says, yeah, I think you'd be good. And then you play around with that idea. After two years of thinking about it, I had the idea that I might be able to make a positive impact on people's lives in a different role. So, I applied.

Judge Kelley: That is probably a very common experience. Sometimes it takes someone to plant that seed. You may not think of yourself as being good enough or worthy of the position. It was the same for me: it was when I was making that transition from New York to Massachusetts, and meeting with some judges here and talking about a career in Massachusetts, when those judges planted the seed for me by saying, "Angel, looking at your background, why don't you consider applying to the bench?"

Judge Guzman: During my time as a trial attorney, many judges urged me to consider seeking a judgeship. Despite my protestations, I think the idea did find its way into the back of my mind. As my life and career matured and changed, many of those same judges reapproached me and asked – "Okay, now are you ready?" I'm not sure if my hesitance was due in large part by the way I saw myself – as an advocate, the one who takes on the worst case, or because of how I looked at the judiciary – I really didn't see anyone on the bench who looked like me or had a similar life journey. And yet, once I got on the bench, the differences began to fade away. Unlike in my early years as a lawyer, the state judiciary became much more representative of the larger society. And despite my own journey, when I was encouraged to apply for the federal bench, I felt those same old doubts about the value of my personal and professional experience to this possible new challenge. Luckily, I have a deep bench of supporters, who refused to let me be trapped by those artificial limits. Of course, the switch from state to federal judiciary was not without challenges, but I approached my new role with the same commitment to bring my experience and desire to do justice for each litigant and each case.

Gardon: What surprised you about being a judge? And, do you miss civil discovery at all?

Judge Kelley: What surprised me, and something I mention to others who are considering a position on the bench, is the lifestyle change. Your world gets smaller, not larger. As lawyers, you might go to different events, and you're always expanding your network. I found that as a judge, my network became other judges. There is less building of friendships and relationships outside of the judiciary. People refer to the job as isolating. There are a lot of things that you cannot do. You cannot engage in political activities, and you need to conduct yourself honorably because you're a reflection of the court.

Gardon: Do you miss discovery?

Judge Kelley: Funny you should ask. I don't miss trials as much: one, because I teach trial skills, and two because I see trials in front of me all the time. But I do miss depositions. On occasion, I teach deposition skills. Depositions were fun. There's a whole science behind doing it well and different ways of doing it. Doing a deposition well is the key to prevailing on a summary judgment motion or at trial.

Judge Joun: I agree with Judge Kelley about the surprise of being a judge. I was surprised by the diversity of cases in the Boston Municipal Court. I had no idea that there were mental health civil commitment hearings and administrative agency appeals in addition to all the contract and car accident cases. Coming here, you have insurance, securities, antitrust, labor, immigration, and IP/trademark cases. Again, it has only been four months, so it seems like every day that I'm opening a file that surprises me, and it keeps me engaged. Today, during lunchtime I was talking to Judge Young, and he said, he's been on the bench for 40 years and he just had a case that he's never seen before. I think that's what keeps us all going. So many interesting cases.

Judge Guzman: I concur with both judges. I would say as much as I enjoyed meeting litigants and doing what I could as a lawyer in the District Court, being on the bench fulfills my desire to be fully challenged with complex legal issues. I was looking for ways to challenge myself and contribute. But I did not believe that the federal judiciary was a realistic goal despite repeated encouragement from my good friend and longtime colleague, Judge Kelley. I wasn't worried about my ability to be a federal judge but skeptical that such a pursuit would be successful. But like most of my life, timing and other forces propelled me to action. When I applied, it was received very well, and I even enjoyed the confirmation process. Every day I come into the Worcester federal court and take on another legal challenge. I have found that I can maintain my way of interacting with lawyers, court staff, and litigants. In conferences, I speak directly to the lawyers to get a sense of what is really at issue—cut to the problems and help find resolutions or just bring it to trial. In my short time on the bench, I have had several jury trials, both civil and criminal. It's been incredible—exhausting, but a good tired. It has taken me a long time to find a place where I could really contribute something unique. And it's almost poetic that I get to do it in my hometown of Worcester.

Gardon: Judge Guzman and Judge Joun, both of you were sole practitioners. How has that shaped your careers as lawyers and prepared you for the bench?

Judge Joun: I feel like this job is more like the solo practice that I had. In state court you didn't own the cases. I remember when you're in private practice and you prepared for everything. Everything was organized. Everything was calendared. As a judge in state court, you don't know what is on the next day until it showed up; then the clerk started passing the files to see what the case is about, and you're trying to read it while listening to the lawyers and trying to figure it out on the fly. Here, because you own the cases, I find myself thinking about the cases all the time, which I didn't do for the last few years. Now I'm thinking about cases as I'm eating dinner, as I'm lying in bed. It's just all-consuming. Just like I had in my solo practice.

Judge Guzman: I think Judge Joun got it exactly right. I only did it for four years. But you take anything that comes in the door. I was really grateful for that experience which helped me a lot when I sat in the civil sessions in the District Court because it took away a little bit of the mystique. You worry about what will happen when you are faced with a trial on a civil case and you've never done one. What I learned is that a trial is a trial. They all have parts, and you can handle them all. So, as a solo practitioner, I was my own secretary, my own investigator, and my own file keeper. I also had to learn how to manage my time when I didn't have a lot of support staff, and that was very helpful. That nimbleness is very helpful in this job. I also think that there's a mystique about serious civil cases. But if you've handled a murder case or very serious criminal assault that's multi-defendant, actually presiding over a trial is quite doable. The issues are similar, and quite frankly, there's almost nothing that can come up in a civil case that can be as jarring as autopsy photos, seeing a juror starting to cry in the middle of a presentation, and things like that.

Judge Kelley: I think Judge Joun makes an important distinction that practitioners may not fully understand. Judge Joun primarily was in the Boston Municipal Court; Judge Guzman and I, probably early on, sat in several different courts within our region. In the District Court you could be in a different place every day, and so you keep your books and robe in the car with you, because you might be on your way to one court, get a call, and be told to go to another court. You don't know what you're walking into. And I used to think that I just needed to have my boots on because I didn't know what I was stepping into. The Superior Court is a bit different in that you have assignments for three months. You're assigned to a civil session or a criminal session; a first session, a trial session, or a motion session. You're able to set up camp for a period of three months, maybe six months if you have a double rotation there. But as far as knowing what you're going to have, I would have my clerk line up my cases for the week, a week in advance so that if I had time, I could start to look ahead to the cases that are coming down the pike. But you don't want to get too far ahead because so many things can come off the list. Then that's time wasted. Whereas here, we have our own cases, from beginning to end, we are managing all aspects of it. That is a really big difference from the state courts. In state court, those cases belong to the session of that court. They weren't our cases. We were only presiding over them for either that day or for that three-month period. It is important to understand the differences between the three courts.

Gardon: All three of you practiced in different offices and environments during your careers, so you bring your own unique backgrounds and paths to the bench. Do you have any advice for someone considering whether to pursue a judicial position?

Judge Guzman: I was a known entity in the City of Worcester, but I also was very active in the local community on the planning board, numerous other boards, and commissions in the city. They also got to know me as a lawyer and someone who was well-known in the community. I didn't do it strategically, but it turned out that many of those calls were very instrumental in filling out a picture of me that was larger than just my resume and my experience as a lawyer. One of the things I would say is, you must be true to yourself. I think the most important thing a young lawyer or new lawyer must figure out is who are they within the legal community and if this is something they want to do for a career. Some people find themselves practicing law for a couple of years, and then they segway into something more lucrative or more satisfying. So, you have to figure out what you want. The natural reputation that you have earned shows who you are. For instance, Judge Kelley dedicates a lot of her off time to teaching, training students in trial advocacy, and volunteering to judge mock trials. That is something I've known about her since we met more than 15 years ago. That is a very natural thing she does. She's good at it. And so, she found that and has continued to do it. People need to find that thing about themselves.

