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President's Page

The Importance of Calling Out Hate and Supporting its Targets

By Hannah L. Kilson

In our country generally, and this Commonwealth specifically, we must challenge the rising tide of hate. Over the past month, there has been a troubling increase in antisemitic and Islamophobic hate crimes across the country following the horrific and deplorable October 7 terrorist attack by Hamas on Jewish and non-Jewish civilians in Israel and the Israeli government's subsequent military actions in Gaza impacting Palestinian civilians. I extend my condolences to those directly impacted by these events, as well as to members of the BBA community feeling its far-reaching effects.

This rise in hateful speech and activity that has followed needs to be highlighted and condemned and understood as part of an ongoing truth in our country and the Commonwealth.

In the U.S., hate crimes rose to their highest recorded levels in 2021, according to the FBI, and hate crimes against Jews and Muslims continued to rise both prior to October 7 and in its aftermath. In the Commonwealth, the Anti-Defamation League's 2023 report on "Hate in the Bay State: Extremism and Antisemitism" highlighted the following:

- In 2021 there was a 33% increase in hate crimes in Massachusetts.
- In 2022, there was a 71% increase in white supremacist propaganda in Massachusetts (the second highest in the U.S.).
- In 2022, there was a 41% increase in antisemitic incidents, which was on the heels of a 48% increase in 2021.

While tragedy, upheaval, and strife abroad weigh on all of our hearts and minds, our Jewish friends, neighbors, and members of our community should not also have to fear for their own and their families' safety here at home nor should our Islamic and Arab friends, neighbors, and members of our community.

Equality and justice require constant vigilance and a willingness to hold ourselves collectively accountable for recognizing each person's humanity and to stand against the othering of any individual or group of people in order to separate members of a social group from the mainstream. It is our responsibility as stewards of our democratic society to renounce and to not allow the normalization of such tactics. Hatred thrives on ignorance and indifference. We must first acknowledge it, then work to combat it, while always being sure to support those most affected by it.

This community—not just at the BBA, but the entire legal community, city, and Commonwealth—must look out for, and show solidarity with, one another. We must be willing to have difficult, uncomfortable conversations, and always be open to new ideas and solutions to ensure we're fostering a community where people of all backgrounds and identities feel safe and supported.

A priority of mine this year for the BBA is a renewed focus on lawyer well-being. A huge part of that is making sure we're taking the time to check on each other, to ensure that our friends and colleagues and peers are not suffering in silence, and that they are aware of resources that are

available to help them when they aren't feeling at their best. Right now, many of our members are hurting—our Jewish and Arab members, our LGBTQ+ members, our immigrant members, as well as many others. All of them are seeing a rise in hate directed at them, their families, their friends, their communities.

I've said that the future of the profession depends on taking care of ourselves and each other, and on being fully engaged in the profession. The latter is not possible without the former. At this time, when so many groups are seeing and hearing threats to their communities, it has never been more important to show empathy and solidarity. Important mental health resources are available to members of the BBA through Lawyers Concerned for Lawyers, including confidential counseling and supportive webinars on managing trauma. I encourage the utilization of these resources.

Here are some resources for lawyers experiencing direct or indirect trauma:

- Building Resilience from Trauma in the Legal Profession [Panel Discussion Video](LCL)
- Mindfulness & Self-Compassion Tools for Legal Professionals: 4 Guided Practices (LCL)
- Dealing with Secondary Trauma in the Legal Profession [Webinar](LCL)
- How to Make Sense of Tragedies Happening in the World: How to Take Care of Yourself and Your Children in Difficult Times (Riverside Trauma Center)
- Practicing Self-Care After Traumatic Events (Riverside Trauma Center)
- Reactions to Highly Stressful or Potentially Traumatic Events (Riverside Trauma Center)

Moving forward, the BBA must continue to serve in its role as a convener and an educator to the Boston legal community. Combatting hate requires an entire community vested in ensuring that all voices are heard. Which voices can we amplify? What offices and organizations can we partner with? There is no simple solution, but by thoughtfully considering ideas from across demographics and throughout our membership we can identify worthy approaches. Tell us who you want to hear from, who we can work with, and what kinds of programs and education we can provide to equip our community with the knowledge and tools it needs to recognize, understand, call out, and—ultimately—eliminate hate and violence from our communities.

We always remind people that the BBA is for everyone—regardless of your background, your experiences, your path to where you are today, we are here for you and hope to have something to offer you. Now, more than ever, let's work to make that true of the city and the Commonwealth. Boston, and Massachusetts as a whole, should be a place where all are welcome and all *feel* welcomed, and I look forward to doing all we can as a legal community to move closer to that collective reality.

Hannah L. Kilson
President, Boston Bar Association

Head's Up

The Interesting Implications of the Massachusetts Interest Statutes

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

In most jurisdictions, the amount of interest that may accrue on a judgment for damages generally comes as somewhat of an afterthought and has only a marginal impact on the size of a recovery **[1]** Not so in Massachusetts. Here, the 12% statutory interest rate, recently confirmed as constitutional by the Supreme Judicial Court, looms large – often from the outset of litigation.

The Massachusetts Interest Statutes

In Massachusetts, calculation of interest on a verdict, finding, or order for judgment (collectively, a "judgment") for pecuniary damages is controlled principally by twin statutes: G.L. c. 231, § 6B ("Interest added to damages in tort actions") and § 6C ("Interest added to damages in contract actions"). *See Bank v. Thermo Elemental Inc.*, 451 Mass. 638, 662 n.30 (2008) ("The same principles govern the calculation of prejudgment interest under both statutes."). **[2]** These statutes apply not only in the state courts in Massachusetts, but also in diversity cases controlled by Massachusetts law. *See Fratus v. Republic Western Ins. Co.*, 147 F.3d 25, 30 (1st Cir. 1998). **[3]** These statutes do the following:

1. Set the prejudgment rate of interest at 12% per annum (except where otherwise set by contract);
2. Specify the date from which such interest shall be calculated; and
3. Provide that the clerk of court must automatically calculate and add the interest award to the judgment.

The Calculation of Interest

The date from which interest is calculated amplifies the impact of the high rate of interest. Under both statutes, that calculation is not performed from the date of judgment. Rather, in tort actions, it is calculated from "the date of the commencement of the action." G.L. c. 231, § 6B. In contract actions, it is calculated from the "date of breach or demand" if "established" or, if none is established, from "the date of the commencement of the action." G.L. c. 231, § 6C.

Given that many lawsuits continue for years before a judgment, the interest component of a recovery may end up comprising a significant portion of the overall award. Indeed, in cases where intervening appeals prolong the litigation, the interest owed could even approximate the damage award itself. For example, assume the defendant breached a $100,000 contract with no interest provision on January 1, 2016, and the plaintiff filed suit three years later on January 1, 2019. If judgment does not enter until January 1, 2024, then the total judgment after eight years would be $196,000 including interest – nearly double the original value of the contract. ($12,000 per year x 8 years). **[4]**

The Constitutionality of the Twelve Percent Interest Rate

In addressing a challenge to the constitutionality of the rates in G. L. c. 231, § 6B (pre-judgment interest) and G. L. c. 235, § 8 (postjudgment interest), the Supreme Judicial Court recently concluded "that the Legislature's pre- and postjudgment interest rates pass rational basis review and, thus, are constitutional." *Greene v. Philip Morris USA, Inc.*, 491 Mass. 866, 868 (2023). Philip Morris contended that the 12% rates in the statutes, which had been used to calculate interest due on a judgment against it, "under current market conditions, are excessive in violation of its due process rights under the Federal and State Constitutions and cannot survive rational basis judicial review." *Id.* at 880. Citing the fact that the purpose of the statutes was to help make plaintiffs whole, Philip Morris argued that the rates were punitive and did not rationally advance the purpose of the statutes. *Id.* at 881.

The Supreme Judicial Court rejected this position, holding that the 12% rate did not lack a rational basis, did not amount to punitive (as opposed to compensatory) damages, and was not excessive or in violation of Philip Morris's due process rights under the Federal and State Constitutions. The Court explained, "[d]espite the arguable windfall this rate provides in a low interest economy, the interest amount is comparable to stock market returns over the same period; the money at issue, whether in the hands of plaintiffs or defendants, may very well have been so invested, despite the risk. Furthermore, that this high rate may encourage settlement does not violate a defendant's due process rights." *Id.* at 884-85.

Limitations on the Application of the Interest Statutes

Though the interest statutes provide for the automatic application of an interest award, certain principles limiting the applicability of these statutes have emerged in the case law.

- First, because these statutes are designed to "compensate a damaged party for the loss of use or unlawful detention of money," *Perkins School for the Blind v. Rate Setting Comm'n.*, 383 Mass. 825, 835 (1981), and "not to penalize the wrongdoer," *McEvoy Travel Bureau, Inc. v. Norton Co.*, 408 Mass. 704, 717 (1980), to avoid a windfall, interest should not be due on sums when the plaintiff was "not deprived of the use of those sums." *Sterilite Corp. v. Continental Casualty Co.*, 397 Mass. 837, 841-42 (1986). *See also Thermo Elemental, Inc.,* 451 Mass. at 662-63. For example, prejudgment interest may not be awarded on portions of a judgment that compensate for lost future earnings and benefits. *See, e.g.*, *Conway v. Electro Switch Corp.*, 402 Mass. 385, 390-91 (1988).
- Second, prejudgment interest under these statutes may not be awarded on multiple damage portions of a judgment. *McEvoy*, *supra* at 718. *See also*, *Briggs v. Carol Cars Inc.*, 407 Mass. 391, 396 n. 2 (1990).
- Third, prejudgment interest may not be awarded on penal or punitive damage portions of a judgment. *Makino, U.S.A., Inc. v. Metlife Capital Credit Corp.*, 25 Mass. App. Ct. 302, 320-21 (1988) ("Indeed, to add interest on punitive damages in a c. 93A case would have the flavor of an unseemly piling on.").

The Consequences of These Statutes

Several considerations flow from these interest statutes.

- **For all contracting parties:** Persons entering into a contract that may be enforced in Massachusetts may wish to ensure that both the rate of interest and the accrual trigger is controlled by their contract and not by the Massachusetts interest statutes.
- **For plaintiffs:** The incentive is significant to file suit early so that prejudgment interest begins to accrue. In contract disputes, the incentive for a potential plaintiff to serve a demand for performance on a breaching party at the earliest possible time is significant. Indeed, in contract actions, both the defendant and plaintiff may have a significant motive for establishing the date of breach to control the date from which interest will be calculated, with the plaintiff preferring an earlier date and the defendant a later date. In a tort case, a plaintiff may need to take into consideration competing needs, such as the need to determine the extent of their injuries.
- **For defendants:** The benefit that a defendant often obtains from delay may be offset to a considerable extent, with delay increasing the defendant's risk of paying substantial prejudgment interest on top of any actual damages. To offset leverage created for the plaintiff by the accrual of prejudgment interest, the incentive for a defendant to identify and prosecute counterclaims may be materially increased.
- **For all litigants:** The impact of these statutes on the exposure of a defendant should be taken into account by all parties in the context of settlement efforts.

Conclusion

The Massachusetts interest statutes may materially increase the risks of litigation for defendants in Massachusetts courts. To a greater degree than the interest statutes of many other states, parties in Massachusetts should take the interest statutes into account at the outset of a dispute in order to inform litigation strategy and risk assessment.

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[1] Note the much lower rates of interest in other states. For example, absent any contractual terms, Virginia, Maryland, Pennsylvania, and Texas provide only 6% prejudgment interest for contract actions. *See* Va. Code Ann. §§ 8.01-382, 6.2-302; Md. Code Ann. Com. Law. §12-102; 41 Pa. Stat. § 202; Tex. Fin. Code §§ 302.001, 302.002.

[2] Interest required to be paid by the Commonwealth is governed by G.L. c. 231, § 6I, and calculated differently.

[3] The federal district court, however, has substantial discretion to determine the interest rate in patent infringement cases. *See, e.g., Banhazl v. Am. Ceramic Soc'y,* No. 16-CV-10791-ADB, 2023 WL 159842, at *2 (D. Mass. Jan. 11, 2023).

[4] In the example, interest is not compounded. A party may argue for compound interest, but compound interest is generally disfavored and only permitted in limited circumstances, including an express contractual provision. In general, whether to compound interest is within the discretion of the judge. *See Scott v. Boston Housing Auth.,* 64 Mass. App. Ct. 693, 697 (2005) (upholding judgment that did not compound interest award where jury awarded multiple damages). *See also Sec'y of Admin. & Fin. v. Labor Rels. Comm'n*, 434 Mass. 340, 347-348 (2001) (Labor

Relations Commission acted within its discretion to order "'quarterly compounding' of the awarded interest"); *Cent. Water Dist. Assocs. v. Cedar Meadow Lake Watershed Dist.*, 80 Mass. App. Ct. 468, 473-474 (2011) (reversing judge's order denying compound interest). In the example, if the interest were compounded, the total award would be $247,596.32.

The Profession

The Business, Legal, and Moral Case for Supporting Parent Attorneys

By Andrew Glynn and Rebecca G. Pontikes

In Massachusetts, several statutes give employees rights to significant time off for caregiving: the Family and Medical Leave Act, the Massachusetts Parental Leave Act, and the Massachusetts Paid Family Leave Act. To comply with these laws, Title VII, and the Massachusetts Fair Employment Practices Act, parental leave policies must be designed and applied equally among genders. Yet, the majority of people who exercise their rights under these laws continue to be birthing mothers. When men or non-birthing mothers seek to take parental leave, they are often discouraged if not outright penalized for using their full benefits.

