Boston Bar Journal

A Peer Reviewed Publication of the Boston Bar Association

Volume 56

Number 4

Fall 2012

ABOUT THE BBJ

SUBMITTING AN ARTICLE

BOARD OF EDITORS

CONTACT US

CITING THE BBJ

LETTERS TO THE EDITOR

ARCHIVES

PRESIDENT'S PAGE

Expanding Lawyer for Day at Housing Court: One Piece of Homelessness Puzzle
By James D. Smeallie

FEATURED ARTICLES

20/20 on 2020: Predictions for the Future of Social Media and the Law
By David Kluft, Peter Lefkowitz, Martha Mazzone, Zick Rubin and Tom Hemnes

Vexatious Litigation: A Vexing Problem
By Richard M. Zielinski

Oh, the Places You've Been! Preserving Privacy in a Cellular Age
By Sara E. Silva

Sealing the Virtual Envelope: Protecting Attorney-Client Privileged Email in Criminal Investigations
By Michele L. Adelman and Jennifer S. Behr

Don't Click This Article!
By Richard J. Yurko

Preserving Evidence To Convict the Guilty and Protect the Innocent: Massachusetts' Post-Conviction Access to Forensic and Scientific Analysis Act
By David M. Siegel and Gregory I. Massing

Translation
By Judge Rudolph Kass (ret.)

Tell us what you think about the *Boston Bar Journal*

Expanding Lawyer for Day at Housing Court: One Piece of Homelessness Puzzle

Posted: September 12, 2012 | **Author:** bbabarjournal | **Filed under:** Fall 2012, Vol 56, #4, President's Page | **Tags:** BBA President, Boston Bar Association, Boston Bar Journal, Boston Housing Court, Civil Right to Counsel, Greater Boston Legal Services, Holland & Knight, housing, landlord tenant, Volunteer Lawyers Project | **Modify:** Edit this |Leave a comment »

By James D. Smeallie

President's Page

In March of this year, the **Boston Bar Foundation** (BBF) released a groundbreaking **study** assessing the practical impact of legal representation in eviction cases. The data indicated that without representation by counsel, many vulnerable tenants forfeit important rights, often lose possession of homes they could have retained, and sometimes forego substantial financial benefits. Conducted under the auspices of a **Boston Bar Association** (BBA) Task Force on Expanding Civil Right to Counsel, the study involved two different pilot projects, one in the Quincy District Court, and one in the Northeast Housing Court.

Meanwhile, a **study** conducted by the Task Force to Expand Access to Civil Legal Services in New York found that "the unmet need for civil legal assistance in New York State is profoundly impacting vulnerable New Yorkers and costing taxpayers millions of dollars by increasing homelessness, failing to prevent domestic violence, and increasing poverty."

This is not a new problem. In 1999, the BBA's Real Estate Section partnered with the **Volunteer Lawyers Project of the Boston Bar Association** (VLP), **Greater Boston Legal Services** (GBLS), the**WilmerHale Legal Services Center**, and the **Boston Housing Court** (BHC) to establish a **Lawyer for the Day** program. The goal was to prevent evictions resulting in homelessness. At the request of the BHC, the program has two different legal information tables, one for unrepresented tenants, and another for unrepresented landlords. The **Herbert W. Vaughan Fund** of the BBF helps support the operations of this program.

During the 13 year history of the Lawyer for the Day program at the BHC, 1,200 volunteers have donated their time to assist more than 14,732 individuals. In just the past year alone, 443 volunteers helped 991 tenants and 181 landlords.

About 95 per cent of tenants at the BHC are unrepresented. According to **Chris Saccardi**, a solo practitioner from Somerville and a frequent volunteer, tenants, the bulk of whom are low-income and frequently minorities, are usually opposed by a landlord represented by counsel. The issue before the court is typically whether the tenant can stay in his or her home. Were it not for the Lawyer for the Day program, the imbalance in power would be profound.

Chris reports that it is not uncommon to see families with young children, families with elderly parents sharing their home, as well as elderly people living alone — all of whom are facing eviction. But he also sees tenants who have slipped below middle class status because of job loss or illness.

For tenants living in subsidized housing or Boston Housing Authority developments, the stakes can be especially high. Take for example a grandmother raising grandchildren. Should one of those kids get in

trouble, the entire family can face eviction. Should they be evicted "for cause," the impact can be devastating — with the family being required to split up, move in with relatives, or live on the street. Collateral consequences may follow.

GBLS is well-known for having housing attorneys second to none. Yet the demand for their services by poor people overwhelms the supply.

The BHC, which hears anywhere between 200 and 225 evictions weekly, considers the Lawyer for the Day program a godsend. Thanks to Lawyer for the Day volunteers, some 80 per cent of the cases can be resolved successfully through mediation provided by BHC staff — without a judge having to get involved.

"The program has been successful beyond our wildest dreams," says Robert Lewis, Chief Clerk Magistrate of the BMC.

A word about unrepresented landlords. . . they are frequently immigrants with limited English proficiency who depend on the rent to pay mortgages on owner occupied two or three family homes. Missed rental payments can put them at risk of foreclosure. Indeed, there are situations where landlord owners of small multi-family homes can be in a tighter financial situation than their tenants.

Often times this population of landlords need to be advised about what steps they must take to bring their property to the minimum state sanitary code, and assisted in determining the difference between a tenant complaint and what the law requires them to do.

This month, the Lawyer for the Day program will expand its services to low income landlords, starting with one Monday a month dedicated specifically to those cases. As Joanna Allison of the VLP points out, the mistakes that unrepresented landlords make on a procedural basis make it impossible for them to prevail in their cases — resulting in wasted filing fees for people who can least afford them and inefficiency for a busy court.

The Lawyer for the Day program is a model for legal services organizations to leverage the contributions of committed volunteers to preserve housing for a very vulnerable population and to conserve precious judicial resources. If we consider the fact that the cost of placing a family in a shelter is on average three times higher than the average government subsidy for families in Massachusetts, the program is also saving taxpayers money.

The program also illustrates the concept that lawyers can do well by doing good. Mary K.Y. Lee, a lawyer whose paid work involves both immigration and landlord/tenant matters, is another dedicated volunteer. She says that were it not for her volunteering for Lawyer for the Day at the BHA, she might not have gotten litigation experience so early in her career, and credits the program with helping her become "a better person and a better lawyer."

We should all applaud all those involved for making the Lawyer for the Day program a continued success. That being said, we still confront the painful reality of overburdened courts and underrepresented litigants.

As the Task Force to Expand Access to Civil Legal Services in New York concluded, "private lawyers cannot fill the gap in services as the sheer numbers of needy and unrepresented litigants overwhelm the capacity of volunteer lawyers." In response to that Task Force's recommendations, the New York Legislature dramatically increased legal aid funding to provide for counsel in eviction and other cases involving basic human needs.

So while I say "keep up the good work" to all our volunteers, I look forward to the BBA expanding beyond its civil right to counsel study and pursuing new paths to assuring counsel to all those involved in cases involving basic human needs such as housing. Stay tuned.

###

Vexatious Litigation: A Vexing Problem

Posted: September 12, 2012 | **Author:** bbabarjournal | **Filed under:** Fall 2012, Vol 56, #4, The Profession | **Tags:** pre-filing orders, Vexatious, Vexatious Litigation and Vexatious Litigants | **Modify:** Edit this |Leave a comment »

By **Richard M. Zielinski**

The Profession

Massachusetts courts **continue to face difficult challenges**. Hampered by extended backlogs, severe budget cuts, and prolonged hiring freezes, our hard working judges and dedicated court staff struggle every day to efficiently manage and provide a high quality of justice in thousands of legitimate cases involving important financial, personal and societal issues. Their efforts are additionally burdened by vexatious litigants who seem to regard the courts as their own personal complaint departments. This Article discusses the problem and calls upon judicial, legislative and bar leaders to put their heads together in an attempt to devise both fair and practical solutions to the problem.

What is vexatious litigation and why is it a problem in Massachusetts?

Defining vexatious litigation is difficult because litigants' motives – whether in filing lawsuits to harass or control another party, litigating claims that are not legally recognized, or manipulating the system for personal gain – are quite diverse. Some common threads among vexatious litigants, however, are clear: their filings are often numerous, their claims largely without merit, and they impose enormous burdens on the court system and those required to respond to their claims.

In a recent article on "*frequent fliers*" of the court system, **Massachusetts Lawyers Weekly**newspaper reported that it had identified *more than 450* complaints, appeals or other requests for relief filed in Massachusetts courts over the past three decades that were traceable back *to just six litigants*. In one notorious series of cases, a plaintiff filed at least one hundred and fifty separate lawsuits, resulting in more than ninety appeals, against his former girlfriend after their relationship ended. Ironically, a restraining order against that particular plaintiff failed to prevent him from using the judicial system to continue harassing the woman in question. The plaintiff's repetitive and groundless actions have also been admonished by the Supreme Judicial Court, which presided over five of the plaintiff's appeals for extraordinary relief in a single day. *See Watson v. A Justice of the Boston Div. of the House Court Dep't*, **458 Mass. 1025** (2011).

Vexatious litigants also frequently turn their fire on judges, clerks, other court personnel and opposing counsel when cases are not resolved in their favor. For example, one such litigant brought over three hundred complaints in several states against public officials, various courts and judges due to events arising out of a series of traffic violations. *See Azubuko v. McCabe*, No. 1:108-CV-226,**2008 U.S. Dist. LEXIS 91798**, at *1 (D. Mass. Oct. 27, 2008). Such conduct imposes inappropriate personal burdens on court personnel, diverts resources and time away from legitimate disputes, and subverts the purpose and basic functioning of our justice system. As the United States Supreme Court has noted in several *per curiam* decisions, "[t]he goal of fairly dispensing justice . . . is compromised when the Court is forced to devote its limited resources to the processing of repetitious and frivolous requests." *See* In re *Sindram*, **498 U.S. 177**, 179-80 (1989), In re *Whitaker*, **513 U.S. 1**, 2 (1994), *Whitaker v. Superior Court of California*, **514 U.S. 208**, 1447 (1995).