Judge Joun: I think back to why I dismissed the thought initially when people suggested that I apply to be a judge, and it was because I thought, "I'm not the sort of candidate that they're looking for with my background." To those people who are interested in the job of being a judge but are afraid that they might be rejected for their diverse professional experience, I would ask them to reconsider. I think back to when my kids were really young, there was a movie called Ratatouille, and there was a line that said, "Anyone can cook," and it didn't mean that anybody can be good at cooking, it just meant that a cook can come from anywhere. And so, people who didn't have the traditional resume of having gone to an Ivy League school, clerk for other federal judges, gone on to work for a prosecuting agency or work for a big law firm. I mean, that was the sort of the traditional path to the bench. I really thought I had no chance. I was definitely interested in the job, but I was also being realistic and looking at my resume. I thought this is not the kind of resume that they're looking for. So, to those people who have similar backgrounds, and think that the bench is foreclosed to them, I would ask them to reconsider.

Judge Kelley: I would say two things: One is following up what Judge Joun just said and that is, people should not screen themselves out, particularly persons of color, who tend to do that. Whether you call it imposter syndrome, or something else, I would suggest to people that they turn down that noise in their head, because that's what it is, noise. As the slogan for the lottery is, "You gotta be in it to win it." You've got to apply. And if you have a job, that's a great time to apply. If you have a job that you love, that's an even better time to apply because you're not screening yourself out, you are creating an opportunity to go on to something greater, but if you don't get it—and sometimes we don't get it—we're still in a job that we love. I urge everyone not to screen themselves out, even for the second application or third time trying. Maybe it's the New Yorker in me, and maybe because of my tough mother that I have developed a thick layer of skin. You can tell me "no." It's okay, because I still have a job, and it doesn't diminish me. That's why I would suggest people turn down that noise in their head because they are worthy of it. The second thing relates to what Judge Guzman was talking about—that people should guard their reputation in whatever it is that they do—whether it's in their professional job title, or whether it's in the work that they do outside of that job title. If you take on a responsibility, do it well, because that will be what people remember.

Hon. Angel Kelley was appointed to the U.S. District Court for the District of Massachusetts in September 2021. She previously served twelve years as a state court judge in both the District Court and the Superior Court. She was a trial attorney before joining the bench, in New York and Massachusetts, in both state and federal courts, with experience in both civil litigation and criminal work as a federal prosecutor and defense attorney.

Hon. Margaret R. Guzman was appointed to the U.S. District Court for the District of Massachusetts in July 2023. She previously served for fourteen years as a judge in the Massachusetts District Court. Prior to judicial service, she was a sole practitioner in Worcester from 2005 to 2009; and from 1992 to 2005, she served as a public defender for the Massachusetts Committee for Public Counsel Services.

Hon. Myong J. Joun was appointed to the U.S. District Court for the District of Massachusetts in July 2023. From 2014 to 2023 he served as an Associate Justice of the Boston Municipal Court. Before the bench, he was in private practice for fifteen years focusing on criminal defense and civil rights litigation in state and federal courts.

Elizabeth L. Gardon is an associate at Todd & Weld, where she concentrates her practice on complex civil litigation matters. Gardon previously served as a law clerk to a state trial court judge in New York.

Case Focus

The Impact of the SJC's Decisions in *Commonwealth v. Guardado* on Future Firearms Prosecutions

By Elisabeth Martino

The last two years have been notable ones for Second Amendment jurisprudence, both nationally and locally. The seeds of this dramatic transformation were planted when the United States Supreme Court decided *District of Columbia v. Heller*, 554 U.S. 570 in 2008, holding for the first time that the Second Amendment to the United States Constitution confers an individual right, unconnected to militia service, to keep an operable firearm in the home for self-defense. Two years later, the Court incorporated that right and made it applicable to the states through the Fourteenth Amendment in *McDonald v. City of Chicago,* 561 U.S. 742 (2010). In 2022, the Court expanded its holdings in *Heller* and *McDonald* in *New York Rifle & Pistol Ass'n v. Bruen*,142 S. Ct. 2111 (2022), ruling that the Second Amendment protects an individual right to carry a firearm outside the home for self-defense, and creating a new framework—rooted in the text of the amendment and the "Nation's historical tradition of firearm regulation"—for assessing Second Amendment challenges to gun laws. *Id.* at 2139-40.

Since *Bruen,* civil and criminal litigation has proliferated in Massachusetts' state and federal courts to flesh out the limits and contours of the right to carry a firearm and other bearable arms. Criminal defendants and civil plaintiffs alike have challenged the constitutionality of Massachusetts statutory schemes criminalizing the possession and carrying of illegal firearms and dangerous weapons as well as the licensing regime for obtaining and maintaining a valid firearm license or identification card. Lawsuits challenging bans on categories of weapons, such as the Massachusetts assault weapons ban, are also increasing in frequency.

During the twelve years between *Heller* and *Bruen,* the Supreme Judicial Court decided how the Second Amendment would impact criminal prosecutions for unlicensed possession of firearms and ammunition under G.L. c. 269 § 10, holding in *Commonwealth v. Gouse*, 461 Mass. 787 (2012), that a defendant charged with illegal firearm possession must furnish evidence of a valid license as an affirmative defense. In *Gouse*, the defendant challenged his conviction for illegally possessing a firearm under G.L. c. 269 § 10(a), claiming that it violated the due process guarantees of the Fourteenth Amendment to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights, as well as his Second Amendment right to keep and bear arms. *Id*. at 799. Specifically, the defendant claimed that the lack of a license was an essential element of the possessory offense under Section 10(a), and that placing on the defendant a burden to affirmatively produce evidence of licensure created a *presumption* of unauthorized possession that did not pass constitutional muster. The SJC disagreed, reasoning that, because *Heller* and *McDonald* established only a right to possess a handgun in the *home* for the purpose of self-defense, the prohibition against possessing a firearm *outside* the home did not implicate the defendant's Second Amendment rights. As a result, a presumption of unauthorized possession where the defendant failed to affirmatively prove he had a license did not infringe on constitutionally protected conduct. Gouse, 461 Mass. at 802. After the Supreme Court in *Bruen* recognized a Second Amendment right to keep and carry a firearm outside the home, however, the SJC's decision in *Gouse* was called into question.

Commonwealth v. Guardado (Guardado I)

In *Commonwealth v. Guardado*, 491 Mass. 666 (2023) the defendant challenged his illegal firearm convictions under G.L. c. 269, § 10, arguing that the trial judge improperly failed to instruct the jury that the prosecution was required to prove that the defendant did not have a firearms license in its case in chief. *Id.* at 686. The defendant's criminal trial occurred in 2021, before the decision in *Bruen*. During trial, the defendant did not object to the lack of a jury instruction placing on the Commonwealth a burden to prove the defendant lacked a valid license. While the failure to object often results in waiver or a higher standard to make a claim, the SJC invoked the rarely used "clairvoyance exception," holding that the defendant need not have raised this constitutional issue at trial because "the constitutional theory on which the defendant [] relied was not sufficiently developed at the time of trial," and thus did not "afford the defendant a genuine opportunity to raise his claim." *Id.* (citing, *e.g.*, *Commonwealth v. Connolly*, 454 Mass. 808, 830 (2009)).

The SJC then revisited the question whether "the failure to obtain a valid firearms license is now an essential element of unlawful possession of a firearm," such that "the defendant's rights to due process were violated when the judge placed upon him the onus of presenting evidence of licensure." Id. at 688. The Court concluded that *Gouse* is no longer valid, noting that because, after *Bruen*, "possession of a firearm *outside the home* is constitutionally protected conduct, it cannot, absent some extenuating factor, such as failure to comply with licensing requirements, be punished by the Commonwealth." Guardado, 491 Mass. at 690 (emphasis added). Thus, the Court overruled *Gouse*, and so going forward the Commonwealth must prove that the defendant did not possess a valid license to possess the firearm or ammunition as an essential element of firearms offenses, and the jury must be appropriately instructed that the Commonwealth bears that burden of proof.