The moral case for extending equal, generous parental leave should, at this point, be apparent. The definition of "family" has drastically changed over the past few decades, as have the traditional roles of men and women in the workforce and at home. The notion that most attorneys have a partner at home who can handle the bulk of childcare and other family obligations is a relic of the past. Equally arcane is the idea that men have no interest in raising their children. All people, regardless of gender, should have the opportunity to bond with their new child, adjust to the sleep deprivation, stress, anxiety, and new routines that often accompany a new child, and support their partner, who may be facing new challenges such as physical and mental complications following childbirth. Further, allowing all parents to take equal leave would go a long way toward eliminating the stigma and disadvantages that mothers often still face.

However, given the glacial progress thus far, the moral case may not be enough to generate meaningful change in law firms' parental leave policies. Here we focus on the business case. Based on the authors' experiences as a legal recruiter and as an employment litigator, providing increased and equal parental leave policies can more than pay for themselves by making law firms more competitive in recruiting and by avoiding legal liability.

Gaining the Edge in Recruiting Through Progressive Leave Policies

By Andrew Glynn

Being a single dad, I am part of the ever-changing definition of "family" and what defines a parent. Frustratingly, until recently, the majority of law firms would either have not allowed me, a single father, the benefit of taking parental leave or discouraged or penalized me for taking it because they did not recognize that parental leave should cover both mothers and fathers.

As a recruiter, I have negotiated detailed changes to the parental leave benefits offered to candidates. Unfortunately, firms are generally willing to make these accommodations only for candidates they deem exceptional—and only during times of economic prosperity and a competitive legal hiring environment. Even when firms are willing to make changes to leave policies for a specific candidate, those changes generally apply only to that one potential employee and rarely spark a greater sea change within the organization.

However, "times are a-changing" (albeit slowly) when it comes to parental leave policies and for an interesting reason: associates. Associates are influencing their firm's parental leave policies not because they are immediately using those policies, but because Millennials and Gen-Z-ers, who typically make up the majority of the associate class, overwhelmingly view progressive human resources policies as a strong reason for accepting an offer and joining a new firm. In other words, progressive human resources policies—even if they affect only a small percentage of attorneys—have become a strong recruitment tool.

In practice, the number of people who use parental leave each year is a small fraction of a law firm's entire workforce, and those who do not fall into the "father, mother, and (at least) one biological child" category who use parental leave policies make up an even smaller percentage. Despite this, in the end of 2020, all of 2021, and the beginning of 2022, multiple associate candidates with whom I worked selected among offers based solely on a firm's parental leave policy, even if that policy did not affect that candidate at the moment and even if that policy would never affect that candidate.

Associates today view the value of a firm beyond just market pay and market bonuses. While those two factors will always be enormously important, most firms fall in line with current standard pay-scales and thus, based solely on pay, are indistinguishable from each other. With nearly 40% of the workforce being either Gen-Z or Millennial, firms will attract more candidates and, more importantly, better candidates by ensuring the firms are competitive on factors beyond just pay. One stellar hire each year could potentially make up for any costs associated with an updated parental leave policy.

The workforce is changing. Recognizing this new reality and making consistent meaningful change in parental leave policies to support employees of all genders and family types is not only the right thing to do, it also is an incredibly effective recruitment tool.

Four Common Parental Leave Mistakes For Firms to Avoid

By Rebecca G. Pontikes

After 25 years of litigating sex discrimination and caregiving cases, I have concluded that the disparities in parental leave policies and how they are used by men and women are wrapped up in our implicit biases about the roles men and women have in caregiving. These biases affect not only individual superiors' views toward caregivers but also how law firms design and apply their parental leave policies. These biases also lead to several legal and practical mistakes that could result in law firm liability.

Mistake 1: Designing policies to give men and women lopsided amounts of bonding time for the birth or adoption of a child. A distinction made in leave time to allow for physical recovery of birthing parents is permitted. Guidance from the Equal Employment Opportunity Commission (EEOC) acknowledges that a person who gives birth needs time off for physical recovery. EEOC also recognizes the current guidelines from the American College of Obstetricians and Gynecologists that physical recovery takes between six and eight weeks.

Bonding time, however, must be equal and employers risk liability if they fail to comply with this requirement. A cautionary tale is the Estee Lauder Consent Decree that resolved a suit brought by the EEOC against the cosmetics giant. Estee Lauder provided men with a two-week paid leave while it provided women with a six-week paid leave and "return to work" benefits to help them ease back. The suit settled in 2018 and per the consent decree, Estee Lauder agreed to provide 20 weeks of gender-neutral bonding leave, with additional physical recovery leave for birthing parents.

Law firms are not immune. Two former associates of Jones Day sued the firm because biological fathers received only 10 weeks of paid leave, unlike the 18 weeks of leave received by birthing mothers and adoptive parents of any gender. The additional eight weeks for birthing mothers were designated as physical recovery—legal under the law. However, there is no denying that biological fathers get the least amount of paid leave of any parents. The firm could have avoided this problem by giving all parents equal paid bonding time and providing additional paid leave for birthing mothers, as the EEOC mandated with Estee Lauder.

Mistake 2: Applying a policy unequally or in a way that disparately impacts men. In the early 2000s, law firms began writing parental leave policies that distinguished between "primary" and "secondary" caregivers, with the former receiving generous leave and the latter very little leave. The intent was to be inclusive of LGBTQ+ couples. Although the language "primary" and "secondary" seems gender neutral, implicit biases got in the way when the policies were put into practice. If primary caregiver is defined as the person primarily responsible after birth, *de facto* that is likely the birth mother if she is breastfeeding. In addition to denying the current reality of parenting, whereby both parents may equally share or stagger caregiving responsibility, this type of policy had a disparate impact on biological fathers. As "secondary" caregivers, they generally took smaller leaves or none at all. When fathers did claim the designation of primary caregiver, they (unlike mothers) were often asked to "prove" it.

Mistake 3: Retaliating against any parent who takes leave. Requiring parents to work while on leave is illegal, yet it still happens. Those "quick questions" assume that the parent is available for work when the assumption should be the opposite and new parents often feel pressured by firm culture to pick up the phone and remain available while on leave. Also, penalizing parents when they return could be actionable as both retaliation or sex discrimination. In my experience, men who take long leaves face ridicule in the workplace both before and after taking the leave or are pressured (either outright or subtly) not to take their full leave. Likewise, testing the commitment of parents when they return by deliberately assigning them travel or short deadlines could also be a form of retaliation.

Mistake 4: Failing to accommodate post-birth mental or physical disabilities, such as postpartum depression or anxiety. Even when a new parent has exhausted statutorily required leave, firing the person for needing more leave, or intermittent leave, after returning is a legal and practical mistake. The Americans with Disabilities Act (ADA) requires firms to explore additional leave as an accommodation to a disability. In addition to the birthing parent, a parent whose partner has mental or physical disabilities after birth is also protected against discrimination under the associational provision of the ADA.

* * *

To stay competitive and avoid potential liability, law firms need to balance short-term financial interests with the potential long-term pay-off of more generous, equal parental leave policies. Such policies not only support attorneys during one of the most challenging times in their lives, contribute to attorney morale and retention, and promote diversity, but they also, as explained above, make good business sense. The opportunities to bolster existing policies in their terms and implementation are great. In addition to providing more leave for all parents, firms can offer other benefits such as gradual return-to-work policies that allow all returning parents to ramp up slowly while they figure out how to balance their new responsibilities, providing coaches or mentors to help new parents return to work, and assigning sponsors to new parents to ensure they have assignments and opportunities when they return.

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Legal Analysis

Commonwealth v. Privette: SJC Reins In the Fellow Officer Rule

By John Hayes

In *Commonwealth v. Privette*, **[1]** the Supreme Judicial Court ("SJC") reconsidered and substantially limited its previous formulation of the horizontal collective knowledge doctrine, often colloquially known as the "fellow officer rule." **[2]** With *Privette*, the SJC reined in its permissive application of the fellow officer rule and set new conditions limiting the circumstances in which the Commonwealth can invoke the rule.

Before *Privette*, when considering the warrantless stop of a suspect, Massachusetts courts imputed the knowledge of any officer involved in a *cooperative* investigation to the officer making or requesting a stop (the "acting officer"), even if the acting officer did not know that information, and even if the officers were not in communication. This allowed the aggregation of information known to any police officer to the acting officer in determining whether the stop was justified. The collective knowledge doctrine only required that the officers engaged in a cooperative effort; the doctrine imposed no requirement that the information supporting the stop or seizure be conveyed to any of the officers involved in the cooperative effort. As the SJC reasoned, "the knowledge of each officer is treated as the common knowledge of all officers." **[3]**

The *Privette* court recognized that its prior expansive interpretation of the collective knowledge doctrine was the minority view. Most federal and state jurisdictions require that the information supporting reasonable suspicion or probable cause be conveyed to the acting officer prior to the stop or seizure. **[4]** Other jurisdictions require communication amongst officers to establish that they are engaged in a joint effort, but do not require explicit communication to the acting officer of the facts supporting the stop or seizure.**[5]**

With *Privette*, the SJC moved the Commonwealth closer to the majority view. The SJC applied article 14 of the Massachusetts Declaration of Rights to limit application of the collective knowledge doctrine and impose stricter conditions on when information may be aggregated and imputed to the acting officer. *Privette* holds that four requirements must be met before information supporting a warrantless stop or seizure can be aggregated and imputed to the acting officer:**[6]**

1. The officers must be engaged in a joint investigation, with a mutual purpose and objective;
2. The officers must be in close and continuous communication with each other about that mutual objective;
3. The acting officer must have knowledge of at least some of the critical facts giving rise to reasonable suspicion or probable cause, but the acting officer need not have knowledge of all of those facts; and
4. The acting officer must have been in communication with others who have such knowledge.**[7]**

When these conditions are met, the knowledge of any one of the officers in the investigatory team will be imputed to all the officers in that team.

What is *not* required for the collective knowledge to apply after *Privette*? First, the acting officer does not have to know all the information that forms the legal basis for a stop. Second, all that information does not have to be contained in the information dispatched or shared with any of the officers in the team (as long as one officer knows it). Third, all that information need not have inevitably become known to the acting officer. *Privette* merely requires that the aggregated information known to officers involved in a joint investigation justified the stop or seizure, and that the acting officer knew some of the critical information.

As such, while *Privette* limits the reach of the collective knowledge doctrine, the SJC nevertheless maintained the legal fiction that the aggregate knowledge of the investigative or pursuit team may be imputed to the acting officer. The SJC justified this fiction on the need to balance the right of individuals to be free from unreasonable seizures with the practical needs, realities, and risks incumbent in a police operation that is unfolding moment to moment, in "dynamic environment(s) marked by the potential for violence."**[8]** The SJC reasoned that the *Privette* requirements appropriately balance the right of "the suspect to be free from unreasonable searches, with the need of law enforcement and the public to stop someone who is fleeing the scene after having committed a violent crime before further violence is visited upon the public."**[9]**

In reaching this conclusion, the SJC repeatedly discussed the collective knowledge doctrine in the context of the "hot pursuit of fleeing suspects,"**[10]** and justified the doctrine by balancing the rights of individuals against the need for police to quickly act during a fast-developing and inherently dangerous "hot pursuit." The SJC explicitly stated that it was unreasonable to require police officers in pursuit of a suspect, and in continuous communication with each other over police radio broadcasts, to have to stop and confer with each other about the facts known to each other, even as the suspect continues to flee or to pose a danger.**[11]** While the SJC did not explicitly limit application of the collective knowledge doctrine to fast-developing and potentially dangerous pursuits of suspects, the balancing test it employed and the frequency with which it discussed the needs of police in "hot pursuit" situations allow both the defense and prosecution room to argue the point. Defense counsel should consider whether the specific joint police operation in their case fits into the common but limited circumstances of the pursuit of suspects shortly after a crime. If the need for police flexibility or speed is reduced, or the pursuit does not involve dangerous circumstances, imputing knowledge of other team officers to an acting officer to justify the stop of a suspect may be unreasonable. On the other hand, prosecutors may argue that the collective knowledge doctrine applies to *any* investigation that leads to the seizure of a suspect or evidence because *Privette* did not make "hot pursuit" a requirement for invoking the doctrine and because the police continue to require flexibility even in more slowly developing investigations.

Following *Privette*, certain pieces of evidence will gain prominence in litigation over the application of the collective knowledge doctrine. For example, the SJC's emphasis on the necessary "close and continuous communication" requirement in the context of police radio communications suggests that recordings of those radio communications, computer-aided dispatch (CAD) logs, and body-worn camera recordings will be essential evidence in cases where the Commonwealth invokes the collective knowledge doctrine to justify a warrantless stop or seizure. These recordings and logs will substantiate the degree of close communication between officers on a pursuit team and will identify which officers are part of the team. They also may reveal what facts were known to individual officers at the moment a suspect is

apprehended, which of those facts were dispatched to the pursuit team, where those facts came from, and which critical facts were known to the acting officer at the time of the stop. If facts were not reported in radio transmissions or otherwise communicated between officers, or certain officers did not appear to be part of the pursuit team, the Commonwealth will have a difficult time arguing that the missing facts should be imputed to the acting officer.