The Massachusetts courts and the Board of Bar Overseers have an array of weapons at their disposal that, for the most part, effectively deters lawyers from filing repeated, baseless lawsuits. The problem of vexatious litigation, however, does not appear to be primarily lawyer-driven. Instead, the vast majority of vexatious litigants are self-represented individuals, who need not be concerned about the spectre of Rule 11 sanctions or a complaint to the BBO. Even in federal court, where pro se plaintiffs *are* subject to Rule 11 sanctions, many vexatious litigants are judgment-proof, thereby blunting both the deterrent and punitive effects of monetary sanctions.

How Have Courts and Legislators Dealt with Vexatious Litigants?

Research suggests that Massachusetts courts and judges have inherent authority, rooted in common law, to take a variety of steps to curtail vexatious litigants. For example, a judge has inherent authority to dismiss a suit that is frivolous or designed to harass, or as necessary to prevent a fraud on the court. *See, e.g., Munshani v. Signal Lake Venture Fund II, LP*, **60 Mass.App.Ct. 714** (2004).

Another tool judges have at their disposal is the use of an injunction prohibiting a vexatious litigant from filing any new suit in a particular court. Although reasonably effective in curtailing vexatious litigation, injunctions are problematic in two respects. First, pre-filing bans curtail an individual's constitutional right of access to the courts, so they should be used only when truly necessary and ordinarily should contain an exception allowing for the filing of a particular matter with prior judicial approval. Second, a determined plaintiff can often avoid the effect of an injunction by simply filing suit in a different forum. For example, one of the most prolific vexatious litigants in the Commonwealth avoided pre-filing bans in both Suffolk Superior Court and the United States District Court in Massachusetts by filing suits in courts stretching from New Jersey to Georgia. *See Azubuko v. Boston Public Schools*, 2006 WL 1373161 (D.N.J. 2006); *Azubuko v. Berkshire Mut. Ins.*, 2003 U.S. Dist. LEXIS 26768 (N.D. Ga. Oct. 22, 2003). Unfortunately, Massachusetts does not currently have an effective administrative system in place to track problematic plaintiffs and enforce bans across its various divisions.

At least six states have enacted legislation to address the problem of vexatious litigants – California, Hawaii, Texas, Florida, Ohio, and Connecticut. These statutes include remedies ranging from a bond

requirement to cover defendant's costs (not unlike the bond requirement in **G.L. c. 231, s. 60B**, the medical malpractice statute), to pre-filing orders barring vexatious litigants from filing additional suits without prior leave of court.

One challenge in drafting legislation is defining precisely what constitutes a vexatious litigant. In California, for example, a litigant is "vexatious" if he meets any one of a number of tests, including repeatedly re-litigating a claim after a final, adverse judgment; repeatedly filing unmeritorious motions; or bringing at least five suits (other than small claims suits) in the prior seven years that have been resolved against him or permitted to remain pending at least two years without justification. **Cal. Civ. Proc. Code § 391(b)**. In Ohio, by contrast, a litigant is vexatious if she "persistently engages in vexatious conduct in a civil action," regardless of whether or not she initiated the suit. Vexatious conduct, in turn, is defined as behavior that either harasses another party, is unwarranted under existing law, or is designed to delay. **Ohio Rev. Code Ann. § 2323.52(A)(2)**.

Whether based on the number of lawsuits filed or the litigant's motives or conduct any fixed, statutory definition of "vexatious litigant" is bound to be both *over* as well as *under* inclusive when it comes to real world litigants. Perhaps this problem can be overcome by leaving the issue of whether a particular litigant is or is not vexatious to be determined by an appropriate judicial officer on a case by case basis, applying a set of pre-determined but somewhat flexible statutory factors.

What more can and should Massachusetts do to address the problem?

Courts, legislators and commentators from around the country have not agreed on the most effective means of curtailing vexatious litigation. But nearly all agree that the problem is real and continuing and, especially in difficult economic times, poses a genuine threat to the administration of justice and a cost to society. I urge members of the judiciary, our state legislators, and the leaders of the organized bar to convene a task force or other group to further study the problem and formulate recommendations for how we might best address the problem in Massachusetts.

*Richard M. Zielinski is a Director in the Litigation group of **Goulston & Storrs, P.C.** He is also a past member of the Massachusetts Board of Bar Overseers, the Boston Bar Association Council, and a Fellow and past State Chair of the American College of Trial Lawyers (ACTL).* *Richard wishes to thank Alana Van der Mude and Keerthi Sugumaran, associates at Goulston & Storrs, for their valuable assistance in researching and drafting this Article.*

###

20/20 on 2020: Predictions for the Future of Social Media and the Law

Posted: September 12, 2012 | **Author:** bbabarjournal | **Filed under:** Fall 2012, Vol 56, #4, The Profession | **Tags:** evidence in social media, government regulation of social media, preserving facebook evidence, privacy, social evidence, social media and the law, spoliation | **Modify:** Edit this |Leave a comment »

By David Kluft, Peter Lefkowitz, Martha Mazzone, Zick Rubin and Tom Hemnes

The Profession

This December marks the 10th birthday of the founding of **Linkedin.com**. Next year, 2013, will witness the 10th anniversary of both the public launch of **Myspace.com** and the initial launch of Facebook (nee Facemash) at Harvard. While the world celebrates the *history* of social media, the BBJ is taking a few moments to consider its *future* impact on the law.

To get the ball rolling, we solicited five leaders and practitioners in areas currently affected by social media to offer thought pieces containing their own predictions (or wild speculations) about how this phenomenon will affect the law in the future. We asked them to use 2020 as reference year, but some of the predictions went a little further.

How do you think electronic social media will affect the future of your legal practice and the legal profession? Please share your thoughts by commenting on this article in the space provided below (the Boston Bar Journal's **terms of use** apply).

There is no wrong answer . . . yet.

Cyborg Evidence, by Dave Kluft

The technology exists in 2012. Funded by commercial and military interests, universities and hospitals are developing neural interface systems using hardware developed for electrocorticography, electroencephalography and functional magnetic resonance imaging. These technologies allow human brains to interface with computers by translating neurons into software commands. By 2006, a subject at Brown University, using technology funded by the Department of Veteran Affairs, **played computer Pong with his mind**. In 2012, paralyzed patients can employ neural

impulses to **direct a prosthetic hand to raise a coffee cup**. The principal application of this technology is for severe epilepsy and spinal cord injuries, but the military also is developing "**telepathy helmets**." Application to consumer electronics follows. In 2012, effective neural interface technology requires invasive implants. By 2017, these can be replaced by headsets and earpieces. In 2018, the *Wall Street Journal* reports that social media companies have been making substantial investments in portable non-invasive cyborg technology.

In 2020, a neural interface social media site is beta tested. Users are able to share simple binary thoughts (e.g., Like/Don't Like). By 2025, more advanced software allows the recognition of more complete thoughts. Many users allow their thoughts to be transmitted contemporaneously. By 2028, new software translates visual stimuli received by the human retina into rough still images: a user's perception of a dog is recorded and published as a stock image of a dog. Further refinements allow recognition of the dog's breed and individual characteristics. By the end of the decade, old-fashioned social media updates give way to cloud-stored virtual records of thoughts and images. By 2035, if you are under 30, Facebook is something your parents used to use.

Early attempts to admit cyborg evidence recorded by social media are barred. Despite **Section 901(b)(11) of the Mass. Guide to Evidence** and similar rules providing that expert testimony is not necessary to authenticate digital communications, Judges initially demand onerous expert testimony and doubt the accuracy of the technology. As neural interfacing becomes more widely accepted, however, accuracy and security concerns fade.

Cyborg evidence is first considered in non-jury civil contexts. In 2039, it serves as part basis for a spoliation ruling in a New Jersey state court, in which a product liability defendant who was wearing a neural interface when he deleted a folder is shown to have had knowledge that relevant documents were contained in that folder. Cyborg evidence is later admitted in other circumstances, and the arguments against its admission shift to hearsay. Many courts admit cyborg evidence as a present sense impression. Massachusetts courts, which do not recognize the present sense impression exception, cite the excited utterance and past recollection recorded exceptions.

In 2050, in a matter of first impression, the Massachusetts Supreme Judicial Court is asked to decide whether the final thoughts of a vehicular homicide victim, captured by a social media neural interface, are admissible as a statement made under belief of impending death. The 130-day period has been waived twice. The defendant, citing Confrontation Clause concerns, plans to appeal to the Supreme Court if the admission of the evidence is upheld.

***The Regulatory Landscape,* by Peter Lefkowitz**

The turning point came in 2015. In the preceding five years, newspapers had covered the social media industry in ever-greater detail; the Federal Trade Commission had issued new notice and consent requirements for web tracking and limits on use of social media to evaluate employment and credit; a number of social media services had been fined heavily for altering privacy terms without notice and for over-collecting, over-enriching and over-using data; and the European Union had issued regulations governing use of cookies and other tracking technologies. The real change in the landscape, and the real cause for celebration, was that privacy finally became cool.

After several high profile cyber-attacks, privacy became the product and service differentiator for consumer technology. Browsers were released that allowed consumers to easily surf the web without extensive tracking by individual sites and ad networks. Computers, phones, tablets, and hybrid computer-phone-tablets arrived on the doorstep with encryption enabled and no passwords stored by default, and credit cards came with pictures, PINs and various means of confirming identity at check-out. The “Don’t Let Them Find You” advertising campaign ran six times during the Super Bowl, featuring a husband and wife hiding out in their garage, cell phone SIM cards removed, until their new Privacy Phones arrived and they could re-emerge into the sunlight.

