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WHEN NEGLIGENCE IS NOT A CRIME: IN *LIFE CARE CENTERS*, SJC DRAWS A BRIGHTER LINE BETWEEN CRIMINAL AND CIVIL CORPORATE LIABILITY

By Raymond P. Ausrotas

Civil and criminal practitioners alike can easily envision the scenario — a business provides a service to the general public: a hospital, a restaurant, a stadium, a theater. A terrible thing happens — something breaks, something slips, something falls, a system that usually works goes wrong. A patron is severely hurt and there is a crisis. Firefighters and EMTs arrive as quickly as they can to help. The injured party is rushed away for emergency care and may not live. Police take statements from witnesses and employees. The local press immediately, eagerly and aggressively reports on the tragedy and speculates as to who and what may be responsible. Federal and state regulatory agencies will soon send their own inspectors.

Your client is the president and owner of the company, she has just learned of all this, and calls you. You advise her to immediately place any and all of the company's insurers on notice of a potential civil claim. But then she asks whether she needs to worry about her company being charged with a crime, which — if the company is ultimately found guilty — could put her out of business altogether. And what if, instead, you are the district attorney and get a call describing the same situation? Do you investigate and charge the company with a crime?

Of course, every case is different, and more facts are needed to analyze the question as to any particular matter (especially depending on the nature of potential criminal conduct at issue), but in the recent decision *Commonwealth v. Life Care Centers of America, Inc.*,¹ the SJC provided helpful guidance as to the proper scope and analysis of corporate criminal liability as opposed to civil liability.

Here are the facts: in 1996, Julia McCauley became a resident of a long-term care nursing home in Acton run by the corporation Life Care Centers of America, Inc. ("Life Care Centers")² She was not well. She suffered from brain damage and dementia.³ A few years later, in 1999, while in a wheelchair, she was found near the foyer of the nursing home, which was near a set of stairs.⁴ Medical

staff ordered that a "WanderGuard" bracelet be placed on McCauley at all times, which would sound an alarm and automatically lock doors when she came close to an exit.⁵ After this, she tried to leave the nursing home through its front doors several times, which the staff knew about.⁶ McCauley's night nurse was required by physician's orders to check and note, daily, that the bracelet was placed on her and working.⁷ These medical notes were subject to an "editorial" review each month, which called for two nurses to independently confirm that doctors' orders were clear and correct on the home's patient treatment sheets, in order to prevent any mistakes.⁸

Fast forward to 2004. The nursing director of the facility asked an assistant to "clean up" all resident treatment sheets.⁹ The employee mistakenly took this to mean to erase doctors' orders, and did, including McCauley's WanderGuard instructions.¹⁰ The monthly review of treatment orders did not uncover the error over the next few months. Two nurses went over her notes in February (including a nursing supervisor who personally knew about McCauley's WanderGuard order), one did in March, while no one looked over the notes at all in April.¹¹ The night of April 16, 2004, the facility was short-staffed and a substitute nurse was on duty for McCauley, and he did not personally know about her treatment needs.¹² Not seeing anything in the notes, he did not check for her bracelet.¹³ The next morning, April 17, an aide wheeled McCauley to the nurses' station near the front of the home.¹⁴ Within minutes, McCauley left the home while in her wheelchair, fell down the front steps and died.¹⁵

This was clearly an awful and tragic occurrence. A critically vulnerable elderly woman died who shouldn't have. Quality control systems failed, people made mistakes, and had any of a number of individuals at the facility done their jobs correctly, they could have prevented McCauley's life from ending in this terrible way. But was there a crime committed here? And if so, by whom?

As to the crime, there was no evidence of intent to cause death, or heat of passion, which left only the crime of involuntary manslaughter as a possibility. Black letter law in the commonwealth holds that involuntary manslaughter is "an unlawful homicide unintentionally caused by an act which constitutes such a disregard of probable harmful consequences to another as to amount to wanton or reckless conduct."¹⁶ In order to determine whether an intentional act has been wanton or reckless, i.e. "a willful act that is undertaken in disregard of the probable harm to others that may result,"¹⁷ there need not be an intent to cause death, but rather, "intent to perform the act that causes death."¹⁸ Failure to act can constitute the crime of involuntary manslaughter where an actor creates a life-threatening condition, giving rise to "a duty to take reasonable steps to alleviate the risk created" where "the failure to do so may rise to the level of recklessness necessary..."¹⁹ However, the crime of involuntary manslaughter (when not vehicular)²⁰ "re-



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quires more than negligence or gross negligence.”²¹

Given these legal elements, who exactly would a prosecutor charge? The commonwealth did not proceed against any individual employee of the nursing home — presumably because it determined there was insufficient evidence as to the requisite elements of intent as to any single individual or in connection with a single causative act as would be required under the law of involuntary manslaughter set forth above.²² This left the corporation, itself, acting collectively through its several employees, as the potentially culpable actor. Life Care Centers was indeed indicted by a grand jury for involuntary manslaughter.²³

A corporation can only act through people, and of course may be held civilly and criminally liable for their actions. “Pursuant to the theory of *respondeat superior*, a corporation is responsible for both the acts and omissions of any one of its employees.”²⁴ The position of the commonwealth in charging Life Care Centers was that “criminal liability may attach to a corporation based on the aggregate knowledge and conduct of its employees even where no individual employee has committed a crime.”²⁵ Defense counsel moved to dismiss, challenging the “aggregation theory” of criminal liability as having been unsupported under the law of the commonwealth.²⁶ This was not decided right away, but eventually, on a motion *in limine*, the trial judge reported the question to the Appeals Court, and the SJC took direct review, on the following issue: “May a corporation be found guilty of involuntary manslaughter ... based upon a theory of collective knowledge and conduct of multiple of its employees, in the absence of one specific employee who is criminally liable for the commission of that crime?”²⁷