In litigating the collective knowledge doctrine, particularly in suppression hearings where the Commonwealth bears the burden of producing evidence sufficient to establish reasonable suspicion or probable cause for a warrantless stop or seizure, the Commonwealth will need to collect and preserve any radio communications, recorded 911 calls, CAD logs, and body-worn camera recordings related to a pursuit. It will also need to ensure that these records are preserved in a manner that will allow them to be admissible at a suppression hearing. The Commonwealth should also collect any notes that officers may have kept during the pursuit, if those notes reflect the knowledge of an individual officer in a joint police pursuit, and especially if that information did not come from radio dispatches (for instance, from an on-scene witness). Conversely, defense counsel in their discovery motion practice should make broad and creative requests for any records related to the pursuit to be preserved and provided to the defense. If police relied on any other sources of information during the joint operation, such as surveillance videos of the relevant area, the Commonwealth and defense should act to preserve those materials. Counsel should not assume that these materials, especially private video recordings, are permanent: while police departments are modernizing their radio systems, not every department is able to save police radio and 911 recordings indefinitely, and other evidence—such as privately operated surveillance systems (including video doorbell cameras and store cameras)—is often erased or overwritten within days or weeks. If the Commonwealth negligently or recklessly fails to preserve evidence that is in the possession, custody, or control of the prosecution team, a motion judge may sanction the Commonwealth by refusing to consider that information when determining the aggregate information known to the investigative or pursuit team or may not credit police witnesses when deciding whether the Commonwealth has met its burden under *Privette*.

Finally, the Commonwealth will continue to bear the burden of establishing the reliability of any information it seeks to aggregate under the collective knowledge doctrine. Even if the acting officer reasonably relied upon information they learned through radio dispatches or from other officers or witnesses, that information will not support the legality of a stop if the Commonwealth does not establish its reliability. The traditional factors to determine the reliability of information continue to apply: the anonymity or identification of a witness providing information, the witness's basis of knowledge of the information, the witness's history of giving reliable information, corroborating information known to the officers, and the degree of specific details provided by the witness. Often, the admission into evidence of police radio recordings, such as the recording of an anonymous 911 caller, will be necessary to establish the reliability of information.**[12]**

Clarification of the four requirements set forth in *Privette* must await further legal development. Because *Privette* borrows concepts from other jurisdictions' application of the collective knowledge doctrine, reference to precedents in those jurisdictions will be important in defining the conditions where the doctrine should and should not apply. As the concurring opinions in *Privette* presage, these conditions may be difficult to ascertain in complicated circumstances. For example, will *Privette* continue to allow for unreasonable stops of individuals, as Justice

Wendlandt opined, or will *Privette* unreasonably fetter the ability of police to safely and effectively protect the public during hot pursuits of suspects, as Justice Cypher fears?**[13]** What will be required to show "close and continuous communication?" What level of critical facts will the acting officer need to know to justify a stop? What officers may be included in the "joint investigative" team? In what circumstances may the horizontal collective knowledge doctrine even be applied: in any joint investigation or only in hot pursuit situations? Prosecutors and defendants will need to wrestle with the scope and operation of the new "fellow officer rule" as scenarios arise in the future.

John Hayes is currently a supervising senior trial counsel in the Boston Trial Unit of the Committee for Public Counsel Services. He previously was attorney in charge of the Boston Superior Court Trial Unit and has been a trial attorney with CPCS since he received his JD from Boston College Law School in 1990. Mr. Hayes just completed a three-year term with the Council of the Boston Bar Association, was also a member of the Executive Committee, and is currently a member of the Amicus Committee and Criminal Law Section.

The defendant in Privette is a client of an attorney with CPCS, and the appeal leading to the decision in Commonwealth v. Privette *was also handled by a CPCS attorney, but Mr. Hayes was not involved in the representation of Mr. Privette 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 Committee for Public Counsel Services.

[1] 491 Mass. 501 (2023).

[2] *Id.* at 503. The horizontal collective knowledge doctrine is distinguished from the uncontroversial doctrine of vertical collective knowledge, in which the officer seizing a person (the "acting officer") acts under the direction or request of another officer with the necessary knowledge to justify the stop or seizure (the "directing officer"). In vertical collective knowledge cases, the issue is whether the knowledge of the directing officer, and any information to be imputed to that officer because known to other officers in the team, is sufficient to establish legal cause to stop a suspect; the knowledge of the acting officer is irrelevant.

[3] *Commonwealth v. Roland R.*, 448 Mass. 278, 285 (2007) (citation omitted).

[4] *Privette*, 491 Mass. at 510. A small number of jurisdictions have adopted an inevitable discovery exception to this rule, allowing non-communicated information to justify a stop or seizure if that information would have imminently become known to the acting officer. *Id.* at 511.

[5] *Id*. at 511-12.

[6] In formulating these requirements, the SJC sometimes only referred to a reasonable suspicion analysis, not probable cause, but the SJC also discussed the collective knowledge doctrine in other jurisdictions for both reasonable suspicion and probable cause determinations. This formulation may be a recognition that, in the vast majority of circumstances invoking the application of the collective knowledge doctrine, including the underlying circumstances in *Privette*, the reviewing court will be considering a joint police operation shortly after a crime has occurred, in which the police are executing a dragnet and are likely to conduct a stop of a suspect on the basis of reasonable suspicion.

[7] *Privette*, 491 Mass. at 513.

[8] *Id*. at 515 (quoting *United States v. Cook*, 277 F.3d 82, 86 (1st Cir. 2002)).

[9] *Id*. at 516.

[10] *Id*.

[11] *Id*.

[12] *See* *Commonwealth v. Mubdi*, 456 Mass. 385, 395-97 (2010); *Commonwealth v. Depina*, 456 Mass. 238, 243 (2010); *Commonwealth v. Gomes*, 75 Mass. App. Ct. 791, 794-95 (2009).

[13] *Privette*, 491 Mass. at 548-49 (Wendlandt, J., concurring); 491 Mass. at 541 (Cypher, J., concurring in part and dissenting in part). The SJC was unanimous that, whatever legal analysis applied, the police had a reasonable basis to stop and frisk Mr. Privette.

Voice of the Judiciary

Comments from Newly Appointed Housing Court Chief Justice Diana H. Horan

By Justice Diana H. Horan

I am honored to have been appointed Chief Justice of the Housing Court Department of the Massachusetts Trial Court on March 27, 2023. It has been my true privilege to work alongside the most dedicated and persevering professionals in my more than 20 years with the Department. I am grateful to Chief Justice Jeffrey A. Locke for my appointment and to the Boston Bar Association for this opportunity to expound on the diligent efforts and virtues of the people who make up the Housing Court.

Deputy Court Administrator Benjamin Adeyinka and I believe strongly that the court can be of best service when it looks like the communities it serves. To that end, the diversity of the Housing Court's incredible staff is a particular point of pride. In the Housing Court, more than 42% of all staff identifies as diverse and more than 73% are female. Under my leadership, the Housing Court will continue its efforts to promote and encourage diversity on all levels—including in leadership roles—by attending career fairs, speaking to high school and college students, and educating the public on the work of, and employment opportunities within, the Housing Court.

Speaking of "particular points of pride," a unique and often underappreciated aspect of the Housing Court team is its housing specialists. Housing specialists are court employees who are trained mediators with professional expertise in Massachusetts residential housing law, including in the State's sanitary, building, and fire codes. They are neutrals who provide helpful information regarding local resources that are available from the court or other government agencies, housing authorities, and non-profit agencies in the community. Housing specialists may, at a judge's request, also conduct inspections of residential properties to determine if a premises meets code or to investigate an issue that is in dispute between parties in a case. Over the last several years, the Housing Specialist Departments' role as the Housing Court's "triage center" in each division has been crucial, and their overwhelmingly positive impact on the resolution of almost all cases that enter the Housing Court has been amplified.

The Housing Court Department has undergone a tremendous amount of growth and change over the last five years. From its humble beginnings as the Boston Housing Court in 1971, it expanded steadily to Springfield, Worcester, and beyond. Thanks to a forward-thinking Legislature, the Housing Court finally expanded to encompass the entire Commonwealth in 2017, adding an additional 84 municipalities and two million people to its geographic jurisdiction. The court's expansion also created a new Metro South Division and added five new judges. To handle the growing caseload of the Housing Court, however, the Housing Court needs additional judges, which I plan to ask for when appropriate.

Since March 2020, housing issues and eviction cases were significantly impacted by the outbreak of the Covid-19 pandemic. As a brief review, on April 20, 2020, Chapter 65 of the Acts of 2020 (Chapter 65) was enacted, pausing eviction actions in the Commonwealth for non-essential tenancies. After the expiration of Chapter 65 on October 17, 2020, the Centers for Disease Control and Prevention's (CDC) eviction moratorium took effect in Massachusetts until the Supreme Court of the United States invalidated the CDC's order.

In the interim, Massachusetts enacted Chapter 257 of the Acts of 2020 (Chapter 257) in late 2020, which was extended and amended multiple times. Chapter 257, as amended, required in part that landlords provide a residential tenant with an additional form in cases for non-payment of rent and for nonpayment cases be continued in certain defined situations.

As a result of this legislative attention, the Trial Court had to react quickly. The Executive Office of the Trial Court temporarily suspended the Uniform Summary Process Rules on October 18, 2020, and later repealed and replaced that order on June 15, 2021. As of this writing, the June 15, 2021 order continues to be in effect.

On October 5, 2020, then Chief Justice Timothy Sullivan signed Housing Court Standing Order 6-20 (Standing Order 6-20) effective October 19, 2020. Standing Order 6-20 allowed each division of the Housing Court to conduct court operations virtually and created a two-tier process for handling summary process evictions. The first-tier court event was a Housing Specialist Status Conference where the parties were able to discuss the status of the case and possibly resolve the matter in mediation. The second tier was trial. Under Standing Order 6-20, landlords also were required to include an affidavit of compliance with Chapter 257, as amended, with all entries of a summary process case for nonpayment of rent. The Chapter 257 protections expired on March 31, 2023, but in August 2023, were in large part codified into G.L. c. 239, s. 15. *See* St. 2023, c. 28, s. 64.

As summarized above, the pandemic caused many changes and disruptions to court processes, and adapting to the evolving and uncertain landscape often felt like shifting sand under our feet. Throughout the pandemic, however, the Housing Court has made significant efforts to digitize the Court's resources and increase access to justice for our court users. In an effort to provide simple answers to questions regarding changes to Housing Court procedures due to the pandemic, including updates to the Housing Court's standing order(s), the court developed a Frequently Asked Questions page.

For up-to-date resources, court users should visit the Housing Court Resources webpage, which provides information on Housing Court digitization initiatives, access to Housing Court forms, and has division-specific civil informational sheets that list resources that may be available to assist the parties in resolving their case, such as Lawyer for the Day Programs, a Tenancy Preservation Program, and free interpreter services.

Moreover, the Trial Court, including the Housing Court, has developed a courtesy text message reminder service for pending court dates. Parties are encouraged to sign up for eReminder (formerly known as Interactive Text Response), which is a text message reminder of upcoming court events in a specific case. Parties to a pending case in the Housing Court may sign up for eReminder online.

Parties in the Housing Court are also able to file documents with the court online. Electronic filing can be done by anyone who has access to a computer and the internet. Paper filing with the Housing Court is still available, but since January 27th, 2020, all attorneys are required to eFile (Summary Process and Small Claims Case Types) only, pursuant to Housing Court Standing Order 1-20.

The Housing Court is very excited to announce its eSummons initiative. The Housing Court's eSummons is an electronic (or digital) version of the Summary Process Summons and

Complaint. Users may electronically purchase, download, and print an eSummons from the Housing Court, rather than traveling to the courthouse or waiting for the Housing Court to process and mail requests for a paper Summary Process Summons and Complaint. The eSummons initiative makes it easier, quicker, and more convenient to obtain a Summary Process Summons and Complaint from the Housing Court. At this time, eSummons is available only from the Housing Court, and it may be filed only in a Housing Court Summary Process case. Housing Court's eSummons is available here.

In conclusion, I look forward to contributing to the work of the Housing Court in my new role. My current goals are two-fold. First, I want to build on the initiatives already in place through digitization and to support the hard-working judges, clerks, housing specialists and staff as they continue to serve our court. Second, throughout my tenure, my plan is to continue building on both the Housing Court's and the Trial Court's initiatives supporting diversity in the judiciary. It is with absolute pride and pleasure that I continue serving the people and communities of this Commonwealth, and I am pleased to be able to do so along my dedicated judicial and Housing Court colleagues.

Hon. Diana H. Horan is Chief Justice of the Housing Court as of March 27, 2023, after stepping down as First Justice in the Central Division, a position she held for almost 20 years. She was appointed to the bench in 1999 after having served as a staff attorney at Greater Boston Legal Services, an Assistant City Solicitor with the City of Worcester, and a First Assistant Clerk Magistrate in the Housing Court. A graduate of the University of Connecticut (1982) and Western New England University School of Law (1985), she has taught Business Law and Conflict Resolution/ Mediation at Clark University and Judicial Administration at Anna Maria College. She has sat on the Board of Trustee at Western New England University and the Board of Trustees of the Flaschner Judicial Institute. Judge Horan was a J2J mentor and participated on committees that wrote the self-represented guidelines and revised the Judicial Code of Conduct.

Case Focus

A Costly Reminder from the First Circuit: Ensuring Diversity Jurisdiction with Unincorporated Entities

By Michele E. Connolly

Litigants who invoke diversity jurisdiction in federal court need to ensure that there is, in fact, complete diversity of citizenship between plaintiff(s) and defendant(s), lest they find themselves facing reversal of a judgment after trial. That is exactly what appellees in *BRT Management LLC v. Malden Storage LLC, et al.* faced in a case recently decided by the United States Court of Appeals for the First Circuit. The parties in that case litigated for six years, went to trial, and the defendants/counterclaim plaintiffs obtained an eight-figure judgment — only to have that judgment overturned on appeal because diversity had not been established.

Diversity jurisdiction requires complete diversity of citizenship between plaintiffs and defendants, a threshold fact that is often not straightforward when one or more parties is neither a corporation nor a natural person. An unincorporated entity is a citizen of every state of which any of its members is a citizen. How is citizenship determined when the members of an unincorporated entity are, themselves, unincorporated entities? A court must look to the citizenship of each member-entity's members. The inquiry must continue until only natural persons or corporations remain. In the case of *BRT Management LLC v. Malden Storage LLC, et al.*, a three-judge panel of the First Circuit found that the parties had not adequately traced through the membership of two LLC defendants and therefore the District Court's jurisdiction had not been established.