Further, the SJC found in *Guardado I* that, because there had been no licensure instruction to the jury at the defendant's trial, the defendant could only be convicted of unlawful possession of a firearm if the Commonwealth had proved the defendant lacked a valid license during its case in chief and, because no such evidence was in fact admitted, "the defendant was convicted of a crime solely on the ground that he had engaged in the constitutionally protected conduct of possessing a firearm in public." Id. at 691. The Court thus reversed the defendant's convictions, ruling that his rights to due process had been impermissibly violated. Relatedly, the SJC also reversed the defendant's conviction as to possessing ammunition, because that conduct was also protected under the Second Amendment.

The SJC concluded that its holding did not announce a "new constitutional rule" and therefore would not be applied to convictions that became final prior to the *Bruen* decision on June 23, 2022. This means that the Court's holding applies only prospectively and to those cases that were active or pending on direct appellate review as of the date of the issuance of *Bruen. See* id. at 693.

The Remedy in *Guardado I*

After vacating the defendant's conviction in *Guardado I*, the SJC remanded the case to the trial court for entry of a finding of not guilty without any possibility of retrial, which is the usual remedy when a defendant is convicted upon insufficient evidence at their criminal trial.

In May 2023, however, the Commonwealth moved the SJC to reconsider the *Guardado I* remedy, arguing that the appropriate remedy was to reverse his conviction and allow for retrial, and not to

wholly vacate his conviction and bar the possibility of retrial. The SJC granted the Commonwealth's motion for reconsideration.

The Remedy in *Guardado II*

In *Commonwealth v. Guardado*, 493 Mass. 1, 4 (2023) (*"Guardado II"*), the Court agreed with the Commonwealth that the proper remedy in this case was a reversal of the defendant's convictions and remand to the Superior Court for a new trial for the defendant. The Court reasoned the lack of a jury instruction on the licensure requirement as part of the Commonwealth's case in chief did not violate double jeopardy provisions, especially where prior case law from the Court had not put the Commonwealth on notice of this "new" constitutional burden. "In such circumstances, a retrial does not impose on the defendant any of the evils from which the prohibition against double jeopardy is intended to protect." *Id.* (citations omitted). The Court again remanded the case to the trial court, this time for a retrial on the defendant's firearm indictments.

Future Implications

Numerous criminal defendants in Massachusetts courts may be entitled to the benefit of the SJC's decisions in *Guardado I* and *II.* Currently, any active case or direct appeal that had not been decided by June 23, 2023, may be impacted by the Court's *Guardado* decisions. Trial judges and litigants are grappling with a myriad of issues going forward at both the trial and appellate levels.

At the appellate level, litigants and the appellate courts are considering what quantum of evidence *was* sufficient on the issue of non-licensure such that a defendant's criminal conviction need not be reversed, and a new trial ordered, even when there was no jury instruction that the government needed to prove non-licensure. For example, if there was evidence that the defendant was under the age of twenty-one or a convicted felon–both of which make it impossible to obtain a firearms license as a matter of law, *see* G.L. c. 140, § 131(d)(i)-(ii), (iv)–is a new trial warranted? Also, when a defendant's defense at trial was that a firearm was not theirs, are they entitled to a new trial due to lack of instruction on licensure?

The SJC has said that a defendant's conviction may stand even where the trial judge failed to give a proper licensure instruction at trial in cases where the defendant's lack of license was never in dispute. For example, in *Commonwealth v. Bookman*, 492 Mass. 396 (2023)—a decision that post-dates *Guardado I*—the SJC held that the trial judge's failure to give a licensure instruction was harmless beyond reasonable doubt where a police officer testified at trial that the defendant did not have a valid firearms license and where "there [was] nothing in the record to suggest that the defendant disputed this testimony." *Id*. at 401. Similarly, another unpublished decision that post-dates *Guardado I*, the Appeals Court held that the lack of licensure instruction was harmless beyond a reasonable doubt where the defendant had admitted to police that he did not have a license and did not dispute his lack of licensure as an issue at trial. *See Commonwealth v. Taft* , 103 Mass. App. Ct. 1108 (2023). Where the trial record was devoid of any evidence of licensure however, convictions will not stand. *See, e.g.*, *Commonwealth v. Souza*, 492 Mass. 615, 638 (2023) (where no evidence was admitted at trial that would suggest defendant did not have a license to carry a firearm, the trial judge's failure to instruct was not

harmless beyond a reasonable doubt); *Commonwealth v. Gibson*, 492 Mass. 559, 579 (2023) (where there was no instruction that required the Commonwealth to disprove that the defendant had a license to possess a firearm and no evidence that defendant's lack of license was introduced at trial, defendant's firearm convictions cannot stand).

At the trial level, litigants are contending with evidentiary issues to prove the "new" element of non-licensure, as well as how to object to the prosecution's evidence to prove the lack of licensure in a particular case. To give just one example: Should the Commonwealth be able to meet its burden of proving a defendant was ineligible for a license because of prior felony convictions, or is such evidence impermissibly prejudicial "prior bad act" evidence? Should a defendant be allowed to object to such evidence on that basis, or is the Commonwealth entitled to the best evidence to prove its case?

Questions abound, and the next few years will likely bring many answers. For now, it seems clear that the government must prove that defendants are unlicensed to hold them criminally liable. But virtually every other question about how to implement this new rule remains to be worked out by Massachusetts courts in the years to come.

Elisabeth Martino is currently the Deputy Chief of the Appeals Unit at the Suffolk County District Attorney's Office. She has been an appellate attorney with Suffolk County District Attorney's Office since she received her JD cum laude from Suffolk Law School in 2008, with the exception of a few years when she worked part-time as an adjunct professor of Appellate Research and Writing at New England School of Law while also raising her two young children.

Ms. Martino was not involved in the prosecution of Mr. Guardado either before the Superior Court or the Supreme Judicial Court.

This article represents the opinions and legal conclusions of its author and not necessarily those of the Suffolk County District Attorney's Office.

Heads Up

Recent Superior Court Rules Amendments

By Hon. Jackie A. Cowin

Several changes to the Superior Court Rules governing civil motion practice took effect on September 1, 2023. These changes were jointly drafted by the Superior Court's Civil and Rules Committees, which include a combined 16 judges; adopted by a vote of the entire Superior Court ("Court"); sent for public comment; and approved by the Supreme Judicial Court.

Some of the changes are meant to end practices that, in the Superior Court's view, impede the efficient disposition of motions. While such practices were not universal, they occurred frequently enough to merit response. All of the changes are designed to inform the bar as to the Court's expectations for how motions should be filed, and promote the Court's ability to act on motions in a timely and effective manner.

For each substantive rule amendment, the relevant portion of the rule is reprinted in italics below, with the amendment in bold, followed by a brief explanation of the amendment's purpose.

AMENDMENTS TO RULE 9A: CIVIL MOTIONS

RULE 9A(b): PROCEDURE FOR SERVING AND FILING MOTIONS

Rule 9A(b)(2)(iii): Notice of Filing

> *The moving party must give prompt notice of the filing of a Rule 9A Package by serving all parties with a copy of a notice of filing in a separate document that lists the title of each document included in the Rule 9A Package, and by filing the notice with the Rule 9A Package.* ***No other list of documents need be included in the Rule 9A Package.***

This change is meant to end the practice of filing both a Notice of Filing and a List of Documents, in order to eliminate the latter, duplicative filing.

Rule 9A(b)(2)(iv): Exhibits

> ***Exhibits, attached to a motion, memorandum or affidavit, or contained in a separate appendix, must be separated from one another by off-set tab dividers, or page markers if filed electronically, and the pages of the exhibits must be consecutively numbered. If more than one exhibit is included, a Table of Contents or Exhibit Index shall precede the exhibits.***

This new rule is meant to end the practice of filing exhibits without dividers, an index, and/or pagination, which led to significant frustration on the part of judges trying to locate material cited and relied upon by the parties. These changes will enable judges to reference cited exhibits easily, leading to more efficient review of the motion.