The phenomenon was not lost on social media providers. Having lost valuable traffic, revenue and market cap because consumers feared “being the product,” providers made a point of advertising the information they did *not* collect and the data they did *not* share. Web pages for pharmaceutical products carried banners advertising that they would not track visitors. Registration pages provided clearly marked options for collecting and sharing information. And surveys found that consumers signed up for social media services based overwhelmingly on how much they trusted the service provider.

Having become cool, privacy was able to take a short vacation. Consumers decided once again that they wanted advertising and coupons for their favorite food and their needed drugs and felt empowered to store healthcare and banking data on their cell phones, with greater assurance that leaving a phone in a taxi wouldn’t upend their personal lives. Consumer technology companies and service providers made sharing information progressively easier (by providing common formats for consumer decision-making) and more lucrative (by openly sharing the benefits of data collection with consumers). Health care and other scientific fields benefitted from the ability to use “big data” for clinical research. And regulators shifted their focus back to hackers, phishers, spammers, scammers and other ignoble creatures.

Perhaps most critically, privacy officers became extremely cool. Their focus shifted from defending against increasingly aggressive regulation and avoiding the next breach to designing privacy features into products. CPO's found new allegiance with their development and sales teams, and their budgets grew as they became integral to the design and release of new products across technology, social media and consumer industries. Admittedly, the latter trends only began to take hold late in the review period and will be covered in greater depth in the follow-on article of 2030.

Landmarks in Copyright Law, **by Zick Rubin**

January 14, 2014: After Twitter introduces a simple online copyright application process with PayPal payment options, the Copyright Office receives 14 billion applications to register tweets and begins to collapse under the load. The Office issues a new regulation providing that works containing fewer than 141 characters will no longer be eligible for copyright registration.

February 14, 2014: Under pressure from Twitter and its users, the Copyright Office rescinds its "No Tweet" regulation. Twitter supporters point to nursery rhymes, haikus, and aphorisms containing fewer than 141 characters, including Poor Richard's pithy "He that lies down with Dogs, shall rise up with fleas."

June 27, 2016. The Affordable Idea Sharing Act of 2016 is signed into law by President Clinton. The Act requires all citizens between ages 12 and 80 to make at least one "bona fide" post each week that is dedicated to the public domain, or they will be presumed legally incompetent. "We all have great ideas," the President writes in her signing message, "and we have a duty to share them with our friends."

May 2, 2018. In a case of first impression, the First Circuit holds that John Peebles infringed Maurice Schwartz's copyright when Peebles copied Schwartz's Match.com on-line profile, including his "favorite sports team," "favorite recording artist," "astrological sign," and "favorite color." The court concludes that "Schwartz's favorites – Red Sox, Springsteen, Capricorn, and blue – constituted a protectable compilation with the required minimal level of creativity, though just barely."

December 9, 2019. The Republic of Montenegro declares that it owns all content posted on the .me top-level domain, which has been assigned to Montenegro by ICANN (the Internet Corporation for Assigned Names and Numbers), including ask.me, tell.me, and click.me.

January 3, 2020. The South Sea island nation of Tuvalu declares ownership of all content posted throughout the world on the .tv top-level domain, , including abc.tv, pbs.tv, and mtv.tv.

January 12, 2020. In retaliation for Montenegro's and Tuvalu's "Internet imperialism," Craigslist founder and customer service representative Craig Newmark announces that Craigslist Podgorica and Craigslist Funafuti have been taken off-line.

June 2, 2020. In a long-awaited decision, the Supreme Court upholds the constitutionality of the Affordable Idea Sharing Act of 2016. The Act had been challenged by an order of Trappist monks bound by a vow of silence. "They have a First Amendment right not to speak," Justice Michelle Obama writes for the five-justice majority, "but that doesn't mean they have a right not to text."

Email: So 2000 and Late, **by Marty Mazzone**

It's 2020. If 2012 was the dawn of social media as evidence in litigation and investigations, it's high noon now. And you are Marshal Kane, facing down the discovery enemy: highly connected, complex "awareness" systems incorporating movement, touch, and location feedback, non-computer instant messaging, video and speech, and more – all, by the way, located in the one cloud above Hadleyville (the dusty Western town in the movie). After the geniuses at MIT developed and commercialized Blossom, the now-ubiquitous multi-person awareness system (**http://www.media.mit.edu/research/groups/fluid-interfaces**) in 2014, the very conceptual framework of communication changed. The legal system still depends on the information in the new awareness systems, but how to get it, preserve it, extract it, read it? That is the challenge.

We have been here before. The discovery and authentication concerns of 2012 seem almost quaint now but at the time, with the introduction of social media as a primary source of business as well as personal communications, lawyers actually longed for the goold old days of email. After all, technology races ahead, but the job of a litigator does not change much. Litigators tell stories to fact-finders, decision-makers and opponents. They extract support for those stories, in large part, from the records people leave behind. Where are people, especially younger people, leaving their records today? No longer in paper correspondence trails, where the story is straightforward – a simple discovery challenge. Further, although even today in 2020 litigators do not suffer from a dearth of stupid emails, still we find many fewer stories in email. When we did find them there, we had the tools (even since before 2012) for extracting stories from email: an arsenal of email review, clustering, threading, and analytical software plus an entire professional discipline and infrastructure called eDiscovery.

At that time, though, the social media revolution became a very real legal challenge. Facebook (bought out by Google in 2014 but a very popular beginner social media site back in the day), MySpace (anyone remember MySpace?) and something called Twitter (where anyone could express important or, more

usually, vapid thoughts), were used by hundreds of millions of people daily. In Feburary 2012 Facebook reported 845 million *active* users., and Twitter at the time had over 200 million *active* users. Not only were people telling and leaving their stories in these virtual places, they were telling and leaving a LOT of them. How to get at these stories and tell them in meaningful ways became the focus of the electronic discovery world, while trial lawyers had to figure out how to connect the stories, often anonymized, to the parties in a dispute – how to authenticate them, in other words.

A prescient thinker at the time, John Palfrey, a Harvard Law School professor, wrote a book called *Interoperability: The Promise and Perils of Highly Interconnected Systems*. He foresaw many new challenges in law, such as privacy and data security – he called them "new versions of old problems" in an interview – as the inevitable result of our love affair with connectedness. (Read about it here athttp://cyber.law.harvard.edu/research/interoperability). (Privacy of our written communications and interactions on the Internet seems such a dated notion today, but at the time many people were frightened at the amount of personal information publically available.) Similarly, for the eDiscovery profession, the connectedness and complexity of social media posed overwhelming obstacles to collecting and using evidence. For example, since the information was actually being stored "in the cloud" by a third party (not a client or opponent, on a closed network), how did litigators obtain the information? How could a litigator ensure preservation and avoid spoliation charges when users could delete information even years after they "posted" it (an old-fashioned Facebook term for affirmatively publishing information)? And, since posts were followed by responses over a period of days, interspersed with unrelated topics, how did a litigator *reconstruct* the actual conversation that occurred? The threading/reconstruction tools that existed for email had not, as yet, been invented for social media. Once reconstructed, could the evidence be used? What circumstantial evidence was enough to connect a person to his social media in a world where imposters flourished?

Now, of course, we have technology that effectively preserves and reconstructs meaningful conversations found in older social media technologies. But no one yet has come up with a practical, cost-effective way to collect facts from communications arising not via the written word (or the spoken one) but through motile (movement), visual, or haptic (touch) feedback. We used to have digital interfaces that captured information as part of the hardware and software, or at least we could track and connect users to their interfaces. Now our hands, or the tabletop, or the wall, are the instantly-available and untraceable interfaces. It's 2020, and law is in a show-down with technology. Who will win?

The Legal Landscape, **by Tom Hemnes**

A new field of legal specialization will develop at the intersection of privacy, data protection and movement, and brand protection law. Privacy regulation will coalesce around principles of opt-out for non-sensitive data and opt-in for sensitive data. Efforts to harmonize the privacy laws of the United States and the European Union will fail, but use of the "Safe Harbor" type principles will expand to facilitate international data flow. Behavioral marketing will be increasingly regulated; the industry will organize itself to lobby against further regulation. Copyright-like rights in compilations of data will collide with the personal data protection laws. Law enforcement and security authorities will monitor social media aggressively, leading to thin regulation of their activities in Western countries but no regulation in authoritarian regimes. Tort remedies for invasion of privacy and of the right of publicity will expand. There will be proposals to create property rights in personal data, against which the industry will successfully lobby. By the end of the next ten years social media will have become less revolutionary from both personal and political standpoints, through regulation and ubiquity.

Thomas Hemnes *is a Partner at GTC Law Group LLP & Affiliates. He is a member of the bar in Massachusetts, England and Wales.*

David A. Kluft *is a Partner in the litigation department of Foley Hoag LLP. He is a member of the Boston Bar Journal Board of Editors.*

Peter M. Lefkowitz *is Vice President, Legal and Chief Privacy Officer at Oracle Corporation. He is a member of the Boston Bar Journal Board of Editors*

Martha Mazzone *is a Vice President and Associate General Counsel at Fidelity Investments. She is a member of the Boston Bar Journal Board of Editors.*

Zick Rubin *practices publishing, copyright, trademark, and higher education law in Newton (**www.zickrubin.com**). In December, 2020, he received the National Medal of Soothsaying.*

###

Oh, the Places You've Been! Preserving Privacy in a Cellular Age

Posted: September 12, 2012 | **Author:** bbabarjournal | **Filed under:** Fall 2012, Vol 56, #4, Vantage Point | **Tags:** cell phone location data, cell phone surveillance, privacy | **Modify:** Edit this |**1** Comment »

By Sara E. Silva

Vantage Point

Everyone knows that our daily actions are sometimes recorded. Our Fast Lane accounts create a record of every toll we pay. When we bank or shop, surveillance cameras or credit card payment records may reflect where we were. But when we exit the Pike, or leave the bank or the store, we do not expect the government to continuously track our movements to more private and personal places: doctors' offices, houses of worship, daycares, homes.