Factual and Procedural History

Plaintiff BRT Management LLC ("BRT") filed suit in the United States District Court for the District of Massachusetts against Malden Storage LLC ("Malden"), Plain Avenue Storage LLC ("Plain Avenue"), Banner Drive Storage LLC ("Banner"), and Brian Wallace, invoking diversity jurisdiction pursuant to 28 U.S.C. § 1332. The plaintiff did not assert any federal question or any other form of subject matter jurisdiction. Plaintiff's complaint asserted complete diversity on the basis that it was a Massachusetts LLC with a usual place of business in Massachusetts, and that the defendant LLCs were Delaware LLCs with usual places of business in Illinois. Malden and Plain Avenue asserted counterclaims against BRT, also asserting diversity jurisdiction, and, like BRT, alleged facts relating only to the state of registration and usual place of business of the counterclaim plaintiffs.

Shortly thereafter, U.S. District Judge Saylor issued an order to show cause why the action should not be dismissed for lack of subject matter jurisdiction, noting that BRT failed to allege the citizenship of its members. BRT responded by alleging that its sole member was a natural person and a Massachusetts citizen; the sole member of both Malden and Plain Avenue was C. Banner Storage LLC ("C. Banner"); and the sole member of Banner was Banner Storage Holding LLC ("Banner Holding"). BRT did not allege the citizenship of the members of C. Banner or Banner Holding, however, so the District Court issued a second order to show cause requiring BRT to do so.

In response, BRT argued that it was unable to identify the citizenship of the members of C. Banner and Banner Holding and requested limited jurisdictional discovery, which the court granted. After the limited discovery was complete, the parties filed a stipulation that "there exists complete diversity of citizenship" and set forth several facts, including that the sole member of C. Banner was B-Dev Manager LLC ("B-Dev"). However, though BRT had responded to the first order to show cause claiming that Banner had only one member — Banner Holding — in fact, Banner had more than eighty members, at least one of whom was a Massachusetts resident. Because that Massachusetts resident would destroy diversity, the parties stipulated to Banner's dismissal, leaving Malden and Plain Avenue as the only LLC defendants (the "LLC defendants").

After a conference with the parties, the court dismissed Banner, but did not address the failure of the parties to allege the citizenship of the members of B-Dev. Notwithstanding this failure, the litigation continued, eventually leading to a nine-day bench trial and a judgment of over ten million dollars in favor of the LLC defendants on their counterclaims. BRT appealed.

After receiving the appellate briefs, the First Circuit entered an order finding the record was insufficient to establish diversity jurisdiction and directed the parties to file an affidavit of jurisdictional facts sufficient to establish jurisdiction.

Holding

After the parties filed affidavits — including a corrected affidavit by the LLC defendants that identified their ultimate owners as individuals, corporations, and trusts — a three-judge panel of the First Circuit (Judges Kayatta, Lynch, and Montecalvo) found that the record still was insufficient to establish the Court's jurisdiction and remanded the case to the district court to afford the LLC defendants one more opportunity to establish such jurisdiction.

The First Circuit based its ruling on lack of information about the member trusts. While the LLC defendants' affidavit provided the citizenship of the trustee of each trust, it failed to describe the nature of each trust or provide the citizenship of each trust's beneficiaries. The Court noted that the citizenship of a "traditional trust" that was not a separate legal entity, but rather simply a fiduciary relationship between or among multiple people, is to be determined by the citizenship of the trustee. A trust that stands as a distinct legal entity, however, takes the citizenship of all its members, though it is unclear in the First Circuit whether a trust's "members" includes both beneficiaries and trustees. Without knowing whether the at-issue trusts were distinct legal entities, and without knowing the citizenship of the beneficiaries of the trusts, the Court was unable to determine whether diversity jurisdiction existed.

Because it found that the LLC defendants' affidavit was insufficient with respect to the ultimate trust members, it did not address BRT's arguments that the affidavit was insufficient in other respects; namely that, for certain entities in the LLC defendants' ownership structures, the affidavit failed to provide adequate information about what *type* of entity each member was — e.g., a corporation, a partnership, an LLC, etc. — and therefore the citizenship of those entities could not be determined.

Notably, the Court cautioned that parties cannot establish federal subject matter jurisdiction by agreeing that the basis for jurisdiction is satisfied. The parties' stipulation was not sufficient and did not confer subject matter jurisdiction on the court.

The Court's Coda

In its opinion, the Court included a coda, noting that a potential plaintiff may not have necessary information about an unincorporated defendant entity to determine whether jurisdiction exists, as such information would be uniquely in the possession of the defendant. The Court approved Judge Saylor's approach of granting limited jurisdictional discovery at the outset to try to confirm the existence of jurisdiction where a plaintiff had made a good-faith effort on its own to ascertain the facts necessary to establish a defendant-entity's citizenship. The Court noted that "[i]f done right, limited and succinct jurisdictional discovery to confirm diversity…can assure the parties and the court at an early stage of litigation that complete diversity exists." In this case, however, either the discovery was insufficient, or the parties had not adequately put forth the basis for the Court's jurisdiction.

Takeaways

When a party relies on diversity jurisdiction to sue in federal court, questions of subject matter jurisdiction should be determined at the outset to avoid incurring substantial expense and delay litigating a case in federal court only to have a judgment vacated. Plaintiff(s) considering bringing suit in the First Circuit should consider the following:

- For each party, is the party an individual, corporation, or unincorporated entity?
- If the party is an individual, what is the person's domicile?
- If the party is a corporation, what is/are the corporation's state(s) of incorporation and principal place of business?
- If the party is an unincorporated entity, such as an LLC or partnership, what is the citizenship of its members?
- Has the membership of an unincorporated entity been traced through all the necessary levels to determine its state(s) of citizenship?
- If the entity is a trust, is it a "traditional trust" as described by the First Circuit – i.e., a trust that is a "fiduciary relationship" rather than a separate legal entity? If so, what is the citizenship of the trustee? If the trust is a separate legal entity, what is the citizenship of its members?
- A plaintiff may not always have access to all information necessary to determine the citizenship of a defendant. If the plaintiff has undertaken a good-faith effort to make that determination but is unable to do so because the necessary information necessary is uniquely within the possession of the defendant, then the plaintiff should consider requesting limited jurisdictional discovery at the outset.
- The parties cannot stipulate to a federal court's subject matter jurisdiction.
- A court's determination of subject matter jurisdiction is always subject to *de novo* review, is not given any deference, and is not waivable by a party.

Michele Connolly is a partner with Fitch Law Partners LLP in Boston. She focuses on complex commercial litigation and white-collar criminal defense.

Heads Up

Defending the Supreme Judicial Court, Rule 3:03, Student Practitioner Experience

By Christiana Prater-Lee

Could I really do this? Walking into the Boston Municipal Court for my first "duty day" as a Student Defender with Boston University School of Law's ("BU") Criminal Law Clinic, I was apprehensive. Every third name on the court-appointed list would become my client. I introduced myself to my first client and explained the benefits of student representation: our clinic's ample resources including in-house social workers, the aid of supervisors with decades of public defense experience, and my light caseload which would allow me to give them extra attention. After obtaining my client's consent, I had a few minutes to get to know them before going before the judge. That first day, not only did all my clients leave feeling relieved that they were released without bail, I, too, left feeling relieved. I also had my answer. Not only *could* I do this work, but I *wanted* to do it, and more of it.

Supreme Judicial Court ("SJC") Rule 3:03 allows upper-level law students who have completed underlying requirements to appear in civil and criminal proceedings under the "general supervision" of a barred attorney. This longstanding opportunity in Massachusetts dates back to the 1950s, with only Colorado having established an earlier program. In fact, Rule 3:03 is even enshrined in the popular film *Legally Blond*. Many have launched their legal careers as Rule 3:03 practitioners, including numerous SJC justices. However, last year, after concerns were raised with particular Rule 3:03 practices, the SJC created a committee to review Rule 3:03. The committee is in the final stages of drafting proposed revisions. Several broad concerns have been raised, including under-supervision, inadequate course prerequisites, and students serving as stopgaps for paid attorneys. While these concerns can and should be addressed, the benefits for all militate against drastic change. As Laura Nelson, Esq. (an alum of BU's Civil Litigation Clinic) sees it, without Rule 3:03, "you'll still have student lawyers in court, except they'll be called 'attorneys.'"

It is appropriate that I, a proud Student Defender alum, would "defend" Rule 3:03. Overall, my experience — from arguing a subpoena motion to produce a witness's medical records, to learning how to communicate with clients in crisis, to building practical skills for effective advocacy (like bringing protein bars and extra pens) — reaffirmed my desire to be a public defender. As I start my career, I have already drawn on these lessons.

However, one need not rely on my perspective to appreciate the importance of Rule 3:03. Former student prosecutors who now work as Assistant District Attorneys ("ADAs") credit Rule 3:03 as "without a doubt" their most beneficial law school experience. Recognizing that they learn best "by doing," they used the opportunity of making bail arguments, preparing discovery, arguing motions, and conducting trials to "hit the ground running." Brian Wilson, BU's Student Prosecutor supervisor, credits his own 3:03 experience as a student practitioner with the clinic in the 1990s for giving him the confidence "both professionally and personally" to become a life-long prosecutor. Now back at BU, Wilson has supervised over 80 Student Prosecutors, approximately half of whom have become ADAs. The remainder have put the transferable, real-world experience, skills developed, and lessons learned to good use in a variety of legal venues. Simply stated, student practitioners are more "practice ready" to serve clients, justice, and further the rule of law.

Even those who pursued career paths not directly related to their 3:03 experience have greatly benefited from such lessons. One Student Defender alum credits these "training wheels" as providing her with a "deeper sense of responsibility" that prepared her for her current position as a housing advocate. Professor Karen Pita Loor, who directs BU's Criminal Clinic, sees such "transferrable skills" as a critical takeaway. According to Loor, these benefits are a "win win win" for the student, future employer, and access to justice. With regard to facilitating access to justice, the need for client-centered *pro bono* representation is particularly acute on the civil side, where the right to counsel is generally not guaranteed. For instance, BU prides itself on its Consumer Debt Practicum, where students defend low-income clients in small claims court on credit collection matters. Without their help, these litigants would have to appear *pro se* and may be driven further into debt.

Granted, Rule 3:03 also raises challenges. One student noted there is something "unseemly" about students compensating for the shortage of "actual lawyers." Others caution about the practice of sending student prosecutors into court without a supervisor watching their every move. Although Rule 3:03 requires "general supervision," amendments have clarified that this "shall not be construed to require the attendance in court of the [supervisor]."

During the review process, the committee has sought feedback from stakeholders, including law schools, public agencies, and judges. The student perspective reveals nuances that caution against broad revisions, while suggesting paths forward. For example, Rule 3:03 allows students "enrolled in" evidence or trial advocacy to appear on criminal matters. Thus, students who have taken only one day of evidence are authorized to conduct a trial. During my first mock trial for my trial advocacy course, which was also one month into my evidence course, I missed hearsay objections and failed to move exhibits in evidence. Of course, I did not have a supervisor to help me prep for this mock trial. What if these errors occurred at an actual trial with my client's liberty at stake? Suggestions raised by Professors Wilson and Loor include case-by-case approaches with course prerequisites, more rigorous screening by law schools as to who is allowed to practice under Rule 3:03, and regular check-ins with supervising attorneys.

As Supreme Court Justice William Brennan highlighted over half a century ago, it is "plain that law students can be expected to make a significant contribution, quantitatively and qualitatively, to the representation of the poor in many areas." The proposed revisions to Rule 3:03 now provide an opportunity both to reflect on this vision and press forward.

Christiana Prater-Lee (she/hers) just started her career as a public defender for the Legal Aid Society in New York City. After graduating from Boston University School of Law in May 2022, she clerked for Associate Justice James R. Milkey of the Massachusetts Appeals Court. The views expressed in this article are entirely her own, and do not reflect those of either the Appeals Court or Justice Milkey.

Case Focus

Clarifying the Due Process Relatedness Requirement: *Doucet v. FCA US LLC*

By Lawrence Friedman

The U.S. Supreme Court and Supreme Judicial Court have recently re-considered aspects of personal jurisdiction's due process component. In *Ford Motor v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021), the Supreme Court sought to clarify the relatedness prong of the analysis. As first-year law students learn, for a court to exercise personal jurisdiction over an out-of-state defendant, a plaintiff's claims must either arise from or relate to the defendant's in-state activities. *Ford Motor* found relatedness satisfied in the particular circumstances of the case, but the majority notably declined to explore the broader implications of this conclusion. Enter the Supreme Judicial Court: in its decision in *Doucet v. FCA US LLC*, 492 Mass. 204 (2023), the SJC explained how the *Ford Motor* conception of relatedness ought to be understood and applied.

The plaintiff in *Doucet* had been injured in an automobile accident in New Hampshire in 2015 and brought suit there against the car's manufacturer, FCA US. *See id*. at 397-98. After a New Hampshire court found personal jurisdiction over FCA US lacking, the plaintiff filed suit in Massachusetts. *Id*. at 398. The Superior Court concluded that the Commonwealth could not exercise personal jurisdiction over FCA US, notwithstanding that the car in question had originally been sold to a New Hampshire resident by a Massachusetts dealership. *Id*.