Rule 9A(b)(5)(v)(A): Contents, format, citation, and service (of Joint Appendix)

> ***… All pages of the Joint Appendix must be consecutively numbered by page, and each exhibit must be separated by an off-set tab divider, or page marker if filed electronically. The exhibits served by the moving party with its Motion Papers must include the consecutive numbering and offset tabs. …***

As with the new Rule 9A(b)(2)(iv), the above change is meant to end the practice of filing exhibits without dividers and/or pagination, so that the judge can reference exhibits easily when reviewing a motion.

AMENDMENTS TO RULE 9A(d): EXCEPTIONS

Rule 9A(d)(1): **Ex parte, emergency, and other motions**

> *... Emergency motions, other than ex parte motions, must be served on all parties forthwith upon filing….* ***The nature of the emergency must be clearly specified in the motion.***

This addition is meant to assist judges in evaluating whether the relief being sought is truly emergency in nature, thus permitting Rule 9A procedures to be bypassed.

Rule 9A(d)(2): **Motions involving incarcerated parties**

> *...* ***Upon release, a previously incarcerated party shall promptly file*** **and** ***serve notice of change of address. All provisions of Rule 9A shall take effect (a) for the previously incarcerated party, the day of release; and (b) for the non-incarcerated party, the day of notification of the other party's release.***

This change makes explicit the previously incarcerated party's obligation to notify the Court and the other party of release; both parties' obligation to follow Rule 9A procedures upon release; and the date when Rule 9A takes effect.

AMENDMENT TO RULE 9B: CERTIFICATES OF SERVICE

> *The last page of every paper served in accordance with Mass. R. Civ. P. 5(a) shall contain a brief statement showing the date* ***and manner of service of the paper; the names and addresses (mailing or email) of all counsel (or parties) served; and the party represented by each counsel served.*** *The statement may be in the following form:*
>
> ***I hereby certify that on [date] a true copy of the above document was served by [hand/mail/email] upon:***
> ***Attorney name [or pro se party's name]***
> ***Address [mailing or email]***
> ***Attorney for _____ [or pro se party]***

Under the prior version of this rule, certificates were sometimes unclear as to whether all necessary parties had been served, such as when a Motion to Amend to add a new party was filed, or the case involved numerous separately represented parties. Also, the prior rule did not require identifying the address used for service, which occasionally led to disputes about whether

service was made at the correct address. The changes are meant to eliminate these areas of potential confusion.

AMENDMENT TO RULE 9C: COUNSEL TO CONFER PRIOR TO FILING MOTIONS

Rule 9C(c): Discovery Disputes

> *... With respect to each interrogatory or request at issue, the brief shall set forth separately and in the following order (1) the text of the interrogatory or request, (2) the opponent's response and (3) an argument. Alternatively, the text of the interrogatory or request and the opponent's response may be provided in an appendix to the brief,* ***as long as the brief includes an argument addressed to each interrogatory or request. No argument may be included in the appendix.***

This change is meant to clarify that a party must explain the alleged deficiencies in each discovery response it challenges, rather than simply arguing that the discovery responses as a whole are deficient. Parsing out the deficiency in each response at issue (and specifically defending each such response) is more helpful to the Court's analysis than generalized argument.

AMENDMENT TO RULE 9D: MOTIONS FOR RECONSIDERATION

> ***A Motion for Reconsideration shall be based on (1) newly discovered evidence that could not be discovered through the exercise of due diligence before the original motion was filed; (2) a change of relevant law; or (3) a particular and demonstrable error in the original ruling or decision. A Motion for Reconsideration shall otherwise raise no new grounds for relief not raised in the original motion or opposition and shall not reiterate previously advanced arguments.***
>
> *Motions for Reconsideration shall be served and processed consistent with Rules 9A* ***and 9C****.* ***A Motion for Reconsideration shall identify, in the first paragraph, the newly discovered evidence, change of relevant law, or particular and demonstrable error in the original decision on which the motion is based. A Motion for Reconsideration based on a particular and demonstrable error in the original ruling or decision must be served pursuant to Rule 9A within 21 days of entry of the original ruling or decision.***
>
> ***A Motion for Reconsideration and supporting memorandum shall be contained in a single document and shall not exceed 10 pages in length.*** *The words "MOTION FOR RECONSIDERATION" shall appear clearly in the title of the motion.* ***Any opposition shall not exceed 10 pages in length.*** *...*

This change, which codifies the proper bases for reconsideration set forth in *Audubon Hill S. Condominium Ass'n v. Community Ass'n Underwriters of Am., Inc.*, 82 Mass. App. Ct. 461, 470 (2012), acknowledges the undue burden imposed on opposing parties and the Court by motions for reconsideration which merely rehash arguments made in the original motion, or which raise new arguments that could have been, but were not, raised in the original motion. The new rule is also meant to end the practice of filing motions for reconsideration that allege errors in the

original ruling long after the original ruling is issued, as was permissible under the prior version of the rule.

NEW RULE 9F: REQUESTS TO AMEND TRACKING ORDER

> ***All motions seeking to amend the Tracking Order to permit additional discovery must identify the following: (1) the number of times the Tracking Order has previously been enlarged in the case; (2) a brief summary of the discovery that has been conducted to date; (3) the discovery remaining to be conducted; (4) a brief summary of the nature of the claims in the case; and (5) any other information deemed relevant by the movant(s).***

This new rule is meant to provide judges with information about the progress of a case that will assist them in deciding how to act on motions to enlarge in a way that will best promote the efficient resolution of cases.

Hon. Jackie A. Cowin is an Associate Justice of the Massachusetts Superior Court. She is a member of the Superior Court's Committees on Rules and Civil Practice, and a member of the Flaschner Judicial Institute Board of Trustees.

Case Focus

Investigating Allegations of Elder Abuse Can be Complicated

By Karen Greenberg and Daniel Pollack

The Problem

The National Center on Elder Abuse reports that "the population age 65 and older numbered 52.4 million in 2018" (the most recent year for which data are available). That group of older Americans then "represented 16% of the population, more than one in every seven Americans. The number of older Americans has increased by 13.7 million (or 35%) since 2008, compared to an increase of 4% for the under-65 population."

Elder abuse appears in many forms: physical, neglectful, sexual, emotional, and financial. Some are easily recognizable. Others are not. Regardless of the form, elder abuse is widespread, often hard to detect, and can be deadly. The good news is there are many community and government resources that address elder abuse. The bad news is that these resources do not come with a guarantee. Identifying and addressing each instance of abuse presents inherent roadblocks. Many roadblocks only serve to underscore the complicated nature of elder abuse. Victims may not have a viable support system. They often live alone, have few family or friends close by, and can be isolated because of a disability, memory loss, dementia, or overmedication.

The Law

The Older Americans Act became law in 1965 as part of President Johnson's "Great Society" initiative. Its goal was to help older Americans live at home while maintaining their dignity and independence for as long as possible. The Supporting Older Americans Act of 2020 is the reauthorization of the Older Americans Act. Its goal was to make significant improvements on behalf of older Americans across the country.

There are laws in every jurisdiction to combat elder abuse. The term "abuse" means the knowing infliction of physical or psychological harm or the knowing deprivation of goods or services that are necessary to meet essential needs or to avoid physical or psychological harm. Although the definition appears to be easy to perceive or understand, one must prove the allegation and the act as prohibited by the statute. Investigating these reports is not simple and meeting burdens of proof can be difficult.

A Recent Case

A recent Massachusetts Appeals Court case addresses the complexities of elder abuse cases. In *Gallagher v. South Shore Hospital, Inc.*, 101 Mass. App. Ct. 807 (2022), the plaintiff was named the health care agent and attorney-in-fact by an elderly man for whom she was the caretaker and who had lived in her home for years. *Id.* at 809. The Appeals Court reversed the lower court's summary judgment ruling granted in favor of the defendants: caseworker, police officer, social service agency and hospital. The plaintiff alleged the defendants violated the Massachusetts Civil Rights Act, G.L. c. 12 §§ 11H-11I, by intimidating an elderly person and his caretaker. *Id.*

Allegations included the defendants "illegally entering their home and seizing the man, using threats of intimidation." *Id.*

Specifically, a police officer and elder care caseworker entered the plaintiff's home, pursuant to a report filed under G.L. c. 19A § 15 (1982) (elder abuse and neglect report ("§15 Report")). The §15 Report contained allegations of verbal abuse and neglect. *Id*. Neither the police officer nor the caseworker gave notice pursuant to the statute, to enter the home or had a court order. *Id.* at 809. Over the objections of the caretaker, the man was transported to a hospital. *Id*. at 809.