Cell phone location data allows the government to do exactly that, and has become an incredibly powerful tool for law enforcement. In the past year, cell phone carriers responded to 1.3 million demands from law enforcement for subscriber information and location data, often without a warrant, probable cause, or any judicial oversight whatsoever. *See* Eric Lichtblau, *More Demands on Cell Carriers on Surveillance*, New York Times (July 8, 2012), available at**http://www.nytimes.com/2012/07/09/us/cell-carriers-see-uptick-in-requests-to-aid-surveillance.html?pagewanted=all**. After *United States v. Jones*, 132 S. Ct. 945 (2012), however, criminal defense lawyers have greater room to argue that the Fourth Amendment protects location information. *Jones* held that the warrantless installation of a GPS unit to track the movements of a vehicle violates the Fourth Amendment. Although the majority opinion was based on the physical trespass involved, five Justices agreed that probable cause and a warrant are required when law enforcement uses vehicle tracking technology to aggregate a person's movements over time. *Id.* at 955-56 (Sotomayor, J., *concurring*); 964 (Alito, J., *concurring in the judgment*).

A cell phone can be the equivalent of a tracking device installed on our bodies. Eight in ten American adults own a cell phone. *See* Pew Research Center, *Americans and Their Cell Phones* (Aug. 15, 2011), available at **http://www.pewinternet.org/Reports/2011/Cell-Phones.aspx**. Most cell phones come equipped with GPS chips, which allow cell phone providers to obtain real-time GPS data from the phones carried by their subscribers. Even phones without GPS can provide highly accurate location information, however. When turned on, cell phones automatically and regularly communicate with the towers that serve their provider networks to ensure that they are connected with the tower with the best

reception. Through these communications, the phones transmit certain pieces of data such as the strength, angle and timing of the signal. This data, when analyzed, discloses the location of the phone at the time of the communication; when triangulated between two or more towers, the location data can be highly accurate. How frequently a phone reveals its location varies by provider, but it occurs automatically multiple times a minute, providing a comprehensive record of one's movements. What may be most disturbing is that to transmit this information, the phone need not be in use. It just needs to be on. There is no way for the phone's owner to know when these communications occur, and no way, short of shutting the phone off, to stop them from happening.

Providers use this data for business purposes – to determine where to build new towers, or how and where their subscribers use their devices. This means both that location data remains accessible for a long time and that its accuracy is constantly improving to enhance its usefulness. Increased numbers of cell towers also enhance the precision of location data. Whereas earlier triangulated data may have been able to narrow a phone's location to a particular block, some commentators believe that it can now surpass GPS for accuracy in certain areas. *See, e.g.,* Statement of Prof. Matt Blaze before House Subcommittee on Crime, Terrorism and Homeland Security at 15 (May 17, 2012), available at **http://www.crypto.com/papers/blaze-gps-20120517.pdf**.

Courts in Massachusetts have long permitted law enforcement to obtain historical cell phone location data simply upon a showing that the information is "relevant and material to an ongoing criminal investigation," assuming that "there is nothing [about tracking data] that is any more incriminating or revealing than what could be gleaned from the activation of a pen register or from physical surveillance," and that "outside of the home it is doubtful that the tracking of a cell phone has any Fourth Amendment implication whatsoever." *See In re Applications of the United States of America for Orders Pursuant to Title 18, United States Code, Section 2703(d)*, 509 F. Supp. 2d 76, 77-79, 81 (D. Mass. 2007) (Stearns, J.).

These assumptions are ripe for challenge after *Jones*. Warrantless access to GPS cell phone information is likely unconstitutional. *Jones*, 132 S. Ct. at 955-56 (Sotomayor, J., *concurring*); *see also id.* at 964 (Alito, J., *concurring in the judgment*). Like GPS information, triangulated cell phone location data "generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." *Jones*, 132 S. Ct. at 955-56 (Sotomayor, J., *concurring*) (citations omitted). Such intimate detail is practically impossible to aggregate through visual surveillance. *See id.* at 956. And the ease with which law enforcement can access it renders it highly "amenable to abuse." *Id.*

Since *Jones*, at least one Superior Court Justice has required a warrant for cell phone location information. *Commonwealth v. Pitt*, 29 Mass. L. Rptr. 445, *3 n.5, *8, *10 (Mass. Super. Ct. Feb. 23, 2012) (Cosgrove, J.) (location data reveals "trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, the synagogue or church, the gay bar, and on and on . . . . [T]he extent of this potential incursion . . . unquestionably implicates Fourth Amendment privacy rights") (*quoting Jones*, 132 S. Ct. at 955) (Sotomayor, J. *concurring*). The federal court is also poised to revisit the issue. *See In the Matter of the Application of the United States of America for an Order Pursuant to Title 18, United*

States Code, Section 2703(d) to Disclose Subscriber Information and Cell Site Information, __ F. Supp. 2d. __, 2012 WL 989638, *1-2 (D. Mass. March 23, 2012) (Collings, M.J.).

Cell phone location data can tell the government precisely where we have been every minute of the day. Defense counsel should use *Jones* to press the argument that law enforcement cannot constitutionally mine this potent source of information without probable cause and a warrant.

Sara Silva, a partner with Collora LLP, represents individuals and corporations in the areas of white collar criminal defense and complex civil litigation.

###

Oh, the Places You've Been! Preserving Privacy in a Cellular Age

Posted: September 12, 2012 | **Author:** bbabarjournal | **Filed under:** Fall 2012, Vol 56, #4, Vantage Point | **Tags:** cell phone location data, cell phone surveillance, privacy | **Modify:** Edit this |**1** Comment »

By Sara E. Silva

Vantage Point

Everyone knows that our daily actions are sometimes recorded. Our Fast Lane accounts create a record of every toll we pay. When we bank or shop, surveillance cameras or credit card payment records may reflect where we were. But when we exit the Pike, or leave the bank or the store, we do not expect the government to continuously track our movements to more private and personal places: doctors' offices, houses of worship, daycares, homes.

Cell phone location data allows the government to do exactly that, and has become an incredibly powerful tool for law enforcement. In the past year, cell phone carriers responded to 1.3 million demands from law enforcement for subscriber information and location data, often without a warrant, probable cause, or any judicial oversight whatsoever. *See* Eric Lichtblau, *More Demands on Cell Carriers on Surveillance*, New York Times (July 8, 2012), available at**http://www.nytimes.com/2012/07/09/us/cell-carriers-see-uptick-in-requests-to-aid-surveillance.html?pagewanted=all**. After *United States v. Jones*, 132 S. Ct. 945 (2012), however, criminal defense lawyers have greater room to argue that the Fourth Amendment protects location information. *Jones* held that the warrantless installation of a GPS unit to track the movements of a vehicle violates the Fourth Amendment. Although the majority opinion was based on the physical trespass involved, five Justices agreed that probable cause and a warrant are required when law enforcement uses vehicle tracking technology to aggregate a person's movements over time. *Id.* at 955-56 (Sotomayor, J., *concurring*); 964 (Alito, J., *concurring in the judgment*).

A cell phone can be the equivalent of a tracking device installed on our bodies. Eight in ten American adults own a cell phone. *See* Pew Research Center, *Americans and Their Cell Phones* (Aug. 15, 2011), available at **http://www.pewinternet.org/Reports/2011/Cell-Phones.aspx**. Most cell phones come equipped with GPS chips, which allow cell phone providers to obtain real-time GPS data from the phones carried by their subscribers. Even phones without GPS can provide highly accurate location information, however. When turned on, cell phones automatically and regularly communicate with the towers that serve their provider networks to ensure that they are connected with the tower with the best

reception. Through these communications, the phones transmit certain pieces of data such as the strength, angle and timing of the signal. This data, when analyzed, discloses the location of the phone at the time of the communication; when triangulated between two or more towers, the location data can be highly accurate. How frequently a phone reveals its location varies by provider, but it occurs automatically multiple times a minute, providing a comprehensive record of one's movements. What may be most disturbing is that to transmit this information, the phone need not be in use. It just needs to be on. There is no way for the phone's owner to know when these communications occur, and no way, short of shutting the phone off, to stop them from happening.

Providers use this data for business purposes – to determine where to build new towers, or how and where their subscribers use their devices. This means both that location data remains accessible for a long time and that its accuracy is constantly improving to enhance its usefulness. Increased numbers of cell towers also enhance the precision of location data. Whereas earlier triangulated data may have been able to narrow a phone's location to a particular block, some commentators believe that it can now surpass GPS for accuracy in certain areas. *See, e.g.,* Statement of Prof. Matt Blaze before House Subcommittee on Crime, Terrorism and Homeland Security at 15 (May 17, 2012), available at **http://www.crypto.com/papers/blaze-gps-20120517.pdf**.

Courts in Massachusetts have long permitted law enforcement to obtain historical cell phone location data simply upon a showing that the information is "relevant and material to an ongoing criminal investigation," assuming that "there is nothing [about tracking data] that is any more incriminating or revealing than what could be gleaned from the activation of a pen register or from physical surveillance," and that "outside of the home it is doubtful that the tracking of a cell phone has any Fourth Amendment implication whatsoever." *See In re Applications of the United States of America for Orders Pursuant to Title 18, United States Code, Section 2703(d)*, 509 F. Supp. 2d 76, 77-79, 81 (D. Mass. 2007) (Stearns, J.).