Under the familiar rules, jurisdiction over an out-of-state defendant depends upon the satisfaction of both a state's long-arm statute and the requisites of due process. On appeal in *Doucet*, the SJC ruled the "but for" causation required by the Commonwealth's long-arm statute satisfied and then turned to the due process analysis. *Id*. at 400-01. Reviewing the test derived from the seminal case of *International Shoe v. Washington*, 326 U.S. 310 (1945), the court explained that due process allows the exercise of personal jurisdiction over an out-of-state defendant where that defendant purposefully availed itself of the privilege of conducting activities in the state, and the plaintiff's claims either arose out of or related to the defendant's forum-based activities. *Id*. at 401.

The record in *Doucet* showed that FCA US had engaged in ongoing automobile distribution, maintenance, and marketing activities in Massachusetts, and the SJC had little trouble concluding that purposeful availment was satisfied. *Id*. Addressing the relatedness prong of the analysis, the court observed that Massachusetts could exercise personal jurisdiction over FCA US only if the plaintiff's claims related to activities in which FCA US had engaged in the Commonwealth. *Id*. at 403. Relying upon precedent from the U.S. Court of Appeals for the First Circuit, the SJC described the relatedness prong of due process as requiring a "demonstrable nexus" between the claim and "the defendant's forum contacts." *Id.*, quoting *Knox v. MetalForming, Inc*., 914 F.3d 685, 691 (1st Cir. 2019). Here, the court concluded, "not only did FCA US engage in extensive business dealings in the forum," but there existed "a causal connection between its business dealings and the injury, albeit an indirect one, as the automobile was first sold in Massachusetts and eventually purchased by Doucet, a resident of a neighboring State." *Id*. at 403-04.

FCA US urged the SJC to read the Supreme Court's decision in *Ford Motor* to cabin and not expand the reach of relatedness when a cause of action did not arise directly from a defendant's

forum-based activities. *Doucet*, 492 Mass. at 405. In *Ford Motor*, the plaintiffs brought products liability suits against the defendant in states where car accidents had occurred and the respective victims resided. Ford Motor argued that the state courts lacked jurisdiction over it "because the particular car involved in the crash was not first sold in the forum State, nor was it designed or manufactured there." *Ford Motor*, 141 S.Ct at 1022. Rejecting this argument, the Supreme Court concluded that both Ford Motor's extensive business dealings in each state concerning the vehicles in question and the occurrence of the alleged injury in each together satisfied the requirement that the plaintiff's claims related to the defendant's activities in the forum. *Id*. at 1026. FCA US argued that the *Ford Motor* court did not intend a similar conclusion when, rather than the injury occurring there, the forum state was simply the site of the first sale of the automobile at issue. *See Doucet*, 492 Mass. at 405. After noting that the thrust of Justice Elena Kagan's majority opinion in *Ford Motor* was to expand the scope of relatedness when the cause of action did not arise from the defendant's forum-based activities, the SJC reasoned that, regardless of whether the injury occurred in the forum or that was the state in which the first sale occurred, due process is satisfied by the existence of both the defendant's extensive business dealings in Massachusetts *and* "business dealings related to the automobile that is the subject of the litigation." *Id*. On the facts in *Doucet*, the SJC found a "strong relationship between the defendant, the forum, and the litigation." *Id*., quoting *Ford Motor*, 141 S.Ct at 1028.

The value of the SJC's decision in *Doucet* lies in the court's clear answer to a question *Ford Motor* implicitly posed: whether, assuming extensive activities in the forum state, relatedness will only be satisfied if the plaintiff's alleged injury occurred there. Answering in the negative, the SJC recognized *Ford Motor*'s emphasis on the quality of the activities that connect the defendant to both the plaintiff's claim and the forum. In addressing a question the Supreme Court did not expressly ask or answer, *Doucet* also furthers the development of the law of personal jurisdiction. Given that the modern Supreme Court issues only fifty-some odd decisions per term these days, it is far from clear that the justices soon will be revisiting the intricacies of the relatedness prong of the due process analysis. Additional guidance as to the reach and scope of the court's doctrinal constructs should be welcomed no matter the court whence it comes.

Lawrence Friedman *teaches constitutional law and civil procedure at New England Law | Boston; prior to teaching, he was a commercial litigator at Choate, Hall & Stewart, in Boston.*

Voice of the Judiciary

Jury Trials and the Global Pandemic: Lessons Learned about Remote Jury Impanelment

By Hon. Sarah Weyland Ellis and Hon. Michael A. Vitale

March 2020 began an unprecedented time in the history of the Massachusetts court system. Due to the COVID-19 pandemic, our court system was forced to balance the health and safety of people in our courthouses and the imperative of providing access to justice. Accordingly, jury trials were suspended, initially for weeks and then indefinitely. Trial Court Departments were taxed as they continued to address the daily flow of emergency business with reduced staffing schedules designed to limit contagion. For many of us working every day in the courtroom setting it was both alarming and difficult as various courthouses closed and reopened in response to court employees and users contracting the virus. For broad categories of court business, courthouses were largely closed to the public until July 2020. During this time, the Jury Management Advisory Committee ("JMAC") played an active role in advising the Supreme Judicial Court ("SJC") on measures to reinstate jury trials in this challenging climate. What we learned may make it easier in the future to pivot into a crisis response model that allows us to conduct jury trials with remote features and enhanced safety precautions as needed.

JMAC

JMAC is a standing committee of the SJC established by G.L. c. 234A, § 6. It consists of six members appointed by the justices of the SJC, drawn from among the justices of the Trial Court departments or the appellate courts**[1]** JMAC has three primary mandates: (1) assist and counsel the justices of the SJC in their supervision of the Office of Jury Commissioner (OJC); (2) provide direct supervision of OJC in the performance of its statutory duties; and (3) supervise OJC on any matters delegated by the Chief Justice of the SJC.

After jury trials had been suspended due to the pandemic, the SJC asked JMAC to propose a series of recommendations for the phased reinstatement of jury trials across the Commonwealth. These recommendations were offered in reports later published and made public here.

Balancing competing considerations

Compelling citizens to appear for jury duty during the pandemic raised obvious health and safety concerns. It was a challenge to reconcile the imperative of public pandemic protections with criminal defendants' due process and speedy trial rights and civil litigants' rights to a jury trial. JMAC needed to reimagine how cases could be impaneled and tried in new, but fair ways. As the court system necessarily prioritized the trial of certain criminal cases, it was also apparent that it needed methods to provide civil litigants with their day in court.

To arrive at its recommendations, JMAC consulted with experts in epidemiology, infectious disease control, and healthy building modification.**[2]** JMAC considered public health strategies including mask use during trials, the availability of COVID testing for jurors and trial participants, reducing civil juries in the Superior Court to six jurors, providing the Jury Commissioner with authority and discretion to excuse summoned jurors upon request for COVID-related reasons, and alternatives to in-person jury trial proceedings.

JMAC and OJC also engaged in extensive information gathering, including a review of OJC data on past jury trials and data from the Trial Court Department of Research and Planning (DRAP) on pending cases awaiting trials. JMAC also collected data about courthouse facilities from the Trial Court Facilities Department and employees familiar with individual locations. JMAC communicated with court leaders across the country to learn about their innovative approaches and ideas. JMAC also held a series of listening meetings on the Zoom video-conferencing platform to solicit perspectives, concerns, and ideas from criminal and civil attorneys, Trial Court officials, and other system stakeholders. From these sessions, it was apparent that the Trial Court professional community was committed to identifying and developing acceptable methods to reinstate jury trials.**[3]**

In addition to a plan for phased reinstatement of in-person jury trials, JMAC ultimately recommended a pilot program for the remote impanelment of jury trials that was authorized by the SJC and adopted by the District Court. This article will examine the remote juror impanelment process for criminal cases piloted in the Greenfield and Plymouth District Courts, and a fully remote civil jury trial conducted in Brockton Superior Court and highlight key learning points. It also will address briefly the SJC opinions on due process in remote court procedures and some limitations encountered in expanding remote impanelment procedures, including the hesitation of litigants and defendants alike to engage in the process.

Laying the foundation for remote court proceedings

The Massachusetts unified court system, in which a Chief Justice and a Court Administrator serve all Trial Court departments across the Commonwealth, is relatively unique. OJC is responsible for summonsing jurors for all state courts. Thus, pandemic-related responses and innovations needed to be implemented on a large scale but with consideration of needs specific to geographical regions, courthouses, and Trial Court departments. As the court system contemplated how to hold jury trials during COVID-19, certain obstacles were endemic.

Jury pools posed a particular challenge. Prospective jurors travel from across the county to sit together as a large group in the jury pool room before impanelment even starts. Our modern courthouses typically have large jury pool rooms and spacious elevators. But modern multi-use courthouses need a high volume of jurors to hear trials across Trial Court departments. Our historic courthouses often have smaller jury pool rooms, hallways, and elevators, making it difficult to provide for any real social distance. Workable solutions, such as staggered appearance schedules for jurors, alternating trial days between court departments, and converting unused courtrooms and other large courthouse spaces into jury pool rooms resolved some issues. While some options necessarily lengthened the duration of impanelment, they did limit the contact between potential jurors prior to trial. The Trial Court also addressed courthouse occupancy levels by borrowing courtroom space in the John Joseph Moakley United States Courthouse**[4]** and leasing alternative facilities to convert into courthouses.**[5]**

While generating plans for in-person trials, the Trial Court simultaneously worked on expanding the ability to hear cases remotely. As a predicate to launching and bringing to scale the many remote courtroom procedures that were initiated during the pandemic, the Trial Court needed to address key IT infrastructure issues. The Trial Court significantly expanded internet bandwidth in the 95 courthouses statewide to support multiple platforms over a two-year period, including Polycom video conferencing, Zoom video conferencing, Masscourts, For the Record courtroom audio recording, Court FM audio storage and playback, electronic docketing, civil e-filing, and

the filing of criminal pleadings by email to employees in the various clerk's offices. Other IT challenges the Trial Court tackled included internet and intranet security, the integration of language interpretation into video and audio electronic platforms, and the deployment of laptops, courtroom desktop computers and monitors, portable audio recording devices, and video cameras in courtrooms across the Commonwealth. These infrastructure expansions were necessary to support our evolution into a court system that could bridge the pandemic breach electronically. The expansions took funding and time to initiate and implement.

Creating and launching remote impanelment

Once achieved, this increase in available technology allowed for the implementation of a remote jury impanelment pilot program which explored the efficacy of using video conferencing to winnow a jury pool of 20-30 prospective jurors to eight impaneled jurors (six seated plus alternates). In February 2021**,** with the assent of all parties, impanelments in two criminal jury trials were conducted using a hybrid of remote and in-person participation before Judge William F. Mazanec, III, in Greenfield District Court, and Judge Michael A. Vitali in Plymouth District Court. For comparison purposes, Greenfield used a technology-equipped courtroom and Plymouth used a traditional one. Special procedures and instructions were discussed and agreed to with trial counsel in advance.**[6]**

OJC gave prospective jurors the option to appear in-person or remotely, sending remote venire-members a Zoom link, log-in instructions, and instructions for downloading, completing, and securely uploading the confidential juror questionnaire on secure file-sharing software. Those who did not designate a preference were treated as in-person, and jurors who did not respond at all were treated in accordance with existing juror walk-in policies. A technology clerk was available to remote jurors by email and telephone for any technology questions. In the Greenfield District Court impanelment, the jury pool divided equally between jurors who elected to appear by Zoom and those who appeared in person. This was attributed in part to Internet connectivity limitations in rural parts of Franklin County. In the Plymouth District Court impanelment, the jury pool was 60 percent remote.

To ensure that neither in-person nor remote jurors were prioritized, juror numbers were assigned randomly across those participating remotely and in-person. To start the impanelment, the session clerk and the technical clerk admitted each juror to the Zoom platform individually, changing each username to the person's juror number. Receipt of each confidential juror questionnaire on the secure server was confirmed by the clerk. Each juror was then placed in a virtual waiting room, with status updates posted by the clerks on the room's home page. Court officers brought in-person jurors into the courtroom.

The trial judge introduced the impanelment and provided instructions to both sets of potential jurors simultaneously from the courtroom, using video conference via laptop on the bench for the remote jurors. Instructions specific to COVID-19 and the bifurcated process were created for the pilot program. The judge asked general *voir dire* questions of the venire at large, including several COVID-19 specific questions. Access for the public was provided in both trials by in-person socially distant seating, and in the Plymouth District Court impanelment by way of an open YouTube channel. Screens connected to the video conference feed allowed the attorneys, the defendant, and the public seated in the courtroom to see the prospective jurors. In the Plymouth District Court case, the defendant used a tablet both to see the jurors and to be visible to the pool.

The trial judge then posed individual *voir dire* questions to each juror. In-person jurors were brought into the courtroom individually by juror number, and each juror on video conference was admitted from the virtual waiting room in turn. Ultimately, each impaneled jury consisted of a mix of the in-person and video-conference jurors. All seated jurors were instructed to appear in the courthouse the following morning to commence the trial in-person. The remaining members of the venire were excused.

The remote impanelment pilot program showcased the court's flexibility. Allowing jurors to fulfill their jury duty from home, or a similarly private location, was a novel approach to a seemingly intractable problem. Employees who volunteered to learn the nuances of the now ubiquitous Zoom platform made themselves available to help jurors experiencing technical difficulties. Jurors could appear on Zoom without a mask, while jurors in the courthouse, at that stage of the pandemic, were required to wear masks throughout the trial. Feedback elicited after the trials from jurors who participated in remote impanelment was overwhelmingly positive.

While the District Court pilot focused on remote jury impanelment in criminal cases, the Superior Court piloted a fully remote civil jury trial. The civil trial, presided over by Judge Daniel J. O'Shea, was held on video conference from start to finish. The parties agreed to the format, not only for impanelment, but for the entire trial. Procedures like those in the District Court pilot were used to impanel the jury completely on Zoom. The parties relied on file-sharing software and the share screen Zoom function to display and provide the jury with trial exhibits, including a video exhibit. Witnesses testified by Zoom. At the conclusion of the trial, the jury was provided with the verdict slip via file share. They deliberated in a Zoom breakout room kept private by the clerk, and they signed the verdict slip electronically. This trial demonstrated that remote civil trials can be a viable solution that promotes access to justice during exceptional historical times.