The Appeals Court disagreed with the lower court's summary judgment ruling based upon a number of facts in dispute. Alleged violations of civil rights and trespass failed to support summary judgment in favor of the Defendant police officer, caseworker, and Elder Services. *Id*. at 807-809, 813-14. In dispute was whether the caseworker, while standing outside the front door, could see that the elderly man was nonresponsive. *Id*. at 814. There was no dispute that the officer and caseworker entered the home without permission. *Id*. at 807, 814. Summary judgment was also unsupported for the claims of false imprisonment and battery in favor of the Defendant hospital. *Id*. at 816-17. Although there were "no locks on the doors or physical barriers" to prevent the caretaker or man from leaving, the hospital had a "sitter" present 24 hours at the elderly man's door. *Id*. at 817.

G.L. c. 19A § 18 (1982) mandates that, "an elderly person who is the subject of the report shall receive written notice that an assessment is being conducted and shall have the right to review the file and report developed as a result of the assessment." There was no evidence that either [the caretaker] Gallagher or [the elder] LaPlante received notice of, or were given the opportunity, to review a report. *Id*. 807.

The caseworker and police officer claimed that, after observing the elderly man through a glass storm door and receiving no response when they rang the bell, called for the caretaker, and telephoned, they took it upon themselves to determine the need for a wellness check because of "exigent circumstances." *Id*. at 896. The police officer called an ambulance because he had observed the elderly man as non-verbal, looking "disheveled, … pale and in a deep sleep." *Id*. at 815. The caretaker claimed the police officer and caseworker refused to heed her explanation of the elderly man's current condition. *Id*. The caretaker, who was the elderly man's health care agent did not consent to him being taken by ambulance to the hospital. *Id*. Having cared for the elderly man for many years, the caretaker understood his baseline abilities and needs. *Id*. at 816. The hospital staff, however, ignored the caretaker. *Id*. at 816-18.

Contrary to the caseworker's assumptions, the man was not dehydrated. *Id*. at 815. In due course, it was determined that the caretaker was correct and there was simply no medical need. *Id*. at 817-18.

Conclusion

The *Gallagher* case presents a complex situation. The caretaker's responsibility was to protect the elderly man in her charge. The police and the caseworker's responsibilities were also to protect this elderly man. This can be likened to a person who claims she was wrongfully

admitted to the hospital as a danger to herself, or others, because someone, perhaps her own doctor, reacted to observations of her behavior. Both were being vigilant, cautious, and prudent. Nevertheless, this may result in unintended adverse consequences.

How do we get beyond this? Here are some modest suggestions:

Although in many states the public is not legally obliged to report suspicions of elder abuse, the more the subject is discussed the more the public will be aware. It is important to be aware that the predominant perpetrators of elder abuse are people in positions of trust. This means immediate family members and caregivers.

Training regarding elder abuse should be a requirement for attorneys, law enforcement, judicial, health, and social service personnel.

Besides physical abuse, attorneys should be aware of all professionals interacting with an elderly person and be alert to possible exploitation regarding the disposition of an older person's property, will, inheritance, and finances.

The vast majority of victims have no voice. Elder abuse is a transgression which places the victim at the mercy of those entrusted with their care. The *Gallagher* case underscores how professionals may be at fault. Elder abuse is a societal ill which must be placed on high alert. That can only come with education and awareness.

Karen K. Greenberg is a partner at Konowitz & Greenberg, in Wellesley Hills, Massachusetts. Daniel Pollack is a professor at Yeshiva University's School of Social Work in New York City.

Head's Up

What to Know About the Recent Change to the Massachusetts Estate Tax

By Cassandra L.M. Prince

On October 4, 2023, Massachusetts Governor Maura Healy signed into law a $1 billion tax reform package ("tax package"). *See* H.R. 4104, 2023 Leg., 193rd Sess. (Mass. 2023). The enactment of the tax package has garnered much attention as it contains the first tax cuts in more than 20 years in Massachusetts and is intended to boost the affordability in the state for residents and businesses to call Massachusetts their home and to increase the Commonwealth's economic competitiveness with other states. More specifically, the new law increased the Massachusetts estate tax exemption from $1 million to $2 million and did so retroactively to January 1, 2023.

What is an Estate Tax?

To better understand what an estate tax is, it is important to first understand what is an "estate." An estate is the total property, real and personal, owned by an individual prior to distribution through a trust or will. *See Estate*, Wex Legal Dictionary (database updated September 2022). Any individual who owns property (real or personal) has an estate. An estate tax is a levy on the value of the gross estate (this amount less deductions) of a deceased person ("decedent") as of their date of death before distributions to any beneficiaries of an estate. *See* G.L. c. 65C, § 2A(a).

There are both federal and state estate taxes. Federal and state estate taxes apply to estates that have reached a certain threshold value as determined by legislation. Not all states have an estate tax. In the United States, Massachusetts is among only12 states that have an estate tax. Prior to the enactment of the tax package, Massachusetts tied with Oregon as having the lowest estate tax exemption amount ($1 million) in the nation. Currently, Massachusetts ranks third as having the lowest estate tax exemption amount in the nation.

What are Key Changes to the Massachusetts Estate Tax?

The tax package provides a credit of $99,600 against the Massachusetts estate tax, which has the effect of increasing the Massachusetts estate tax exemption to $2 million. With this change, Massachusetts residents and non-residents who own property in Massachusetts that have a gross estate valued over $2 million will be required to file an estate tax return and pay an estate tax. *See* Mass. Gen. Laws ch. 65C, § 2A(g). This change takes effect for estates with dates of death on or after January 1, 2023. *Id*. For estates of decedents who have died prior to January 1, 2023, the previous estate tax exemption of $1 million will apply. *See* Massachusetts Department of Revenue (last updated Dec. 1, 2023). It is important to note that unlike the federal estate tax exemption, the Massachusetts estate tax exemption is not adjusted annually for inflation, so this $2 million amount will remain in effect unless and until the Legislature amends it again in the future.

Additionally, the tax package addresses the issue of the "cliff effect" under the previous law, which taxed an entire estate that was over $1 million rather than assets in excess of $1 million. The new law eliminates this cliff effect by taxing assets that are over $2 million only. For example, prior to the tax package, an estate that had a gross estate valued at $1 million would not owe an estate tax. However, an estate that had a gross estate valued at $1.05 million would owe

an estate tax of $20,500 on the entire value of the estate rather than the $50,000 in excess of $1 million. *See* G.L. c. 65C, § 2A(a). In effect, the tax on the entire value of the gross estate valued at $1.05 million eliminated the exemption amount of $1 million. Under the new law, an estate that has a gross estate valued at $2.05 million, would owe an estate tax of $3,600 on the $50,000 in excess of $2 million, which maintains an exemption amount of $2 million.

Lastly, the new law altered the calculation of estate taxes for estates that include real and tangible property outside of Massachusetts. *Id*. More specifically, the estate tax of an estate would now be reduced by the proportion of the entire gross estate that consists of property outside of Massachusetts. *Id*. Prior to the new law, if a decedent was domiciled in Massachusetts and owned real property outside of Massachusetts, that real property was not included in the determination of estate tax liability in Massachusetts. After the new law, the real property would be included in the determination of estate tax liability in Massachusetts. For example, prior to the new law, if a decedent was domiciled in Massachusetts and had a gross estate that consisted of Massachusetts property valued at $1 million and real property located in Georgia valued at $1 million, then the real property would not be included as part of the estate of a decedent. In that case, the Massachusetts share of the estate would fall within the exemption amount of $1 million and no tax would be due. Under the new law, if a decedent's gross estate consisted of Massachusetts property valued at $3 million and real property in Georgia valued at $1 million, then the taxable estate would be reduced by 25% because the real property in Georgia makes up 25% of the entire gross estate. As a result, the estate in Massachusetts would be taxable at 75% as that is the proportion which is only attributable to the Massachusetts property.