These assumptions are ripe for challenge after *Jones*. Warrantless access to GPS cell phone information is likely unconstitutional. *Jones*, 132 S. Ct. at 955-56 (Sotomayor, J., *concurring*); *see also id.* at 964 (Alito, J., *concurring in the judgment*). Like GPS information, triangulated cell phone location data "generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." *Jones*, 132 S. Ct. at 955-56 (Sotomayor, J., *concurring*) (citations omitted). Such intimate detail is practically impossible to aggregate through visual surveillance. *See id.* at 956. And the ease with which law enforcement can access it renders it highly "amenable to abuse." *Id.*

Since *Jones*, at least one Superior Court Justice has required a warrant for cell phone location information. *Commonwealth v. Pitt*, 29 Mass. L. Rptr. 445, *3 n.5, *8, *10 (Mass. Super. Ct. Feb. 23, 2012) (Cosgrove, J.) (location data reveals "trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, the synagogue or church, the gay bar, and on and on . . . . [T]he extent of this potential incursion . . . unquestionably implicates Fourth Amendment privacy rights") (*quoting Jones*, 132 S. Ct. at 955) (Sotomayor, J. *concurring*). The federal court is also poised to revisit the issue. *See In the Matter of the Application of the United States of America for an Order Pursuant to Title 18, United*

States Code, Section 2703(d) to Disclose Subscriber Information and Cell Site Information, __ F. Supp. 2d. __, 2012 WL 989638, *1-2 (D. Mass. March 23, 2012) (Collings, M.J.).

Cell phone location data can tell the government precisely where we have been every minute of the day. Defense counsel should use *Jones* to press the argument that law enforcement cannot constitutionally mine this potent source of information without probable cause and a warrant.

Sara Silva, a partner with Collora LLP, represents individuals and corporations in the areas of white collar criminal defense and complex civil litigation.

###

Don’t Click This Article!

Posted: September 12, 2012 | **Author:** bbabarjournal | **Filed under:** Fall 2012, Vol 56, #4, Vantage Point | **Tags:** data enrichment, privacy, privacy in digital age | **Modify:** Edit this |Leave a comment »

By Richard J. Yurko

Vantage Point

Each of us lives in a digital soup where, every day, we leave an online record of our activities. For the convenience of an ATM card, we leave traces of our banking transactions. For the social benefit of “connecting” with acquaintances, our Facebook, Twitter, Linked-In, email, and other accounts record what we look at and digitally touch. For the sake of a few cents off at the store, our loyalty cards compile a rich history of our shopping habits. For the sake of our iPhone, we let Apple know our location virtually every moment of the day. This digital soup not only has practical implications for everyday life, but also potentially changes the landscape of two core legal doctrines, the constitutional right to be secure in our private affairs from government intrusion and the common law right to be let alone from private actors. These issues recently surfaced within a divided United States Supreme Court. Thousands of digital data points can be and are being aggregated, cross-referenced, and enriched with still other data, like public records, our credit scores, and political donations. *See, e.g.,*Sullivan, “**Data Snatchers! The Booming Market for Your Online Identity**”, PCWorld.com (June 26, 2012); Sengupta, “**Should Personal Data Be Personal**?”, New York Times (February 24, 2012). This enriched data is, in many respects, more thorough, more accurate, and more detailed than any file ever compiled by J. Edgar Hoover. It is possible that we can be known better by these data aggregators than by our own friends and kin.

I am annoyed when data aggregations are used to try to sell me a particular product that just happens to be on sale at a store on my walk to work. Individually, I am not much troubled by the use of this data by the company that first collected it, which may track what brand of over-the-counter headache medicine I buy so that it can offer me an appealing coupon. I am much more troubled if the first party that collected the information then sells it to third parties with unknown motivations – - commercial, political or nefarious.

Annoyance and displeasure give away to apprehension when purchased data can be enriched and cross-indexed with other information and then used by powerful corporate interests without my knowledge or anticipation. Moreover, what is to prevent the government from routinely accessing or purchasing such detailed, enriched data aggregations for any purpose? And if the government could buy such data

aggregations, what is to stop the government from simply requesting and obtaining the same material from private aggregators, without any subpoena, warrant or judicial oversight?

Indeed, the availability of this detailed information can be used to undermine the underpinnings of essential constitutional safeguards or the common law right to privacy. Although, certainly, the constitutional right to privacy is substantially different from the common law right to be let alone, they share one common foundation. Often, both common law and constitutional principles are grounded on the "reasonable expectations" of the parties and, with respect to privacy, those expectations may be less reasonable if intensely personal data is freely available to anyone who wants to buy it.

That issue was recently raised in **United States v. Jones**, 132 S. Ct. 945 (2012). In Jones, the majority opinion, authored by Justice Scalia and joined by Justices Roberts, Kennedy, Thomas, and Sotomayor, avoided complex issues arising from the warrantless attachment of a GPS tracking device to a suspect's automobile by resorting to the 18th Century common law of trespass. The majority concluded that, because the installation necessarily involved a trespass to the suspect's property right in his vehicle, the resultant search and seizure required a warrant. A four-justice concurrence would have found the search and seizure impermissible without a warrant, on a different ground, because it violated the suspect's "reasonable expectation of privacy," relying on **Katz v.United States**, 389 U.S. 347 (1967). The concurrence, authored by Justice Alito and joined by Justices Ginsberg, Breyer, and Kagan, rejected the majority's resort to trespass law as too narrow a basis for principled application going forward.
By far, however, the most provocative question in Jones was raised by Justice Sotomayer in her lone separate concurrence. Justice Sotomayer joined with the majority but she wrote separately, I believe, to raise a question. She was apparently unwilling to join the four-justice concurrence, applying the "reasonable expectation of privacy" test, because she suggested that our notion of privacy may have to undergo reevaluation in a world in which, with varying degrees of inattention and consciousness, we tolerate third parties collecting a wealth of personal data about us.
Questions about the collection, retention, supplementation, use, misuse, sale, dissemination, and extensive re-use of detailed personal data could be thrashed out in Washington, in fifty state legislatures across the country, or through regulations promulgated elsewhere in the world. Indeed, there are conversations on these subjects at the Federal Trade Commission, in some state legislatures, and in the European Union. There is an outside chance that, just the way child labor laws, worker's rights, consumer rights, and economic justice notions were debated and decided in the state legislatures and then again in Congress, this would happen on questions of privacy in the digital age. The FTC has issued papers in this area and may well act. See Federal Trade Commission,**Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers** (FTC Report, March 2012); see also **Consumer Data Privacy in a Networked World**, The White House, (February 2012) (recommending legislative and regulatory action).
But I am not optimistic that these issues will be decided quickly or at all by legislative or regulatory means. The corporations that collect, dissect, enrich, and/or package your personal data for resale are

some of the most powerful companies in the world. Rashid, "**Google, Microsoft Survival Conflicts With Internet Data Privacy**," eWeek.com, February 7, 2012. Quite possibly, in their own enlightened self-interest, they may block legislative or regulatory action. Moreover, one can question, in this rapidly evolving digital world, whether any law or regulation can sufficiently address the myriad ways in which data can be collected, aggregated and re-used. Any regulation on, say, the use of "cookies," could be outmoded even before being promulgated or implemented. Courts, by contrast, exist to decide questions that arise in disputes between contending parties and decisions on principles in those cases can extend across technological platforms. That is how the common law developed and, to some extent, how constitutional law has progressed as well.

Well over a century ago, Louis Brandeis and Samuel Warren wrote their seminal piece articulating a right to privacy in the Harvard Law Review. At that time, the danger seemed to come from yellow journalists writing about and photographing private persons to satisfy what was characterized as a public lust for gossip. Brandeis and Warren wove together hitherto unconnected strands of cases to fashion an argument for a common law right to privacy. By giving such a name to the "right to be let alone," they gave lawyers and judges a means to articulate the right to control the intimate details of one's own life. The premise of Warren and Brandeis, however, was that privacy was like the water from a spigot with the individual controlling the spigot. Samuel Warren & Louis Brandeis, **The Right to Privacy**, 4 Harv. L. Rev. 193, 198 (1890). They said, "The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others."

In the last two decades, rapid technological change and remarkable inattention by the public at large have seemed to cede control of that spigot to Facebook, Apple, and hundreds of other less-well-known companies. If these corporations now control the spigots of our personal details shared online, can the government hand be far away? If the government is buying and using the data, will we ever know? If the government is buying the data, should there be some control on that? Conversely, if we see the greater danger as coming from misuse by private parties of digital data aggregations, is government actually the solution, not the problem, by regulating how and when such information can be collected and shared?

Whether in the role of common law jurists or constitutional arbiters, it may rest with judges to take the first stab at re-examining the right to privacy, or the "reasonable expectation of privacy," in a digital world. The right to be let alone from government interference has, obviously, a constitutional dimension. The right to be let alone from private interference, as a common law principle, applies to private as well as governmental actors.

In conversations in judges' chambers across the country, the judicial branch may be asked by litigants to return some measure of control of the spigot of private data to the individual. It should be a lively discussion between judge and law clerk. Judges, generally a generation older than their clerks, will remember a time when the public reacted with shock to governmental dossiers and enemies' lists. Law clerks, some of whom may have grown up in the digital soup and the stunning trade-off between privacy

and convenience, may have an entirely different view. Together, they may be able to fashion a new understanding of privacy where incidental disclosure to a third-party providers of services simply through the use of everyday electronic gadgets does not eliminate the broader right to be "let alone." That, at least, is my hope, so that we can move towards the new understanding of privacy rights in a digital era of pervasive commercial tracking.