Questions and concerns about remote impanelment

The remote procedures piloted provided access to justice when in-person proceedings were restricted and delayed. They allowed trial participants to view jurors without masks. Attorneys could preview juror questionnaires prior to trial. Jurors were enthusiastic to serve. Those without smart devices or a private space were provided with alternative methods of participation. Other states implemented remote jury trial procedures during the pandemic that remain in use today.**[7]** Developing the pilot programs was labor intensive, but the process provided a template for future expansion. In evaluating the utility of future remote impanelment proceedings, however, certain questions arise. If remote jury impanelment procedures were safe, cost effective, and more efficient than other options, why didn't we adopt them universally?

Constitutional concerns

The first set of concerns relate broadly to due process and fairness. Does video conference appearance detract from our ability to select a fair and impartial jury? Do jurors understand the gravity of the impanelment process if they are participating from their homes or a nontraditional space such as a library or courthouse Zoom Room?**[8]** The SJC has addressed whether constitutional rights are impacted by video conference participation in three cases.

In *Vazquez Diaz v. Commonwealth*, 487 Mass. 336, 340 (2021), the SJC held that a suppression hearing conducted over a video conferencing platform during the COVID-19 pandemic was not a

per se violation of a defendant's rights to confrontation, presence, public proceedings, or effective assistance of counsel. In *Commonwealth v. Curran*, 488 Mass. 792, 799 (2021), the SJC held that use of a video-conferencing platform in a criminal defendant's bench trial did not create a substantial risk of a miscarriage of justice. The SJC recognized, however, that a criminal defendant's constitutional rights may be implicated when critical stages of court proceedings are conducted remotely, and it provided guidance that judges obtain the assent of a defendant participating in a bench trial remotely. In *Adoption of Patty*, 489 Mass. 630, 645-648 (2022), the SJC held that a termination of parental rights bench trial conducted over an Internet based video conferencing platform, when the mother only had intermittent telephone access, violated the mother's due process rights because inadequate measures were taken to ensure she had access to the technology necessary to participate and view documents and evidence.

The issue of whether remote jury impanelment procedures violate any constitutional rights has not been reviewed by the Appeals Court or SJC.

Assent of the parties

A second impediment was that litigants remained wary of agreeing to participate in remote jury trial procedures. Our pilot program was conditioned on the assent of the parties. While the court system had the capacity to conduct a greater number of remote jury impanelments, identifying cases in which both sides would agree to these procedures proved challenging. Some parties were reluctant to agree to remote impanelment because, as discussed above, they questioned whether remote impanelment procedures were constitutional. Some criminal defendants, particularly those not in custody awaiting trial, may have weighed the costs and benefits to remaining at liberty during the pendency of a longer trial date and decided to wait for in-person impanelment. Also, an atmosphere of waning pandemic restrictions disincentivized an expansion of the remote impanelment pilot. Finally, unless attorneys watched one of the trials in which remote impanelment procedures were used, they may have found it difficult to envision the procedures. It is understandably difficult to agree to jury trial procedures in the abstract.

The technology divide

A third concern was how remote impanelment procedures accounted for the technology divide. Specifically, would limitations faced by people who could not access private locations, stable Wi-Fi, and smart technology exclude such jurors unfairly from jury duty? The pilot program addressed this concern primarily by using a hybrid of in-person and remote proceedings. It was difficult, however, to evaluate whether socio-economic demographics impacted which jurors elected to appear in person versus on Zoom. The pilot program also promoted the use of courthouse and library Zoom Rooms, and made available a technology clerk, who acted as a help line for jurors who encountered difficulties with remote participation. As we have continued to run various court sessions with remote features over time, some of these concerns have been addressed or mitigated. If future remote impanelment procedures were adopted, the Trial Court could investigate additional measures to provide access to technology, including access to smart devices on data plans and expanded Zoom Room locations.

Looking ahead

If the Trial Court were to consider expanding upon remote impanelment procedures in the future, the good news is that the necessary Trial Court IT infrastructure is now in place. Additionally,

Trial Court employees have developed expertise in the use of Zoom, and many court users and members of the public are now facile in using this technology. Litigants and members of the bar have requested the Trial Court's continued use of video conferencing for various types of court hearings because it is easy to access and saves significant time and money. The positive feedback from jurors in the remote impanelment pilot highlight how the use of video conferencing during impanelment could expand juror participation and enthusiasm for jury duty.

But other issues remain, including whether smart devices with video conferencing could be made available to jurors, whether public access video conferencing terminals could be made widely available in courthouses and expanded public locations, and whether attorneys could be provided with advance access to confidential juror questionnaires through the secure file-sharing software. The Trial Court would need to educate the bar on remote impanelment procedures through outreach and communication efforts, such as this article. Taking the pilot to scale across the court system would require a continued resource commitment and more of the innovation and dedication demonstrated by many Trial Court employees during COVID-19.

The pilot program was successful in that it provided a workable model for impaneling a jury trial during a global pandemic. This template raises questions about possible future uses of remote impanelment and whether such procedures should be used only if necessary, or whether there would be utility in a hybrid remote impanelment model for use in regular practice.

Conclusion

Faced with the daunting task of compelling the appearance of citizens to convene together while protecting litigants' rights to a fair and impartial jury, the SJC and JMAC turned to innovation, technology, and the industriousness of Trial Court employees to provide access to justice during the State of Emergency. The pilot trials discussed in this article offer a starting point to explore the future use of remote impanelment. JMAC invites dialogue with the legal community and the public to foster education and collaboration on increasing access to justice for all in Massachusetts.

Hon. Sarah W. Ellis is an Associate Justice of the Superior Court and the Chair of JMAC. Hon. Michael A. Vitali is First Justice of the Brockton District Court, a Regional Administrative Justice of the District Court, and a member of JMAC.

[1] JMAC currently consists of Judge Sarah W. Ellis, Superior Court (chair); Judge David J. Breen, Boston Municipal Court; Judge Mark C. Gildea, Superior Court; Judge Jane E. Mulqueen, Superior Court; Judge Gloria Y. Tan, Juvenile Court; and Judge Michael A. Vitali, District Court. Non-judicial, non-voting members include Pamela J. Wood, Jury Commissioner, and Christine P. Burak, Legal Counsel to the Chief Justice of the Supreme Judicial Court. During the pandemic, JMAC was chaired by then-Chief Justice Judith Fabricant (now retired), Superior Court, and included Judge David Ricciardone (now retired), Superior Court; SJC Justice Serge Georges, Jr., then of the BMC; Judge Kenneth J. Fiandaca, BMC; and Judge William F. Mazanec III, District Court. Other JMAC participants include James Morton, Senior Assistant for Judicial Policy / Chief of Staff of the Trial Court; John Cavanaugh, Deputy Jury Commissioner (now retired); Kara Houghton, Legal Counsel to the Jury Commissioner; and Tanisha Perkins, Administrative Coordinator to the Office of Jury Commissioner and JMAC scribe.

[2] JMAC benefited from the experience of Dr. Joseph Gardner Allen, Associate Professor and Director of the Healthy Buildings Program at Harvard T.H. Chan School of Public Health, and Trial Court consulting infectious disease specialist Dr. Michael Ginsberg of Norwood Hospital. JMAC also obtained the views of Massachusetts Department of Public Health officials.

[3] This article focuses on jury-related efforts. Several Trial Court departments held bench trials remotely by video conference throughout the pandemic. These included small claims, small claims appeals, summary process, and other civil cases in which parties opted for a remote bench trial.

[4] The Superior Court conducted eight criminal trials at the Moakley United States Courthouse during the pandemic. This was done with the permission and collaboration of Chief Judge Dennis F. Saylor and Clerk Robert M. Farrell of the United States District Court, District of Massachusetts, and coordination by Suffolk Superior Court Criminal Regional Administrative Judge Robert L. Ullmann and Suffolk Superior Court Clerk Magistrate for Criminal Business Maura Hennigan and First Assistant Clerk Edward J. Curley. The trials were impaneled in the Suffolk Superior Court and then tried and deliberated in the Moakley federal courthouse.

[5] Converting function rooms and other leased spaces into courtrooms involved significant cost and effort, including for the Trial Court Facilities Department (constructing courtrooms and supplying furniture), Security Department (coordinating transportation of detainees, creation of holding cells, securing courthouse entrances, conducting perimeter sweeps), Judicial Information Services Department (providing remote access to MassCourts and installing For the Record recording systems), clerk's offices (securely moving files and evidence, including firearms and narcotics), and OJC (manually managing large scale processes that were previously automated, creating site-specific juror notices, and responding to juror inquires and concerns).

[6] District Court Deputy Court Administrators Philip McCue and Joseph Jackson, District Court General Counsel Bethany Stevens, Clerk Magistrate Kenneth Chaffee, Assistant Clerk Magistrate Stephen Sloan, and Assistant Clerk Magistrate Brendan Barnes were pivotal in developing and implementing the procedures for the remote jury impanelment pilot.

[7] The King County Superior Court in Washington State continues to use remote jury impanelment procedures. The New Jersey Courts continue to use Zoom for the first part of jury selection.

[8] During the pandemic, the Trial Court established public access terminals in seven courthouses and partnered with public libraries statewide to provide court users access to various virtual court services, such as remote hearings, virtual counter service in the Probate and Family and Housing Courts, and court service centers. Fourteen library branches participate, with more expected in the future. A library kiosk project is underway in Springfield public libraries via a grant through the Western New England School of Law. These are referred to as "Zoom Rooms."

Case Focus

Breath Test Litigation Update: A New Framework for Assessing OUI Convictions Impacted by the Office of Alcohol Testing's Misconduct

By Casey Silvia

Litigation surrounding the breath test devices used in the Commonwealth has spanned the better part of two decades and resulted in three Supreme Judicial Court ("SJC") decisions. In the most recent decision, *Commonwealth v. Hallinan*, 491 Mass. 730 (2023), the SJC created a framework for cases potentially impacted by misconduct at the Office of Alcohol Testing ("OAT"). Under the new framework, tens of thousands of defendants convicted of Operating Under the Influence ("OUI") are entitled to a presumption of egregious governmental misconduct should they seek to vacate their convictions. To prevail, however, they must demonstrate a reasonable probability that they would not have pleaded guilty had they known of that misconduct.

Background

The Alcotest 7110 Litigation

Prior to 2011, Massachusetts law enforcement officers used the Alcotest 7110 to administer breath tests to measure alcohol content in one's blood. *Hallinan*, 491 Mass. at 735-737. A consolidated group of defendants moved to exclude their breath test results on the basis that the technology underlying the Alcotest 7110 did not produce scientifically reliable results. *Commonwealth v. Camblin*, 471 Mass. 639, 640 (2015). After several years of litigation, the SJC held that "because breath test evidence is, at its core, scientific evidence, the reliability of the Alcotest breath test result had to be established before evidence of it could be admitted[.]" *Id.* at 640. After remand and a *Daubert* hearing, a District Court judge concluded that the Alcotest 7110 produced reliable results, a finding that the SJC upheld on appeal. *Commonwealth v. Camblin*, 478 Mass. 469, 469-470 (2017).

The Alcotest 9510 Litigation

Even before the SJC decided *Camblin,* in 2011 OAT replaced the Alcotest 7110 devices with a newer model — the Alcotest 9510. *Hallinan*, 491 Mass. at 735. Hundreds of OUI defendants would challenge the reliability of the Alcotest 9510. Their cases were consolidated and specially assigned to a District Court judge to hold a *Daubert* hearing. *Id*. at 737-738. Thousands more cases were stayed pending the outcome of the consolidated litigation. *Id*. at 738.

Although the consolidated defendants in the Alcotest 9510 litigation raised some issues that were similar to those previously raised in *Camblin*, they also identified a new issue that would prove critical to the 9510 litigation: the standards employed by OAT to calibrate and certify the Alcotest 9510 devices ("certification").

In advance of the *Daubert* hearing, the defendants filed a number of discovery motions, including a request for OAT's internal documentation of the Alcotest 9510 certification process. *Id*. The judge ordered the Commonwealth to produce all certification worksheets from 2011 onwards. *Id*. OAT produced close to 2,000 worksheets indicating that devices had "passed" certification and a very small number of worksheets documenting occasions on which particular

devices had failed certification. *Id*. An attorney for OAT represented to the court that all of the worksheets encompassed by the discovery order had been provided. *Id*.

The District Court judge held the *Daubert* hearing in January 2017 and decided that, while the Alcotest 9510 produced scientifically reliable results, the annual certification methodology employed by OAT between June 2011 and September 2014 did not produce reliable results because of OAT's lack of written certification protocols. *Id*. at 738-739; *see also* *Commonwealth v. Ananias*, Dist. Ct., No. 1248CR1075 (Feb. 16, 2017). While the judge ruled that OAT's "methodology produced presumptively unreliable breath test results," the Commonwealth could demonstrate on a case-by-case basis that individual Alcotest 9510 devices were properly certified. *Hallinan*, 491 Mass. at 739. Breath test results obtained after OAT instituted appropriate written procedures were deemed presumptively reliable. *Id*.

After *Ananias* in 2017, hearings took place across the Commonwealth during which prosecutors sought to demonstrate that OAT had properly certified particular Alcotest 9510 devices. *Id*. During the course of one such hearing in August of 2017, it came to light that OAT had withheld over 400 failed certification worksheets in contravention of the *Ananias* discovery order — worksheets which were exculpatory and should have been produced. *Id*.