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Voice of the Judiciary

Chief Justice Stacey Fortes of the District Court

Interviewed by Judge Catherine Hyo-Kyung Ham

Judge Ham: Thank you for taking the time to interview with me. Can you tell us about your upbringing, education, or experience that led you to first apply to become a judge?

Judge Fortes: I was raised in Boston. My mother and my father were very much involved in social justice and there was a strong emphasis in my family and from African American history to focus on giving back. What I learned from my parents had a big impact on me in terms of wanting to do good and giving back.

I was the first person in my family to graduate from college. I went to American University as an undergraduate, and Suffolk Law School. I became an assistant district attorney in the Roxbury Division.

Judge Ed Redd, Judge Milton Wright, and Judge Greg Phillips were presiding in Roxbury at the time, that was the first time that I ever saw judges that looked like me. There, I really first learned what it was like to work in a community court. And that's where my love for the District Court started.

Judge Ham: You were first appointed to the bench in 2006. You held quite a number of impressive titles and bore significant responsibilities since then: you were the Regional Administrative Judge in 2014, First Justice of Lowell District Court in 2017, and now, the Chief Justice of the District Court in 2022. How did these experiences prepare you for your current role?

Judge Fortes: I think through all of my experiences, I've had an opportunity to really see all of the challenges that face the District Court. For most of my time as a sitting judge, I served in busy urban courts. I sat for 7 years in the Lynn District Court, another 7 years in the Lowell District Court, as the First Justice there. So, I understand the challenges facing the District Court, including pressures on judges, clerks, and probation officers in terms of the volume of cases that they handle on a daily basis.

I often analogize our courts to busy emergency rooms. We see a large volume of cases in the District Court. We are dealing with trauma, mental health issues, substance abuse issues and violence. We often encounter people on the worst day of their lives. That's what we see on a daily basis. We are trying to figure out how to deliver justice and to meet the needs of the communities that we serve. So, having the experience as a sitting judge and being able to deal with a variety of cases that come into the courthouse on a daily basis, has prepared me. I know the challenges that all of our clerks, probation officers and court officers deal with, trying to figure out new ways to meet the demands of the community.

Certainly, there is a need for collaboration and communication with people outside of the court, including all of the stakeholders and community agencies. The relationships that I have built with the other management who serve the court are critical in order for us to continue to deliver

justice. Those types of partnerships, and those experiences, helped me to step into the role of Chief Justice.

Judge Ham: Now that you've served as a chief of the District Court for over a year, has your perspective of the role of a judge in the District Court stayed the same, or has it altered in any way at all?

Judge Fortes: I can tell you I've always been extraordinarily proud to serve the District Court. I spent the first year traveling from one end of the state to the other, so I was able to visit all 62 district courts. I have not made it to Martha's Vineyard, but I have plans to do that soon.

I wanted to do that to hear from that everybody. I spent time with the First Justices, clerk magistrates, probation chiefs, and court officers, and asked them, "What do you need? How can we help?" And I can tell you that I am so impressed with the work that is done in our courts. There are so many disparities in terms of resources, such as old buildings bursting at the seams and lack of technology. But things that are really just being held together by people's initiatives and thinking outside the box. There are challenges like having enough interpreters and having enough clinicians. The esteem that I hold for everyone who serve in and for the District Court has only grown based on my travels and conversations.

Judge Ham: You are the first African American woman and the first judge of color to serve as the Chief Justice of any trial court in Massachusetts. You were the first African American woman to serve as the First Justice of Lowell District Court, and I probably have missed other "firsts" as well. These are many paths that you are paving. To what do you attribute your success?

Judge Fortes: First, my parents. I also look around at the artwork and books in my office and it reminds me that I get so much strength from my history and where I come from, and I understand that there are people who have walked the path before me who have been resilient.

I have two grandmothers: one who had to raise five kids and one who raised seven kids while cleaning people's houses and they suffered all kinds of indignities as African American women, but they had a strong work ethic and cared about their communities. So, I draw a lot from those who came before me, and I attribute any success I have to those who paved a way for me.

Judge Ham: Is there a different pressure that you place on yourself, or that others place on you after becoming so many "firsts?"

Judge Fortes: I don't think there is a minority child who has not heard from their parents, that in order to get in the room, get through the door, you cannot just be good. You have to be better. And that pressure comes from just being who you are. You know that you're under a spotlight that maybe other people don't have, and you're concerned about making mistakes, and how those are going to be perceived. You want to make sure that you are putting your best foot forward again, because as important and as exciting it is to have this first opportunity, you want to make sure that there's a standard of excellence to which you hold yourself so that others can have the opportunity. It means a lot to me to have this role. It means even more to me to know that I am creating opportunities for people who will come after me.

Judge Ham: Being a leader and a woman of color is a congruent concept to you and me, but perhaps not to the general public. In a world where there are so few women of color in leadership, what are your strengths that you draw from?

Judge Fortes: Probably back to what I said earlier, my strength comes from surrounding myself with books, with art, with quotations from my heroes and my family members. I have a book in my office about Judge Constance Baker Motley, the first Black woman on the federal bench. People who have walked the path before me give me the strength and help me to persevere.

Judge Ham: Can you tell us a little bit about the painting in your office? Is that one of the pieces of art from which you draw strength?

Judge Fortes: It's called "Equal Justice," by Ted Ellis. The painting depicts a courtroom with one of my heroes, Thurgood Marshall in the background. The judge is African American, all the jurors are African American, the lawyers are African American, and the court officer is African American. The painting elicits a lot of conversations about the perception of justice.

We have those conversations on a regular basis in the District Court: what it means to an individual to walk into a courthouse, and how their perception of justice starts from the time they walk in the front door.

Before I became Chief, I worked on issues of race and ethnic fairness. One of the things that was important to me was working with clerk magistrates on these same issues, although we had done that work with judges. So, we had our clerk magistrates Conference in September, and I invited Devin McCourty as our speaker, because of all the work he's done on issues of criminal justice reform. What ties this effort back to this painting is the importance of having clerk magistrates involved in the conversation and ensuring that their offices reflect the diversity that we see in our communities.

Judge Ham: What has been most rewarding in your new role as the Chief Justice?

Judge Fortes: I can't point to just one thing. Certainly, being able to travel to all the District Courts, and to have conversations in those courts with staff individuals have been very rewarding. I'm proud of all of our District Court committees, including forming two new committees with clerk magistrates, because I wanted to get more people in the District Court involved through committee work.

And that conference with the clerk magistrates that I mentioned earlier was a result of the work of not just me and the individuals in the administrative office, but also of the two committees of clerk magistrates, because they expressed how committed they are to see diversity and change in their offices. I'm proud of that.

At Chief Justice Dawley's request, I started the Judges' Committee of Race and Ethnic Fairness some years ago and that training continues. We have a conference where we address issues of racial ethnic disparity every December. So that continued work is something I'm proud of. Addressing our pandemic-related backlog in terms of prioritizing cases and prioritizing the firearm cases that were outside of time standards have been rewarding.

Frankly, I'm just proud of how everyone has come together. The judges, clerks, and probation officers to continue to move the work of the District Court forward.

Judge Ham: What has been personally and professionally challenging to you in your new role?

Judge Fortes: When I became a lawyer, and when I became a judge, particularly in a community court, I was driven by this need to help. That's primarily why I applied to be Chief. The biggest challenge for me is to go around the state and ask people how I can help. Whether there is trouble getting enough interpreters, dealing with some of the infrastructure kinds of issues, or trying to have enough jury sessions in order to be able to do the work. So that's been a little frustrating, not being able to get an immediate fix for people despite everybody's efforts. As a judge, to get an answer and solution to a problem is very different than when you're in an administrative position.