Rich Yurko *is the founder of the Boston business litigation boutique, Yurko, Salvesen & Remz, P.C., which publishes a weekly* ***Boston business litigation update****.*

###

Sealing the Virtual Envelope: Protecting Attorney-Client Privileged Email in Criminal Investigations

Posted: September 12, 2012 | **Author:** bbabarjournal | **Filed under:** Fall 2012, Vol 56, #4, Heads Up | **Tags:** attorney-client privilege, Boston Bar Journal, e-mail privilege review, privilege in criminal investigations, taint teams | **Modify:** Edit this |Leave a comment »

By Michele L. Adelman and Jennifer S. Behr

Heads Up

The use of email permeates every aspect of our lives – including communications between attorneys and clients. No longer does an attorney provide all advice to a client in a written memorandum or letter – clearly marked "privileged and confidential." Now, such advice is often provided in an email chain that lacks any indicia of the communication's privileged nature.

Prosecutors often seek to obtain a suspect's communications with others as part of a criminal investigation – and what is better than a written communication such as email? Moreover, with court approval, prosecutors may obtain a suspect's email directly from a service provider (such as Google) without the suspect's knowledge. It is possible, and often likely, that a suspect's email contains privileged communications, which may be difficult to identify.

Prosecutors have always had to identify privileged communications during the execution of search warrants. But pulling a folder of written memoranda or correspondence clearly labeled "privileged and confidential" is much easier than sifting through an email chain starting with "what do you think?" Despite the potential magnitude of the problem, there are few published opinions and scholarly commentaries addressing the issue. As set forth below, prosecutors and defense attorneys should construct a system to protect attorney-client privileged email messages.

Prosecutors may obtain emails directly from service providers.

Both federal and state laws allow prosecutors to obtain a criminal suspect's emails directly from service providers without notice to the suspect. Section 2703(a) of the Stored Communications Act, 18 U.S.C. §§ 2701, *et seq.* ("SCA") limits the means by which a prosecutor may obtain email from service providers. SCA, available at**http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01061.htm.** Thus, a search

warrant is required for unretrieved email stored less than 180 days, while a search warrant or simply a court-order or subpoena with notice to the subscriber is required for retrieved email or unretrieved email stored more than 180 days. Massachusetts similarly requires a search warrant or grand jury or trial subpoena to obtain email from service providers in criminal matters. *See* M.G.L. c. 276, § 1B; M.G.L. c. 271, § 17B. Available at**http://www.malegislature.gov/Laws/GeneralLaws/PartIV** . Because these laws are not limited to situations in which a suspect has not yet been charged with a crime, the government may secretly seize a defendant's email even after charges have been brought.

Email accounts contain privileged communications.

Given the widespread use of email by attorneys, criminal suspects' email accounts may well contain communications covered by the attorney-client privilege. *See, e.g., United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010) (noting that after executing search warrants for offices and email accounts case agents "had access to approximately 60,000 email communications from or to attorneys representing [defendants]").
This is especially true where the suspect has already been charged with a crime and obtained counsel. For example, in a recent case in Suffolk Superior Court, *Commonwealth v. Kishore*, SUCR2011-11006, the Massachusetts Attorney General's Office used a search warrant to obtain emails directly from Google after the defendant was indicted for an alleged Medicaid fraud kickback scheme. The email account contained hundreds of privileged emails.

The challenge of identifying privileged communications.

Even if prosecutors assume that a suspect's email contains privileged communications and endeavor to protect them, it is not easy to identify privileged emails. While the use of search terms may be a good first step – searching for words such as "law," "legal," and "advice" will not reliably capture all privileged emails. Moreover, even if a prosecutor is aware of the suspect's lawyer's or law firm's name, searching for these names will not be enough. Emails from outside consultants, accountants, and experts working with a suspect's attorneys may also be privileged. And the presence of these third parties on an otherwise privileged email chain will not destroy the privilege. *Cf. Cavallaro* v. *United States,* 284 F.3d 236, 247 (1st Cir. 2002). Nonetheless, there are ways to minimize the risk that the privilege will be violated.

Some proposed solutions.

Protecting attorney-client privileged emails during criminal investigations is easier where the suspect has already been charged and is represented by counsel. In such cases there is little danger that the government will undermine its investigation by revealing that it intends to obtain the suspect's emails. In such circumstances, prosecutors should strongly consider serving a subpoena on defense counsel, requesting production of defendant's emails, except in cases where countervailing factors make this impractical – e.g., evidence of a significant risk that the defendant will delete emails or that defense

counsel will not make a full production.   Alternatively, prosecutors may subpoena emails directly from service providers with notice to the defendant (eliminating the risk of deletion or incomplete production), and defense counsel may be given the opportunity to review the emails in the first instance, create a privilege log, and produce the responsive non-privileged emails. Even if prosecutors decline to permit defense counsel review, defense counsel will at least be on notice that the defendant's emails are being seized. Counsel may then approach the court to make sure adequate protections are in place before privileged emails are in the prosecution's hands.

It is more challenging to devise a system to protect privileged communications where a suspect has not yet been charged and search warrants are used. The key in these cases is for the government to plan ahead. As the Department of Justice suggests, "Agents contemplating a search that may result in the seizure of legally privileged computer files should devise a post-seizure strategy for screening out the privileged files and should describe that strategy in the affidavit [supporting the search warrant.]" *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations*, ch. 2(F)(2)(b) (3d ed. 2009) available at**http://www.justice.gov/criminal/cybercrime/docs/ssmanual2009.pdf**. There are basically three choices in this situation: *in camera* review by the presiding judge, review by a special master, or review by a filter or "taint" team of prosecutors or investigators not otherwise involved in the prosecution. *Id.* Given the scarcity of judicial resources, the only realistic choices are usually using a special master or a filter team, and filter teams are preferred by prosecutors and judges in the majority of cases, because they are faster and far less expensive. *Id.*
Filter teams have been accepted by courts. For example, in *U.S. v. Taylor*, 764 F. Supp. 2d 230 (D. Me. 2011), prosecutors obtained a defendant's emails from Microsoft via search warrant after the defendant was indicted, knowing counsel had been appointed. When the reviewing agent discovered emails between the defendant and his attorney, he contacted the prosecutor. The prosecutor went to court to get approval of a "filter agent" procedure "whereby an AUSA uninvolved with the prosecution would review the e-mail materials to cull out any potentially privileged materials before the investigating agent and the prosecuting AUSA received them." *Id.* at 233. Once the privileged emails were identified, they were provided to defense counsel. The defendant objected to the procedure, but the magistrate judge permitted it. Defendant's motion to suppress was also unsuccessful. While the court recognized that "there is a healthy skepticism about the reliability of a filter agent or Chinese or ethical wall within a prosecutor's office . . . the government behaved reasonably" in the case by seeking instructions from the court before reviewing the emails. *Id.* at 234. The judge recognized that it may have been preferable for defense counsel to review the emails first and create a privilege log, however defense counsel had not suggested that procedure. *Id.* 234-5.; s*ee also United States v. Vogel*, No. 4:08-CR-224(1), 2010 WL 2268237, at 7 (E.D. Tex. May 25, 2010) (approving filter agent approach).

But filter teams may be only part of the solution. Defense attorneys and their agents should assist in protecting a client's privileged communications by more carefully labeling their communications as

“Privileged and Confidential.” While there is no guarantee that using the magic words “Privileged and Confidential” will suffice, it would go a long way towards flagging communications as privileged.

Defense counsel and prosecutors should be aware of the risk to attorney-client privilege when criminal suspects’ email accounts are obtained without their knowledge and should work together to construct a plan to protect privileged communications.

Michele L. Adelman *is a partner in the business crimes group at Foley Hoag, LLP. She is a member of the BBA Criminal Law Section Steering Committee.*
Jennifer S. Behr *is an associate in the business crimes group at Foley Hoag, LLP.*

###

Preserving Evidence To Convict the Guilty and Protect the Innocent: Massachusetts' Post-Conviction Access to Forensic and Scientific Analysis Act

Posted: September 12, 2012 | **Author:** bbabarjournal | **Filed under:** Fall 2012, Vol 56, #4, Legal Analysis | **Tags:** Boston Bar Journal, conviction, defendant, DNA, exonerate, forensic analysis, innocence, innocence project, not guilty, post-conviction, wrongful conviction | **Modify:** Edit this |Leave a comment »

By David M. Siegel and Gregory I. Massing

Legal Analysis

Kenneth Waters spent 18 years in Massachusetts state prison for a murder he did not commit. His sister, Betty Anne Waters, put herself through college and law school for the sole purpose of exonerating her brother, a story popularized in the 2010 feature film "Conviction." The evidence necessary to show Waters' innocence – Type O blood collected from the crime scene – was not located until 16 years after his conviction.**[i]**

The **Post Conviction Access to Forensic and Scientific Analysis Act** (hereinafter, "the Act") went into effect on May 17, 2012. The Act inserted a new **chapter 278A** into the Massachusetts General Laws, providing a comprehensive framework for criminal defendants who have been found guilty to gain access to evidence and forensic testing to support a claim of factual innocence. In our article in**the Summer 2012 edition of the BBJ**, we outlined the new procedure for defendants to seek this access and for judges to evaluate these requests. But what if the evidence needed to support the claim of innocence has been lost, misplaced, discarded, or destroyed?

The Act, for the first time in Massachusetts, mandates state-wide retention and preservation of evidence in criminal cases. To carry out this mandate, the Act gave the Director of the State Police Crime Lab the authority to promulgate regulations for evidence retention. This article outlines these provisions and explores the contours of possible regulation in this area.