As a result of these revelations, the Executive Office of Public Safety and Security ("EOPSS"), which oversees OAT, launched an investigation. *Id*.

EOPSS subsequently produced a report detailing "a history of intentional withholding of exculpatory evidence by OAT, blatant disregard of court orders, and other misconduct, all underscored by 'a longstanding and insular institutional culture that was reflexively guarded.'" *Id*. Particularly relevant were two cases which preceded the *Ananias* litigation and involved OAT's refusal to provide internal records in contravention of discovery orders. *Id*.

Following extensive negotiations, the parties in *Ananias* entered into an agreement in which they stipulated that OAT intentionally withheld exculpatory evidence in the form of 432 failed certification worksheets without informing the prosecutors, the defense, or the court. *Id*. at 742. The parties also agreed that OAT would take several remedial measures, including seeking accreditation and expanding access to discovery. *Id*. The Commonwealth further agreed that it would not seek to establish the reliability of particular Alcotest 9510 devices in pending cases (with the exception of certain categories of cases, including homicides and some repeat offenders), and it would pay for notices to be sent to more than 27,000 defendants. *Id*.

The *Ananias* judge accepted the joint agreement and issued a decision concluding that OAT's behavior had undermined public trust and deprived the defendants of a full and fair *Daubert* hearing. *Id*. After OAT took certain actions ordered by the Court, the judge ultimately found the presumptive period of exclusion of breath test results extended from June 1, 2011 to April 18, 2019. *Id*.

Commonwealth v. Hallinan

The defendant in *Hallinan*, whose plea took place in 2013, moved for a new trial after OAT's malfeasance in the subsequent consolidated litigation came to light. Her motion was denied because she was unable to demonstrate a nexus between the misconduct and her own case. *Id*. at 731. On appeal, the SJC concluded that OAT's disregard for its discovery obligations was so pervasive that *all* defendants whose cases included a breath test from an Alcotest 9510 certified

prior to April 18, 2019 were entitled to a conclusive presumption of egregious governmental misconduct, regardless of whether the specific misconduct in *Ananias* preceded their individual cases. *Hallinan*, 491 Mass. at 745-748, 755. However, the SJC required that defendants seeking to vacate their convictions demonstrate a reasonable probability, based on the totality of the circumstances, that they would not have entered a plea had they known of OAT's misconduct. *Id*. at 748-750. The SJC recognized that, while a breath test result is important evidence in any OUI prosecution, it often is not the only evidence by which the Commonwealth can prove its case and may not be the determinative factor in a defendant's decision to plead or proceed to trial. *Id*. Should a retrial be held, the breath test results will be excluded. *Id*.

Implications

The most obvious implication of *Hallinan* is that tens of thousands of defendants will now be entitled to move for a new trial without having to establish a nexus to OAT's misconduct in their individual cases, and many others whose motions for a new trial had previously been denied will now have grounds to renew those motions. Courts will need to determine, on a case-by-case basis, the degree to which the exclusion of the breath test would have impacted a defendant's decision whether to proceed to trial. Defense attorneys and prosecutors will also need to consider the strength of the underlying case in deciding how to handle such motions, and whether a retrial is feasible.

Hallinan is silent as to cases involving the Alcotest 7110, but the Court's holding makes clear that OAT's misconduct was longstanding and dated back at least to 2011. Although further litigation will be necessary to determine if more cases should be included, it seems unlikely that the culture of dysfunction at OAT only existed from 2011 onwards.

Finally, although *Hallinan* notes that the joint stipulation of the parties in *Ananias* excluded from its ambit certain categories of serious offenses, including motor vehicle homicides, the SJC did not specifically discuss the application of its holding to cases involving those charges.

There are likely to be numerous other issues to litigate, but if one thing is clear, it is that *Hallinan* will not be the final word in the breath test litigation.

Casey Silvia is the Chief Staff Attorney at the Massachusetts Appeals Court and a member of the BBA's Criminal Law Section. She previously served as Senior Appellate Counsel and Captain of the Search Warrant Team at the Middlesex District Attorney's Office and was one of the lead attorneys for the Commonwealth on the breath test litigation.

Voice of the Judiciary

Reimagining Justice in the Probate and Family Court

By Brian Pariser

In his 2017 State of the Judiciary address, SJC Chief Justice Ralph Gants identified structural issues that had put the Probate and Family Court in crisis. He observed that Probate and Family Court judges "must understand not only a single transaction or event, but each family's entire history, including the relationship between the spouses, their abilities as parents, and the needs of their children or, in some guardianship cases, the needs of an elderly parent or a drug-addicted adult child. The judges must also determine each family's income, assets, and potential financial resources, including their capacity to earn." The situation is made more difficult, he noted, due to the number of self-represented parties that must litigate matters "as complex, as emotional, as enduring, and as life-changing, as in the Probate and Family Court." The Massachusetts Access to Justice Commission observed in its 2017 Strategic Action Plan that "upwards of 80% of family law cases involved at least one unrepresented litigant at that time, and it appears that the number of unrepresented litigants continues to grow." Those numbers generally continue to hold true today.

Managing cases with self-represented litigants almost always takes more time and resources. This reality is magnified in the Probate and Family Court, where there is little finality to judgments as parties frequently return to court for modifications, which represent 25% of the court's caseload, as well as contempt actions. Additionally, the judges are required by statute to issue written findings or determinations in 181 distinct situations. Compounding the workload, the court had been significantly understaffed since 2015, when a hiring freeze produced critical vacancies.

Despite their deep commitment to helping families in need, many judges find it difficult to keep up with their overwhelming workload. Consequently, the Chief Justice concluded, "Probate and Family Court judges are retiring before age 70 at the highest rate of all our Trial Court departments, and younger judges are running at a pace they cannot reasonably sustain." Judicial 'burn out,' has cost the court judges with institutional memory and deep experience in highly specialized and technical areas of the law.

Facing this crisis, Chief Justice Gants issued a challenge to "reimagine how we do justice in our Probate and Family Court." The court has recently made great strides to answer this call. Although improvement is, and always will be, a work in progress, the Probate and Family Court has been creative and innovative and now stands on a firmer footing, ready to face today's challenges.

The Court's Coordinated Response to the Crisis

A more efficient Probate and Family Court, which can better manage its increasing workload and resolve cases both fairly and promptly, benefits everyone. Chief Justice John Casey, shortly after his appointment in 2018, conceived a multi-stage strategy built around obtaining sufficient funding, welcoming creative solutions and operational innovations, working with stakeholders, and reallocating and repurposing resources. All efforts were focused on the overarching mission "to deliver timely justice to the public by providing equal access to a fair, equitable and efficient

forum to solve family and probate legal matters and to help and protect all individuals, families and children impartially and respectfully."

Pathways Case Management

Judicial and Assistant Judicial Case Managers ("case managers") were removed from the courtrooms, where they had been placed due to a shortage of sessions clerks. The role of a case manager is to manage cases and this move allowed them to implement Pathways case management ("Pathways"). Using Pathways, case managers triage cases and match parties to available resources early in the litigation process. They provide information to parties on appropriate resources and about the court procedure. This allows parties to resolve their cases quickly and efficiently, often without judicial involvement. Fewer court hearings benefits both the parties and the public. When judicial involvement is necessary, judges have more time to hear the evidence and write decisions.

Pathways was rolled out in 2019 in select courts, initially addressing modification actions. It now operates in all fourteen divisions. Since January 2020, more than 3,400 cases have been resolved through this program, and, in the first nine months of 2023, 739 cases were resolved this way. Pathways has already proven to be indispensable and will hopefully soon be expanded to include more case types, such as child support contempt proceedings.

Defining Best Practices for Court Staff

In 2022, Chief Casey and Deputy Court Administrator Domenic Dicenso created a working group of judges and registers of probate to make proposals regarding specific topics deemed essential to the continuing evolution of the two aspects of the court – the judiciary and the Registry - into one cohesive unit. The working group ultimately reached consensus and created an internal guide that identifies the primary responsibilities of assistant registers and case managers and establishes best practices for emergency protocols to promote uniformity within and across divisions.

The Fiduciary Litigation Session

The Fiduciary Litigation Session ("FLS") is another relatively recent, successful, undertaking which has brought relief to congested dockets. The FLS was originally initiated in 2017 as a temporary pilot program to resolve complex probate litigation cases. In 2019, the court committed to building on the FLS, securing funding to expand its single session and hire a dedicated FLS staff of two full time session clerks and a research attorney. The FLS is now staffed by two retired recall judges and receives referrals from all the court's divisions.

As of June 16, 2023, 483 matters have been reassigned to the FLS, of which 355 have been resolved. Each of these contested cases was referred to the FLS in accordance with Probate and Family Court Standing Order 3-17 "based primarily on the complexity of the case and the need for substantial case management." No fewer than 93 of these cases are comprised of two or more related actions, and their complexity demands significant judicial attention and multiple days of trial. The FLS's expansion has saved the court countless hours of trial time for each referred case and provided the bar and litigants with consistent, specialized judicial expertise. The court

hopes to expand the FLS to hear additional case types.

Office of Adult Guardianship and Conservatorship Oversight

In 2021, Massachusetts was one of only seven states to receive a federal grant to establish the Office of Adult Guardianship and Conservatorship Oversight ("OAGCO"), which will be housed within the court's administrative office. The OAGCO will have an important role in educating guardians and overseeing the reporting obligations of both guardians and conservators.

The Pandemic Spurs Permanent Practice Innovations

Beginning in 2020, the COVID-19 pandemic threatened to paralyze the court and set back its reform efforts. The court nimbly responded to the challenges and, in the process, permanently redefined Probate and Family Court practice.

In 2020, in conjunction with the Department of Revenue, Child Support Enforcement Division ("DOR/CSE"), the court established the award-winning Virtual Child Support Case Conferencing Session ("case conferencing"). This session was created to maintain families' access to child support at the beginning of the pandemic, when so much was uncertain about public health, the economy, and the resulting impact on children.

Beginning with telephonic hearings, and later by Zoom, litigants appear safely before a judge to resolve certain paternity and child support matters involving DOR/CSE. Case conferencing rapidly expanded and since its inception has scheduled more than 22,000 individual cases for hearing. In the six months between April and September 2023, case conferencing heard 5,121 cases, more than half of which were reviewed administratively without a hearing.

Due to its success, the court made case conferencing permanent. In-person hearings with judges in day-long "block sessions" are no longer necessary and litigants, many of whom are low income, are saved the time and money that would otherwise be spent to attend court, including extra childcare, transportation, and lost wages from missed work.

The court plans to retain other innovations made in response to the pandemic. Probate and Family Court Standing Order 2-23 keeps remote hearings in place for certain additional case types, and staggered scheduling is required for all cases, in-person and virtual. The court's virtual registries, which presently allow court users to remotely access 'face-to face' help from court staff in 11 divisions, will also be maintained.

Eight New Judges and Adequate Personnel

To sustain and cement the benefits of its successful initiatives however, the court needed to fill significant judicial and staff vacancies. After years of trying to do more with less, court leaders were able to fund additional positions to assist both the registries and judicial staff.

Even with the innovations the court has implemented, the increasing complexity of the litigation means that the most difficult and contested matters must ultimately end up before a judge. Recently, the court has relied on retired judges, in both part-time recall or volunteer capacities, to resolve a significant portion of these cases. This was a temporary solution to a long-term

problem. As such, Chief Casey and Assistant Deputy Court Administrator Dicenso, with the support of Chief Justice Locke and Court Administrator Thomas Ambrosino, advocated for an additional eight permanent, circuit judges to permit both the stability and expansion of proven programs, support judges throughout the state, and improve access to justice in the court. The Legislature and the Governor heeded the call and have shown their support of the court's pressing needs and included funding for eight additional Probate and Family Court judges in the FY 2024 budget.

Conclusion

By 2017, the Probate and Family Court was in crisis and struggling to provide among the most basic, critical services to the public. However, with significant support from all areas of government and the public, the court has improved the administration of, and access to justice. While there is on ongoing need for continued improvement, the past five years has demonstrated that the reimagining of the court has yielded tangible results, and improved the court and the lives of court users.

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Case Focus

Legal Parentage Upheld in *J.M. v. C.G.*

By Claire K. Forkner

Overview

The Supreme Judicial Court ("SJC" or the Court) recently issued an important decision in a paternity case reaffirming the substantial protection accorded to all family units, including those formed out of wedlock, and rejecting arguments that putative biological paternity, alone, confers a special status to disrupt the legally protected bonds of these family units. In *J.M. v. C.G.*, 492 Mass. 459 (2023), the SJC affirmed a Probate and Family Court decision dismissing paternity claims of a putative biological father that were brought four years after another man executed a voluntary acknowledgment of paternity ("VAP") and had developed a close parental relationship with the child. In affirming the lower court decision, the SJC found that the putative biological father's challenge to the VAP was time barred by a one-year statute of limitations. The SJC further found that the putative biological father's equitable claim for paternity failed because he was unable to show the required "substantial parent-child relationship."

Background

At the time the child in question (Amelia) was born, in February of 2013, no father was listed on her birth certificate. When Amelia was 8 months old, she and her mother (C.G.) moved in with her mother's former boyfriend (J.M.) with whom C.G. had co-parented another child. J.M. treated Amelia as his biological child and the evidence showed that the child believed him to be her father from the time she could speak. C.G. and J.M. did not live together for long – C.G. moved in with a new partner months after moving in with J.M. After C.G. and Amelia moved out, J.M. continued to take what the trial court found to be an active role in parenting Amelia, including being involved in her education and medical care.

Shortly before Amelia's fourth birthday, her mother, C.G., and J.M. executed a VAP under G.L. c. 209C to establish J.M. as the child's legal father.