Judge Ham: Where do you see yourself in five or ten years?

Judge Fortes: In ten years, I think I'd like to be back on the bench. I love being Chief, I'm honored to be Chief, but I miss sitting in a courtroom. I feel extraordinarily privileged to be Chief of the District Court. There are some amazing, amazing people working in our courts.

Judge Ham: It's been such an honor to speak with you. Thank you for your thoughtful and inspiring words.

Hon. Stacey Fortes is Chief Justice of the Massachusetts District Court. Fortes previously served as a judge for the Lynn District Court and the Peabody District Court. She was first appointed to the bench by Gov. Mitt Romney in 2006.

Hon. Catherine Hyo-Kyung Ham is an Associate Justice of the Massachusetts Superior Court.

Practice Tips

Appeals Court Takes New En Banc Pilot Program for a Test Flight

By Nicholas D. Stellakis

In late 2022, the Appeals Court instituted a pilot program for *en banc* review. This pilot program is the latest manifestation of the Court's longstanding practice of "second panel" review, where any published decision is first circulated in draft form to all of the Court's justices to ensure that it reflects the views of the majority of all justices on the Court and not just those on the panel that heard argument. Under the *en banc* pilot program, any justice may call for a vote on *en banc* review. En banc review is granted only if: (1) "the draft panel decision would conflict with a decision of the U.S. Supreme Court, the Supreme Judicial Court, or the Appeals Court and *en banc* review is necessary to maintain the uniformity of the court's decisions" or (2) "the proceeding involves one or more questions of 'exceptional importance.'"

If a majority of the court votes in favor of *en banc* review, the parties are notified of the *en banc* hearing date, the amount of time allotted for argument and whether supplemental briefing is needed. The Court may also ask for amicus briefs. *En banc* oral argument is by videoconference, the only practical way for all 25 justices to participate.

Parties may not request *en banc* review, nor will the court entertain any such request. Unlike the federal system, under the Appeals Court's program, there is no panel decision from which to seek *en banc* review.

The pilot program temporarily suspends the Court's protocol announced in *Sciaba Const. Corp. v. Boston*, 35 Mass. App. Ct. 181, 181 n.2 (1993). Under *Sciaba*, when a panel is split and the majority of all justices agree with the panel's dissent, that dissent becomes the published majority opinion. Two off-panel justices supporting the dissent are added to the masthead, resulting in a five-to-three decision in favor of the would-be dissent.

Sciaba has raised questions over the years: Is it fair to the parties if justices, who did not participate in argument, change the result supported by the justices who did hear argument? Is it fair to the attorneys who directed their oral advocacy to the panel and might have augmented that advocacy to address questions that perhaps were not put to them? And what to do if the full court disagrees, in whole or in part, with a unanimous panel?

The *en banc* pilot program offers a potential solution. Rather than adding panel members behind the scenes as in *Sciaba*, an *en banc* hearing affords the parties the opportunity to argue their case before the full Court who will be deciding the matter. In this way, advocates can address, directly, the questions and concerns of the justices who were not part of the original three-member panel.

Chief Justice Green has indicated that the pilot program will remain in place for the immediate future as the Court continues to collect data. He has noted that the decision-making process is very different under the pilot program as compared to what occurred under *Sciaba*, owing to a very different group dynamic when all justices participate in the hearing and the post-hearing

consultations. But there are costs in time and court resources, and the drafting process is decidedly different when all 25 justices participate.

To date, the only case that has been reviewed under the pilot program is *Ferreira v. Charland*, 103 Mass. App. Ct. 194 (2023). Attorneys in a case selected for *en banc* review would be wise to watch the argument in *Ferreira*, linked on the Court's web site. The exceptionally smooth argument saw very well-prepared justices engage in an active, but orderly, questioning of each side, without cross-talk or interruption. Counsel should be thoroughly prepared as always, but with particular attention given to any issue the court has signaled is important. Notably, *the en banc* notice in *Ferreira* was accompanied by a call for amicus briefing. If that pattern holds, counsel will know the main issues of interest to the Court and will be ready to address them.

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Whether the future entails more *en banc* hearings, a revised *Sciaba* protocol, or something else entirely remains to be seen. Attorneys should understand that the *en banc* pilot program is an important evolution in how the Appeals Court adheres to its tradition of ensuring that all published decisions reflect the views of the entire court, not just the panel that heard argument. This custom is part of the fabric that makes the Appeals Court the unique Massachusetts institution that it is. Practitioners would do well to keep that custom in mind not just when arguing to the *en banc* court but in every panel argument. The eyes of the entire court are on every published decision. Prepare your case accordingly.

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Legal Analysis

Ferreira v. Charland: The Devil Lurks in the Details

By Hon. Marylou Muirhead (Ret.)

Hard times breed difficult decisions. The unforeseeable and ever-changing nature of life's vicissitudes often brings about such decisions. The ramifications from such decisions represent an unavoidable part of litigation, both for the parties privy to the case and the court. Every day, the judiciary wrestles with parties' changing circumstances through the lens of equity and the weighing of hardships. The Massachusetts Housing Court often relies on settlement as a means to assure an equitable outcome for both parties. More often than not, however, Housing Court litigants do not avail themselves of that means and regret the decisions they made. For example,a young landlord, Cassandra Ferreira, had to make a difficult decision with respect to the single-family home she owned.

The case pits a woman whose life was ravaged by the effects of the pandemic—she had no place to live, her business had foundered, and she was awaiting a surgical procedure while sleeping in the basement of her parents' home—against a sister and brother, both of whom were disabled and had severely limited income. Albeit in different capacities, each party experienced the unforeseeable and ever-changing circumstances of life, which shaped the case as in many cases for Housing Court litigants.

After experiencing one of life's unforeseeable circumstances, Ms. Ferreira was forced to move into her parents' basement. In July 2020, she commenced the process of recovering possession of her house, which she rented to tenants since 2016. As of September 2023, more than three years after serving an initial notice terminating the tenancy, Ms. Ferreira's tenants remained in possession of her home and the legal process had worked its way to the Massachusetts Appeals Court. This article is an example of the detrimental impact of the failure to take advantage of the Housing Court's settlement processes during litigation.

The case is *Cassandra Ferreira v. Laural Charland, Jason Charland, and James Vasquez*, [1] (No. 20H79SP001676) and was filed in December 2020 (the "2020 Case"). Two of the defendants, Ms. Charland, and Mr. Vasquez, filed answers. At some point, an attorney entered a "limited appearance" on behalf of the Charlands. At least with respect to Ms. Charland, her answer asserted a defense to the eviction and raised a counterclaim—based on a violation of G.L. c. 186 § 22.

The court scheduled a trial on June 22, 2021. Before trial commenced, counsel for Ms. Ferreira stated that he thought counsel for Ms. Charland had agreed that the counterclaims had been satisfied by a payment for damages and the parties were present for the sole purpose of determining whether Ms. Charland was entitled to stay in the property pursuant to G.L. c. 239 § 9. [2] Counsel for Ms. Charland responded that the counterclaim remained [3]; but even if it had been resolved, the same claim was still viable as a defense against the Plaintiff's claim for possession under G.L. c. 239 § 8A [4]. Ms. Charland's counsel maintained that the defense at issue did not afford a landlord protection based on the damages payment. He further argued that G.L. c. 239 provides for counterclaims and defenses, and claimed that a landlord's settlement of

a counterclaim may not necessarily eviscerate the ability to use the claim as a defense. The court took the issue under advisement and proceeded to take testimony solely on the issue of whether the defendants could be entitled to a stay of execution under G.L. c. 239 §§ 9 and 10.

The Housing Court issued an "order" on June 25, 2021 ("Order"), which stated in relevant part:

> . . . Given that the landlord tendered funds for the damages asserted under that claim [M.G.L. c. 186 § 22] and that they were knowingly accepted by the tenants without any reservation of rights, such tender and acceptance satisfied and resolved the tenants' claim under M.G.L. c. 186, § 22 and it cannot be used to trigger a defense to possession under M.G.L. c. 239 § 8A.