I. New Statutory Framework for Evidence Preservation

As Kenneth Waters's story demonstrates, one of the greatest roadblocks for defendants seeking to prove that they were wrongfully convicted is the difficulty in locating and obtaining access to the biological or

physical materials necessary to demonstrate their innocence. This phenomenon is not limited to Massachusetts. For example, the CardozoLawSchool's Innocence Project, the first in the nation, closed 233 cases without resolution between 2004 and 2008. Of these, 22% were closed because evidence had been lost or destroyed.**[ii]** Depending on the case, the materials might be evidence (held by the court) or items collected during an investigation but not used, left in police department evidence lockers or discarded once the case was closed.

The Commonwealth has a constitutional obligation to produce exculpatory evidence in criminal cases so that a defendant may inspect and test it.**[iii]** However, police departments have only limited, specific statutory duties related to particular types of evidence collection. *See, e.g.,* **G.L. c. 41, § 97B** (requiring municipal police to preserve rape kits). Court clerks have only a general duty to maintain papers filed with them. **G.L. c. 221, § 14**. Prior to passage of the Act, no single legal authority obligated state actors to preserve materials collected during a criminal investigation.

Massachusetts is not unique in this regard. A 2007 study conducted for the U.S. Department of Justice of 2,250 law enforcement agencies across the country, including police departments, prosecutors' offices, and government crime labs, found that fewer than half (46%) had a policy for preserving biological material secured in the investigation of an offense in which a defendant was convicted. About half of these policies (51.4%) were established by state law, and most of the rest (42.7%) were set by the agency.**[iv]** Of the 49 states that have passed legislation providing for post-conviction DNA testing, only slightly more than half included an evidence preservation requirement.**[v]**

Massachusetts is now one of those states. The Act creates the first statewide statutory duty for governmental entities in possession of materials collected during an investigation that resulted in a criminal conviction to systematically retain those materials for the duration of a convicted defendant's sentence, including any term of parole or probation. **[vi]** Specifically, the Act mandates, "Any governmental entity that is in possession of evidence or biological material that is collected for its potential evidentiary value during the investigation of a crime, the prosecution of which results in a conviction, shall retain such evidence or biological material . . . without regard to whether the evidence or biological material was introduced at trial." ***Id***.

Two aspects of this brief but important provision bear emphasis. First, the term "evidence" is used in its broadest meaning, not limited to exhibits that are formally admitted into evidence. The statute expressly states that evidence or biological material collected for its "potential evidentiary value" in an investigation must be retained, regardless of whether or not it is introduced at trial.

Second, the term "governmental entity," used to describe those agencies subject to the retention requirement, is defined elsewhere in the Act as "an official body of the commonwealth, or of a county, city or town within the commonwealth." ***Id*. § 1**. Accordingly, state and municipal police departments that collect evidence for investigative purposes, as well as governmental forensic service units like the State Police and Boston Police crime laboratories, are now required by law to retain these materials. By its plain terms, the Act also applies to courts, which clearly satisfy the definitional standard of "official bodies

of the commonwealth." Thus, courts in possession of evidence or biological materials introduced at trial – or even merely marked for identification or used as a chalk – must retain and preserve these materials. The retention requirement is not absolute. For example, the Act recognizes that evidence seized for investigative purposes or introduced at trial may belong to third parties and may be subject to motions for the return of property. Thus, evidence or biological material "need not be preserved if it is to be returned to a third party." ***Id.*** **§ 16(a)**. Likewise, the legislature was cognizant that some materials seized in the course of an investigation – automobiles, for instance – cannot easily be stored indefinitely. Accordingly, governmental entities are excused from retaining objects "of such a size, bulk or physical character as to render retention impracticable." ***Id***.

The Act is not specific as to the manner in which evidentiary materials in general, or biological materials in particular, must be maintained, except to say that they must be kept "in a manner that is reasonably designed to preserve the evidence and biological material and to prevent its destruction or deterioration." ***Id***. Rather, the Act delegates to the director of the State Police Crime Lab, in consultation with the Forensic Sciences Advisory Board, the authority to promulgate regulations governing the materials' retention and preservation. ***Id*. § 16(b)**.

That Board, established under **G.L. c. 6, § 184A**, is charged with advising the Secretary of Public Safety and Security "on all aspects of the administration and delivery of criminal forensic sciences in the commonwealth." ***Id***. The Board is comprised of the undersecretary of public safety for forensic sciences, who serves as chair, the attorney general, the colonel of the state police, the president of the Massachusetts Chiefs of Police Association, the president of the Massachusetts Urban Chiefs Association, the president of the Massachusetts District Attorney's Association, a district attorney designated by the Massachusetts District Attorney's Association, and the commissioner of the department of public health or their designees. ***Id***. The composition of the Board is heavily weighted toward prosecutorial and police interests, and does not include any scientists.

In conjunction with its recommendation that the legislature pass the Act, the 2009 report of the Boston Bar Association Task Force to Prevent Wrongful Convictions, ***Getting It Right: Improving the Accuracy and Reliability of the Criminal Justice System in Massachusetts***, recommended that the Board should be expanded by adding three laboratory scientists and three members of the bar, representing a broader range of criminal justice and scientific stakeholders. ***Id***. at 48, 50-53 & App. B. Senator Cynthia Creem filed a bill to implement this recommendation, **Mass. Senate Bill No. 1204**, in January 2011, but the bill has not moved beyond being referred to committee. While the Board's meetings are open to the public, and recent Board chairs have invited a broad range of stakeholders to attend, regular participation in the Board's work by scientific professionals requires formal expansion of its membership. The proposed legislation would place the Board's consultative role with respect to the retention and preservation regulations on a firmer scientific basis.

Lastly, the Act provides criminal and civil immunity for governmental officials and employees acting in good faith to meet its requirements, including, but not limited to, the evidence retention provisions. **G.L. c. 278A, § 17(a), (c)**. Officials who engage in "willful or wanton misconduct or gross negligence" that results in the destruction of evidence, however, may be subject to proceedings for contempt. ***Id*. § 17(b)**.

II. Regulations To Implement Evidence Preservation

As mentioned above, the Act delegates the responsibility for regulating the retention and preservation of evidence and biological material, "in a manner that is reasonably designed to preserve the evidence and biological material and to prevent its destruction or deterioration," to the director of the State Police Crime Lab. ***Id*. § 16**. The Act gives the director wide berth regarding the content of the regulations, requiring only that the director include "standards for maintaining the integrity of the materials over time" and chain-of-custody procedures: "the designation of officials at each governmental entity with custodial responsibility and requirements for contemporaneously recorded documentation of individuals having and obtaining custody of any evidence or biological material." ***Id***.

Carrying out this broad mandate presents some obvious challenges. While spelling out best practices for retention and preservation of evidence – for example, the proper packaging of materials, and temperature and humidity levels at which they should optimally be kept – is a relatively straightforward proposition, putting these practices into effect is another matter. Nothing in the Act ensures that police departments, especially in smaller municipalities, will possess the storage space – and, if necessary, refrigerator units – to adhere to best practices. Likewise, regulations can easily require police departments to assign evidence custodians and to maintain careful logs of what materials are being stored, the case or cases they are associated with, when materials are removed, and by whom. Less obvious is whether police departments have the available personnel, records managements systems, and information officers to update and maintain these systems. Academic research recommendations aptly note, "[I]t is imperative that once state statutes are established, there must be adequate agency funding to allow crime laboratories and law enforcement to quickly and efficiently address their policies and procedures to support the statutes."**[vii]**

Concerns regarding storage space and funding are especially acute in light of the Act's requirement that government entities preserve not only "biological material," but also any "evidence" collected in an investigation. The original versions of the bills filed in the Senate and the House in January 2011, consistent with the BBA Task Force's recommendation, required only the retention of "biological evidence." *See* **Mass. Senate Bill No. 753**, proposed G.L. c. 278A, § 16(a) (filed Jan. 21, 2011); **Mass. House Bill No. 2165** (filed Jan. 20, 2011); ***Getting It Right***, App. A. Limiting the retention requirement to "biological evidence" is consistent with the requirements of the federal Innocence Protection Act. *See* **18 U.S.C. §3600A**.

In the course of enactment, however, the material required to be retained was broadened to include any "evidence or biological material."**[viii]** This change may have been due to the legislature's belief that evidence other than biological material, such as a murder weapon that was never dusted for fingerprints, or an article of clothing potentially carrying microscopic fluids or fibers not previously susceptible to DNA testing, might yield proof of a defendant's innocence – a belief that is consistent with research recommendations.**[ix]**

Mandating the retention of only biological materials would have been less onerous for state and local law enforcement agencies, whereas the need to retain all evidence might create financial burdens for police

departments in terms of logistics and procuring suitable storage space. The regulations might help alleviate these problems by providing for the sharing of retention responsibilities among forensic laboratories and police departments – so long as responsibility is clearly delineated and strong tracking and security systems are in place. In addition, based on the Act's exemption for the retention of large items that are impracticable to store, the regulations might include recommendations and methods for storing samples or cuttings of materials that will preserve their potential evidentiary value.**[x]**
Adhering to best practices for evidence *collection*, as well as retention, is a critical component of effective evidence preservation, as the evidence retained is only as good as that collected. The statewide regulations must ensure that all evidence and biological material subject to the Act – that is, "collected for its potential evidentiary value" – is carefully identified and promptly logged in, preferably in a centralized record-keeping system. The director of the State Police Crime Lab should examine ways to leverage and strengthen existing Laboratory Information Management Systems (LIMS) and police records management systems to facilitate and expedite this process. Law enforcement training on evidence collection should, at a minimum, include the new requirements for evidence retention created by the Act and any regulations. (For additional recommendations regarding law enforcement training and practices for evidence collection, *see* ***Getting It Right*** at 53-54.)