More than three years later, when Amelia was seven-years-old, J.M. sought legal custody and expanded parenting time of Amelia following a disagreement he had with C.G. The footnotes of the case reference that at that time the relationship between J.M. and C.G. was strained. Amelia's putative biological father (M.H.) sought to intervene in the action between J.M. and C.G. through both a complaint in equity and a complaint pursuant to G.L. c. 209C. This was the first time M.H. filed any legal action. The trial court dismissed both of M.H.'s complaints and denied his Motion to Intervene in the underlying action between Amelia's two legal parents.

Complaint Pursuant to G.L. c. 209C

G.L. c. 209C has a clear one-year time limit to contest a VAP. The SJC found that M.H.'s 209C complaint was barred by this limit because he filed more than three years late. Although M.H. contended that the limit should not apply to him as a biological father, the SJC ruled that the limit could not and should not be ignored because the purpose of the VAP is to provide "stability and permanency with regard to the parentage of nonmartial children." *See Paternity of Cheryl*, 434 Mass. 23, 30 (2001), citing G.L. c. 209C, § 11 ("There is a compelling public interest in the

finality of paternity judgments"). M.H. also argued that the VAP was invalid on its face because it was signed with the knowledge that J.M. is not Amelia's biological father. Here, the SJC rejected M.H.'s argument by referencing *Adoption of a Minor*, 471 Mass. 373, 378 n. 8 (2015), stating that the Court has long recognized that "families take many different forms" and that thus "a genetic connection between parent and child can no longer be the exclusive basis for imposing the rights or duties of parenthood." Further, the Court found no due process violation because M.H. retained the right to claim paternity through a common-law action using the lower court's equity jurisdiction.

Complaint in Equity

To establish paternity using the court's equity jurisdiction, a putative father needs to demonstrate a substantial parent-child relationship by clear and convincing evidence. *C.C. v. A.B.*, 406 Mass. 679, 689-691 (1990). On appeal, M.H. first contended that the substantial parent-child relationship standard should not apply because the mother and J.M. did not live together and, therefore, they did not have a family unit worth protecting. The Court strongly rejected this argument, reaffirming its view that policy concerns about avoiding potential disruptions to a family unit apply equally to marital families and those acknowledged out of wedlock by a VAP. See G.L. c. 209C, § 1; *Smith v. McDonald*, 458 Mass. 540, 546 (2010) ("the legal equality of nonmartial children pursuant to G.L. c. 209C, sec 1, dictates the same rule apply for children in comparable circumstances"). The Court further noted that "protecting the best interests of the child" held paramount importance. And, in that regard, the Court was convinced that Amelia's best interests were served and had been served by J.M. as her father – a man who the Court noted had been known to Amelia as her father since she was a baby. The Court also noted that Amelia spent more than one-half of her time with him and that he had taken an active role in every part of her life so that there was clearly a relationship to protect regardless of the fact that her father was not and never had been married to her mother. Finally, with respect to M.H.'s need to show a substantial parent-child relationship, the Court found that although M.H. and Amelia had a positive and caring relationship, M.H. did not meet his burden. The Court appeared to rely on the facts that M.H. did not and had not provided Amelia financial or emotional support as a parent does and was not routinely involved in her education, health, or welfare.

Conclusion

The Court affirmed the trial court's decisions in all respects and M.H. was unable to move forward on either of his actions. Amelia's parentage was challenged but unchanged in her best interests. Given the decisive action taken by the Court in this case, it may be that we will not see similar challenges to parentage solely on the basis of the challenging party being a biological parent. Another effect of this decision might be a focus of claims of putative biological fathers on development of the substance of their parent-child relationship and attending to the best interests of the child rather than overvaluing the meaning of their biological connection.

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Voice of the Judiciary

Some Pitfalls and Perils of Judicial Social Media Use

By Hon. Julie J. Bernard and Keith R. Fisher

Social media has become part of life, and judges are not expected to live and work in isolation of the world around them. Facebook, X (formerly known as Twitter), Snapchat, Instagram, and LinkedIn are now household words. These platforms play an increasing role in social and professional intercourse, as well as the dissemination of information (and sometimes disinformation). Since most people consume their information online, courts are now connecting with the public in real time on social media to increase public awareness and understanding of the judicial system. The Massachusetts Trial Court uses X and has a Facebook page to share public information, resources, and announcements.

Individual judges can partake in the social media conversation, too, if their actions are consistent with the Massachusetts Code of Judicial Conduct ("CJC"). Other jurisdictions have reached the same conclusion. Wearing a robe is an honor but also entails certain responsibilities to the judiciary as an institution. Judges' personal use of social media can cause problems by creating an appearance of bias or impropriety, and erode public trust and confidence in the judicial system.

This article is intended to highlight several common pitfalls and perils for judges of social media use in an increasingly discordant milieu.

Assume Nothing Is Private!

CJC Rule 2.5 requires competence in performing judicial and administrative duties.**[1]** Judges using social media should acquaint themselves with the security and privacy policies, rules, and settings, periodically review them, and exercise caution.**[2]** Even seemingly "private" posts and messages, some of which might prove embarrassing (individually or to the judiciary as a whole) if publicly revealed, can easily be captured by a screenshot.

Do not rely on the privacy settings: Once you have posted something, you lose control of it and very likely will not be able to retract it. Social media posts may be disseminated to thousands of people without your knowledge or consent.**[3]** Worse yet, these data have long, perhaps permanent, digital lives and may be recovered, circulated, or printed years after being sent. Moreover, electronic communication, devoid of in-person visual or vocal cues, can readily be taken out of context, misinterpreted, or altered. Some representative disciplinary matters include:

- *In the Matter of Bearse*, Public reprimand (Minn. Bd. Jud. Standards, Nov. 20, 2015) (judge erroneously believed his account could be viewed only by approximately 80 family members, friends, and members of his church).
- *In the Matter of Whitmarsh*, Determination (N.Y. Comm'n Jud. Conduct, Dec. 28, 2016) (judge intended her criticism of felony complaint to be seen only by her 352 Facebook "friends" but forgot she had set her privacy settings to "public").

- *In the Matter of Quinn*, Public reprimand (Minn. Bd. Jud. Standards, Mar. 9, 2021) (although judge maintained a private Facebook page, he had 70 "friends"; operating a private Facebook page with "friends" provides no shield for violating Code of Judicial Conduct).

The Poison of Politics

Particularly toxic to public perceptions of judicial impartiality and fairness is offering political statements, opinions, or rants. Judges must be aware of this in their personal capacity, but there is also a trap for the unwary regarding those they supervise, including court staff, law clerks, and judicial externs.**[4]** Massachusetts ethics opinions have been clear there is an ethical obligation to report another judge's social media misconduct. A judge who views another judge's profile on Facebook and learns that it displays political posts, media coverage and bias, links to articles about politics, internet memes about politics, expressions of political opinions, or exchanges about politics has "knowledge" for purposes of CJC Rule 2.15(A) of violations that raise a substantial question regarding the other judge's fitness as a judge and is required to report it.**[5]** Judges should also advise family and friends they are connected with to exercise caution in their online posts and musings.

The political divisiveness of recent years has been mirrored in judicial disciplinary cases:

- *In the Matter of a Judge*, SJC No. OE-150 (Mass. Dec. 22, 2022) (public reprimand for "making posts on social media that expressed views on political candidates, political figures and issues, and posts that could create the appearance of bias based on gender, ethnicity, or immigration status")
- *In re Kwan*, 443 P.3d 1228 (Utah 2019) (6-month suspension without pay for, *inter alia*, asking in a Facebook post about then-presidential candidate Donald Trump: "Is the fact that the IRS has audited you almost every year when your peers hardly ever or never have been, something to be proud of? What does that say . . . about your business practices?")
- *Matter Concerning Gianquinto* (Cal. Comm'n Jud. Performance Aug. 22, 2018) (public censure and debarment for (1) posts and re-posts on his public Facebook page that reflected anti-Islam, anti-illegal immigrant, anti-Native American, anti-gay marriage and transgender, anti-liberal, and anti-Democrat sentiment, and (2) representing that he had taken the posts down when that was not true, although he believed the posts were no longer publicly viewable).
- *In the Matter of Quinn*, Public reprimand (Minn. Bd. Jud. Standards, Mar. 9, 2021) (publicly reprimand for "liking" Donald Trump's Facebook page, "liking" a post which said that Joe Biden is a "disgrace," and posts on the page and posting screenshots of newspaper photos of himself piloting a boat in the Trump Boat Parade).
- *In re Mark B. Cohen* (Penn. Ct. Jud. Discipline, Complaint filed Feb. 23, 2023) (pending) (alleging dozens of improper political posts on judge's personal Facebook page supporting the left and disparaging the right).

Social Media Relationships and Opinions

A judge must be wary of endorsing posts by others through "some affirmative action" which can create the impression that the judge has adopted the comments.**[6]** If something written online by someone else would be inappropriate for you to say as a judge, then it's wrong to "like," "follow," repost, or otherwise endorse it.**[7]** Posting a heart, a "thumbs up," or some similar type of emoji will be deemed endorsement or adoption of the comment or statement in question.

Online reviews can also lead to difficulties. When in doubt, don't. But if so inclined, be sure that nothing in your review can identify you as a judge.**[8]** Otherwise, you could run afoul of abusing the prestige of judicial office under CJC Rule 1.3. Reviews should only be posted to "crowdsourced"**[9]** sites (like Yelp, TripAdvisor, or Open Table), not to other sites.**[10]** Were a judge to write a review appearing on the website of the business itself, that would violate the rule.

When it comes to "friending" attorneys, different jurisdictions have adopted significantly different approaches. Some prohibit it on the grounds that it can convey the impression that the lawyer is in a special position to influence the judge.**[11]** Perhaps the broadest view was taken by Utah, which has permitted "liking" and "following" on Facebook (even "liking" law firms) and even "following" on X, all on the rationale that these practices don't "convey much about a judge's thoughts on a topic."**[12]**

The Massachusetts Committee on Judicial Ethics initially adopted a firm position against judges "friending" attorneys online,**[13]** interpreting the CJC to "prohibit a judge from being Facebook friends with any attorney who is reasonably likely to appear before that judge."**[14]** The Committee went even further and ruled that judges must affirmatively review their lists of "Facebook friends and 'unfriend' attorneys who are reasonably likely to appear before [them]."**[15]** Given the proliferation of Facebook "friends" and the onerousness of monitoring them, however, the Committee has revised its initial opinion requiring disclosure of "former Facebook friends";**[16]** judges are no longer "presumptively" required to make that disclosure but should "exercise sound discretion based on all the facts" to make that decision.**[17]**

Conclusion

Social media and technology have changed society in positive ways. It has also changed judicial practice. Social media use and the consequences of it are sometimes present in our courtrooms every day. If a judge is an active social media user, they have an obligation to keep abreast of developments with ethical rules, including the evolving landscape of social media use and technology. While social media use can better connect judges to their communities, one must be mindful of the perils of reckless or careless personal use of this dynamic technology.

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A former law professor and an expatriate from private practice in what is nowadays referred to as "Big Law," Professor Fisher is the first Distinguished Fellow at the National Judicial

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[1] In 2015, Comment 8 to Rule 1.1 of the MA Rules of Professional Conduct was amended to state: "to maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, and engage in continuing study and education." All Massachusetts lawyers therefore have a professional obligation to stay current with emerging technologies relevant to the practice of law and their individual areas of practice.
[2] *See* N.Y. Jud. Ethics Adv. Op. 08-176 (2009) (judge using social media should exercise appropriate degree of discretion in how to use the social network and stay abreast of features and new developments that may impact judicial duties).
[3] *Cf.* ABA Standing Comm. on Ethics & Prof. Responsibility, Formal Op. 462 (2013) (observing that judges have to assume that things posted to a social media site will not remain within the judge's social circle).
[4] CJC Rule 2.12(A).
[5] CJE Op. 2021-01 (Mass. Sup. Jud. Ct. Comm. Jud. Ethics Mar. 18, 2021; rev. July 21, 2021).
[6] CJE Adv. Op. 2016-1 (Mass. Sup. Jud. Ct. Comm. Jud. Ethics Feb. 16, 2016); *see also* Cal. Judges Ass'n Adv. Op. 66 (Nov. 2010).
[7] CJE Adv. Op. 2016-1, *supra*.
[8] An online review signed "Jane, a diner in Boston" or "Dick, a customer from Lenox" would not be problematic in that regard.
[9] Merriam Webster Online defines "crowdsourcing" as "the practice of obtaining needed services, ideas, or content by soliciting contributions from a large group of people and especially from the online community rather than from traditional employees or suppliers."
[10] *See* Cal. Judges Ass'n Adv. Op. 78 (Jan. 2020).
[11] *See, e.g.*, In re Jud. Ethics Op. 2011-3, 261 P.3d 1185, 1186 (Okla. Jud. Ethics Adv. Panel July 6, 2011).
[12] Informal Op. 12-01 (Utah Jud. Ethics Adv. Comm. Aug. 31, 2012); *accord* N.Y. Jud. Adv. Op. 08-176, *supra* (observing that judges "generally may socialize in person with attorneys who appear in the judge's court").
[13] CJE Adv. Op. 2011-6 (Mass. Sup. Jud. Ct. Comm. Jud. Ethics Dec. 28, 2011).
[14] CJE Adv. Op. 2011-6, *supra*; CJE Adv. Op. 2016-1, *supra*. Similarly, a judge who uses LinkedIn must disconnect with any attorney reasonably likely to appear before that judge. CJE Adv. Op. 2016-08 (Mass. Sup. Jud. Ct. Comm. Jud. Ethics Sept. 6, 2016).
[15] CJE Adv. Op. 2016-1, *supra*.
[16] *Id.*
[17] CJE Adv. Op. 2018-3 (Mass. Sup. Jud. Ct. Comm. Jud. Ethics May 18, 2018).