Notably, the court's order neglected to make any findings of facts. The Order referenced no statements or representations attributable to counsel for either party. Moreover, the Order is devoid of any reference to affidavits submitted by either party relative to a settlement.

As a result of the summary process trial, the Charlands appealed. [5] The Order on which the appeal was based contains no findings of fact and no rulings of law. At trial, there was a statement that "funds for damages ... were knowingly accepted by the tenants" and "resolved the claim under G.L. c. 186 § 22 and it cannot be used to trigger a defense to possession under G.L. c. 239 § 8A." However, the court did not identify any basis for this statement.

With respect to the Housing Court's decision regarding the question of whether a settlement of a counterclaim would preclude the assertion of that same claim as a defense, it offered no explanation for its ruling.

After a panel hearing, the justices of the Appeals Court voted to grant an *en banc* review. [6] The Appeals Court issued a decision in September 2023 holding that:

> [A] landlord's tender of money damages to the tenant, after the landlord commenced summary process proceedings does not render moot the tenant's claim to possession, unless the tenant has clearly released the claim, because money damages are but one of two available remedies—the other being the tenant's ability to remain in the property (possession) upon proof of a valid counterclaim or defense under section 8A.

Ferreira v. Charland, 103 Mass. App. Ct. 194, 196 (2023).

Ultimately, the Appeals Court remanded the case to the trial court for the judge to make factual findings on the issue of damages and answer the questions of whether the Charlands accepted the tender of payment and, if so, whether that resolved the matter.

Eight justices dissented, however. Three of the eight justices wrote separately voicing their individual dissents and all of the other dissenting justices joined with them. The three dissenting justices who wrote separately wrote passionately.

It has often been said, although perhaps not reduced to writing, that the Massachusetts Legislature has provided tenants with a shield with which to defend against an eviction and a sword to enforce the rights afforded to them by statute. Sometimes circumstance dictates that the best choice is to swing the sword, but not always. The summary process eviction statute (G.L. c. 239) could not account for Ms. Ferreria's plight.

This is not the case of Snidley Whiplash [7] tying Nell Fenwick to the railroad track in order to extract the rent. This is a case of an owner who needed to return to her residential property because her other housing had fallen through. Suffering from anxiety and depression, the unheated basement of her parents' home failed to provide the owner with a living situation adequate for a medical recovery from her conditions. [8] Regardless, the current occupants of the house owned by Ms. Ferreira also had no place to go and no money to go there. Is this the case where you drag out your sword and rally the troops or concede to the realities of the circumstances and its inevitable result that eventually the owner will regain possession?

But the swords were drawn and, as a result, at least three people, Ms. Ferreira, Ms. Charland and Mr. Charland, spent more than three years worrying about where they were going to live. [9] We cannot know what was gained in this case, but it is clear what was lost—three years of peace of mind for three people who needed it.

No fact finder can find facts if no facts have been presented. The trial judge stood ready, willing, and able to hear the case. He was met with a statement from plaintiff's counsel; specifically, "I think that the other side has agreed that the counterclaim has been satisfied ...." [10] In response to the court's query about his position, counsel for the defendants stated "[t]here is still a remaining counterclaim of the violation of water statute [sic] and, and an 8A claim based on that …." [11] The court later inquired about the exchange of money. Counsel for Ms. Charland stated "… there may have been some checks in reimbursement for water and sewer expenses ...",[12] and "There's an offer of settlement, but it doesn't mean it was accepted ...." [13] The court did not call for testimony from the parties or inquire into the substance of the communication between counsel, whether there was an acceptance of the tender, or whether the checks had been negotiated, as one would have expected given a clear statement of dispute. Neither counsel called for testimony from his client, as they should have.

Without findings of fact and rulings of law, the Appeals Court was without sufficient information to render an informed decision. Did the Defendants acknowledge the receipt of funds? Were the funds accepted in settlement? If yes, what claims were resolved by the settlement? If no, how and when was this communicated to Plaintiff's counsel, and what happened to the check or checks; where are they? On what basis did the trial judge determine the funds were accepted? On what basis did he conclude that the claim under G.L. c. 239, § 8A was resolved?

The dissenting justices took issue with the idea of a remand given that Ms. Ferreira had been trying to return to her home since 2020. How long was she supposed to wait? But the Appeals Court needs a basis for its decision, and it can't look beyond what is presented to it by the parties. While deciding a case on an incomplete record results in confusion and frustration, deciding a case with no information in the record should not be done. In this case, there was no information in the record upon which a decision could be based.

However, remanding this case for trial was not the only solution. Because of unforeseeable circumstances, like the ones seen here, summary process in a Housing Court lends itself to settlement. Each Housing Court has several trained mediators in court every day at each location. In these cases, there were four formal opportunities for settlement and many others in between, yet there was no resolution. Did Ms. Ferreira instruct her counsel to go to the mat, no matter how long it took and no matter what is cost? Not likely. Did Ms. Charland tell her lawyer, who never filed a full appearance on her behalf, that she did not care how long it took to resolve the case

because she had enough to worry about? Probably not. Why then was the case not resolved? Did everyone miss the forest for the trees?

1. Mr. Vasquez did not respond to the complaint and was not represented by the limited appearance counsel who represented Ms. Charland.
2. G.L. c. 239 is entitled "Summary Process for Possession of Land" and is referred to colloquially as the "Eviction Law". Section 9 is entitled "Stay of Proceedings" and allows a stay of the use and / or the issuance of an execution for possession in certain circumstances.
3. In fact, counsel Ms. Charland's attorney took the position that what money had been sent in an attempt to resolve the matter, the checks had not been negotiated and the issue was still open
4. M.G.L. c. 239 section 8A, while entitled "Rent withholding: grounds, amount claimed; presumptions and burden of proof; procedures" generally sets out the defenses available to a tenant in a summary process action.
5. While the appeal was pending, on December 21, 2021, a second summary process action commenced on December 20, 2021, and asserted the same claims and defenses by both parties.
6. In October 2022, the Appeals Court began a pilot program regarding the manner in which cases could be reviewed *en banc*. See Appeals Court YouTube Channel (https://www.mass.gov/orgs/appeals-court#org-nav-youtube-channel)
7. A fictional character who originally appeared as the main antagonist in the Dudley Do-Right of the Mounties segments of the animated television series The Rocky and Bullwinkle Show." See *Wikipedia* *https://wikipedia.org/wiki/Dudley_Do-Right*.
8. *Ferreira v. Charland*, 103 Mass. App. Ct. 194, 215 (2023) ("Mostly, she stays on a couch in the unheated basement of her parents' home. She suffers from depression and anxiety, both of which have been exacerbated by her living situation. She also is being treated for a medical condition and her doctor opined that '[i]t will be medically necessary for [Ferreira] to have a stable living situation in order to have a successful recovery.'").
9. It is worth noting that Ms. Ferreira filed a second summary process action to gain possession of her property on December 20, 2021 and both cases were resolved by agreement on September 7, 2023, two days after the decision came down from the appeals court. See Mass Courts Western Housing Court Dockets 20H79SP001676 & 21H79SP003526 (www.masscourt.org).
10. Transcript of "Summary Process Trial Before the Honorable Robert G. Fields" Springfield Massachusetts, Courtroom 1, June 21, 2020, page 4, lines 9 and10. *See* Appeals Court Docket 2022-P-0300.
11. Transcript of "Summary Process Trial Before the Honorable Robert G. Fields" Springfield Massachusetts, Courtroom 1, June 21, 2020, page 4, 23 and 24. *Supra*.
12. Transcript of "Summary Process Trial Before the Honorable Robert G. Fields" Springfield Massachusetts, Courtroom 1, June 21, 2020, page 7, lines 15, 16. *Supra*.
13. Transcript of "Summary Process Trial Before the Honorable Robert G. Fields" Springfield Massachusetts, Courtroom 1, June 21, 2020, page 10, lines 11–13. *Supra*.

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