III. Conclusion

By creating an obligation for the Commonwealth to retain and preserve material from criminal investigations, Massachusetts's Post-Conviction Access to Forensic and Scientific Analysis Act provides a tool to help solve future cases, as well as to rectify – and shorten the duration of – miscarriages of justice. This tool is likely to become more powerful as techniques of forensic and scientific analysis improve. Through the intelligent and strategic use of the regulatory authority granted under the Act, the director of the State Police Crime Lab, in conjunction with the Forensic Sciences Advisory Board, can ensure that the law enforcement agencies of the Commonwealth responsibly discharge this duty.

David M. Siegel is a Professor of Law at New England Law | Boston specializing in Criminal Law, Criminal Procedure and Evidence.
Gregory I. Massing is Executive Director of the RappaportCenter for Law and Public Service at SuffolkUniversityLawSchool. He was General Counsel of the Massachusetts Executive Office of Public Safety from 2007 through 2011.
(The authors were members of the Boston Bar Association's 2008-2009 Task Force to Prevent Wrongful Convictions. The opinions expressed here are those of the authors and do not represent those of the Task Force, its members or the BBA.)

[i] This account of the Waters case is based on the Innocence Project's profile,**www.innocenceproject.org/Content/Kenny_Waters.php**.

[ii] Kevin J. Strom, Matthew J. Hickman & Jeri D. Ropero-Miller, **Evidence Retention Policies in U.S. Law Enforcement Agencies: Implications for Unsolved Cases and Postconviction DNA Testing**, 27 J. Contemp. Crim. Justice 133, 134 (2011) (hereinafter "Evidence Retention Policies").

[iii] *See Commonwealth v. Neal,* 392 Mass. 1, 11-12 (1984) (state has duty to produce exculpatory evidence for defendant to inspect and test); *Commonwealth v. Woodward,* 427 Mass. 659, 679 (1998) (duty extends to those "who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to his office").

[iv] *See* Kevin J. Strom, Jeri Ropero-Miller, Shelton Jones, Nathan Sikes, Mark Pope & Nicole Horstmann, **The 2007 Survey of Law Enforcement Forensic Evidence Processing** 3-9 to 3-10 (Oct. 2009).

[v] ***Evidence Retention Policies*** at 142.

[vi] The Act thus ensures that the Commonwealth complies with federal requirements for incentive grants for post-conviction DNA testing, training of criminal justice personnel, and elimination of testing backlogs. Section 413 of the federal **Innocence Protection Act of 2004, P.L. No. 108-405**requires that eligible grant receiving entities (including law enforcement agencies) demonstrate that, for all jurisdictions within their state, retention and preservation of biological materials is done "in a manner comparable to" federal preservation provisions, inserted by section 411 and codified at 18 U.S.C. §3600A.

[vii] ***Evidence Retention Policies*** at 144.

[viii] *Compare* **Senate Bill No. 753**, the bill as originally filed, *with* **Senate Bill No. 1987**, the substitute bill reported out of the Senate Ways and Means Committee. *See* **Senate Journal July 27, 2011**.

[ix] ***Evidence Retention Policies*** at 142 (noting potential value of "all forensic evidence including latent prints, trace evidence, and firearms and toolmarks, not just DNA," for unsolved and postconviction cases).

[x] For additional recommendations regarding how to "maximize the potential to use forensic evidence in the future while minimizing the cost of retention," *see* ***Evidence Retention Policies*** at 144-45.

###

Translation

Posted: September 12, 2012 | **Author:** bbabarjournal | **Filed under:** Fall 2012, Vol 56, #4, The Profession | **Tags:** ADR,alternative dispute resolution, appellate court, Boston Bar Journal, Mediation, retired judges | **Modify:** Edit this |Leave a comment »

By Judge Rudolph Kass (ret.)

The Profession

Shortly after taking my seat as an associate justice of the Appeals Court, I received a notice of deposition. The subject concerned the competence of a testatrix whose will signing I had witnessed while still in practice. In doubt how a judge should behave in those circumstances, I consulted the then Chief Justice, Allan M. Hale, a bottomless source of pragmatic wisdom. His instructions were: "Go answer the questions and don't make any rulings."

I recalled that episode, which involved a degree of behavior modification, when asked by an editor of this journal what, if anything, I had to impart about my translation from appellate judge to mediator and arbitrator. That role change occurred after I reached the constitutionally mandated retirement age for judges.

An appellate judge comes upon a controversy when it has already gone to an advanced state of development: the parties and their counsel have not resolved their differences – if they have even tried; the case has gone to trial; a jury or judge has found the facts; and one side has won. The record is fixed. Except for the rare instance when a losing party challenges the findings of fact (generally a Sisyphean task), the appellate judge engages in analysis to refine the questions in the case and applies the fruits of legal research, life, and professional experience to produce an opinion of what the law is and, by its application, to decide who wins the case. In that effort, the appellate judge has the comfort of collaboration – and sometimes loyal opposition – of the other judges on the court.

The mediator enters upon a dispute in its nascent stage. With rare exceptions, the case has not been tried, and the appellate judge turned mediator is re-introduced to the certainty paradox that characterizes a trial: that the only certainty about a trial is the uncertainty of the result. At the mediation stage facts are still unsettled. This permits the parties enthusiastically to demonize one another – and they generally do.

Mediation theory holds that the role of the mediator is to help the parties size up their vital interests so that those parties reach an accord. Chances are, however, that when counsel for the parties choose a

former judge to be their mediator, they want that mediator to voice some judgment about the strength of the parties' legal positions. There may be a time for that but one quickly learns that at the beginning of the process, the ex-judge mediator, like the judge-deponent, better not make any rulings. The atmosphere is more favorable to settlement if one side may plausibly argue the world is flat and the other that the world is round. Mediation is a search for the mutually unsatisfactory but acceptable resolution – unsatisfactory in the sense that each party will walk from the mediation with less than that to which it thinks itself entitled but can accept upon reflective assessment of the risk of losing the case, the legal expenses even if victorious, and the disruptive wear and tear that litigation imposes. This is not to say that mediation is unprincipled. The relative claims and defenses are grounded in law and those considerations weigh heavily in resolution of the controversy. The legal answer is not the sole answer. In a particular context it may not be a constructive answer and it is wise, as Professor Austin W. Scott was wont to observe when teaching the law of trusts, to rise above principle: for example, when parties reasonably anticipate a course of mutually beneficial commercial relations ahead of them.

In appellate presentations there is a premium on candor on the part of counsel. Judges will give more weight to arguments from lawyers who are playing straight with the court. In mediation there is theater and posturing as parties make offers and counter offers that they do not seriously expect will be accepted. For the translated judge this takes some getting used to and calls upon the patience reserve. One develops a sense when the dance step converts to real negotiation.

In the comparative calm of the appellate process, the emotional state of the combatants is not a factor. The mediator, by contrast, sees emotion – often it is anger – on display and it is very much a factor that the mediator must strive to understand. The mediator's response is that anger, however justified, is corrosive and obstructs arriving at a solution to the problem that produced the controversy in the first instance. It is fair to ask when confronted with anger and its twin, an immovable position, what did the party come to mediate? Was it not to solve a problem by a method other than a shoot out?

As the mediation reaches the climactic stage, the ex-judge begins to resume aspects of her/his former role. While still not a decision maker, the mediator becomes more directive, appraises legal positions more definitively, describes worst case scenarios and what the mediator thinks are a party's vital interests. To the extent that parties are stuck in fixed positions, the mediator may suggest elements of a resolution other than an exchange of money. What does the former judge miss at this juncture? Not sitting one foot higher than everybody else in the room.

The former judge is likely to be conscious of the duty of the trial judge managing the case, if it has reached a judge, to keep the case from stalling or moving sideways. It would be presumptuous for a mediator to suggest how a trial judge should manage scheduling issues but if the parties appear to be getting close to settlement, it may be permissible for the mediator, with the consent of the parties, to so report to the trial judge. That said, the confidentiality statute, G.L. c. 233, §23C, which governs mediation,

imposes circumspection on any communication between a mediator and a judge. The window in the wall that separates the mediation room from the courtroom is very small.

Occasionally parties come to mediation after entry of judgment in a trial and with the case on the path to appeal. The circumstances for a mediated settlement are now more difficult because one party has tasted blood and the other is behind the 8-ball. Yet, if the stakes are large, the winning party has an incentive to scale down its recovery in return for certainty; the losing party has an incentive to reduce the dimensions of its loss.

The Court of Appeals for the 1st Circuit screens cases in which mediation may be productive and invites the parties to mediate with a retired judge. Some years ago the Massachusetts Appeals Court experimented with a similar program. The number of cases that settled did not warrant the expense of maintaining the needed space and personnel. Instead, the court consigned cases which might have been candidates for mediation to the tender mercies of a summary disposition panel.

When listening to argument before the Appeals Court, was I ever tempted to inquire whether the parties would like to take a last shot at mediation? Hardly ever. There are cases involving family business disputes, domestic relations issues, neighbor against neighbor quarrels (e.g. about overloading a common driveway easement) where I would think it likely that a victory for one side will only further poison relations between the contending parties. But there they are. The lawyers have briefed the case, they rise to argue. Sometimes parties just need an authoritative decision. A court's decision is a better way than dueling.

*After receiving the LL.B. from Harvard Law School in 1956, Rudolph Kass broke into the practice of law with Jerome L. Rappaport and from 1961, practiced with Brown, Rudnick, Freed & Gesmer, of which he became a partner. In 1978, Governor Dukakis nominated Kass to the Appeals Court, on which Kass served from 1979 through 2003. Following his retirement from the court, he has embarked on a third career as a mediator and sometime arbitrator under the banner of The Mediation Group (**www.themediationgroup.org**) and REBA Dispute Resolution (**www.reba.net**), as well as doing other law related odd jobs, such as acting as a master.*

###