The SJC, through Justice Cowin, answered “No.”²⁸ In doing so, it stated that the commonwealth’s theory of aggregation “is not supported by logic or law. If one person’s act of simple negligence caused a death, there would be insufficient evidence to convict that person of involuntary manslaughter. The result is the same when the death is caused by multiple individuals who act merely negligently rather than wantonly or recklessly.”²⁹ The SJC also observed that to allow for criminal liability through such an aggregation theory would raise due process concerns.³⁰

Significantly, too, the SJC did not limit its discussion concerning corporate liability to criminal matters. It stated “[O]ur conclusion is consistent with the law governing corporate liability in the civil context.”³¹ The Court drew a distinction between a corporation’s “knowledge” (in which aggregation of the knowledge held by multiple corporate actors is appropriate), as opposed to its “mental state” (where such aggregation cannot be imputed).³² The Court observed that “the majority of federal courts to consider the issue have reached the conclusion that, in both the criminal *and* civil contexts, a corporation acts with a given mental state only if at least one employee who acts (or fails to act) possesses the requisite mental state at the time of the act (or failure to act).”³³ The SJC distinguished its holding from regulatory offenses in which the only *mens rea* required to establish liability is that a corporation possesses knowledge (e.g. disregard for a statute and indifference to its requirements), rather than a specific mental state.³⁴ Civil practitioners on both the plaintiff and defense sides of the bar should certainly be aware of and consider this analysis when confronting issues of corporate liability that are grounded in a theory of *respondeat superior*.

Any party facing a criminal proceeding confronts potentially grave consequences. Although a corporation cannot go to jail,³⁵ it

can be effectively shut down through remedial administrative action, as the defendant Life Care Centers would have been due to its loss of Medicare and Medicaid licensure.³⁶ Often, when confronting a criminal investigation, parties face the potential for civil liability as well, and can expect an accompanying civil suit. In these circumstances, individual defendants facing both civil and criminal liability can seek a stay of parallel civil proceedings due to the potential for a “whip-saw” effect — that is, being forced into compelled disclosure through civil process that could potentially be shared with the government and used against them.³⁷ In *Digital Equipment Corp. v. Currie Enterprises*, Magistrate Judge Bowler for the U.S. District Court of Massachusetts set forth the factors to be considered in such a situation, stating, “[t]he decision of whether to stay a civil case because of a pending criminal action involves a balancing of interests. The pertinent interests include:

- (1) the private interests of the plaintiffs in proceeding expeditiously with the civil litigation as balanced against the prejudice to the plaintiffs if delayed;
- (2) the private interests of and burden on the defendant;
- (3) the convenience to the courts;
- (4) the interest of persons not parties to the civil litigation; and
- (5) the public interest.”³⁸

Because a corporation does not hold a personal Fifth Amendment privilege,³⁹ however, its private interest and burden as a factor in any such balancing does not carry as much weight as an individual’s would. Any determination will necessarily be subject to a trial court’s discretion, which can be unpredictable: “A court ... has the discretion to stay civil proceedings, postpone civil discovery, or impose protective orders and conditions ‘when the interests of justice seem to require such action, sometimes at the request of the prosecution ... sometimes at the request of the defense.’”⁴⁰

In light of the challenges that are faced by companies when a terrible accident has happened (including substantial civil exposure), in its *Life Care Centers* decision, the SJC has at least helped prevent the initiation of criminal proceedings against a corporate defendant unless there has been adequate proof that an individual whose action will properly bind the company to such exposure exists in the first place. The decision will be sure to have significant ramifications for both prosecutors and criminal defense counsel — and potentially civil litigators as well — in the future.

Notes

1. *Commonwealth v. Life Care Centers of America, Inc.*, 456 Mass. 826 (2010).
2. *Id.* at 828.
3. *Id.*
4. *Id.*
5. *Id.* at n. 5.
6. *Id.*
7. *Id.* at 829.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*

14. *Id.*
15. *Id.* at 830.
16. *Id.* at 832.
17. *Id.*
18. *Id.*
19. *Id.*
20. See M.G.L. c. 90 § 24G(b)
21. *Id.*
22. *Id.* at 830, n.6 & 7, 831 n. 11. The trial judge did initially determine that the nursing supervisor who had twice missed the erased doctor's order could have been charged individually but that question was not before the Court where the commonwealth had not charged her. *Id.*
23. The defendant was also charged with neglect of a resident of a long-term care facility, under a since-repealed statute, M.G.L. c. 265 § 38. The SJC's analysis tracked that as to the crime of involuntary manslaughter. *Id.* at 836.
24. *Id.* at 831.
25. *Id.*
26. *Id.* at 830. There were subsequent proceedings leading to a motion *in limine* to exclude collective knowledge evidence when a trial was to be held over *respondeat superior* liability arising out of the nursing supervisor's role alone, which led to the eventual reporting of the question. *Id.*
27. *Id.* at 827-28.
28. *Id.* at 836.
29. *Id.* at 834 (citation omitted).
30. *Id.*
31. *Id.*
32. *Id.* at 835.
33. *Id.* (italics added) (citing for support *First Equity Corp. of Fla. v. Standard & Poor's Corp.*, 690 F. Supp. 256, 259-60 (S.D.N.Y. 1988); *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 366 (5th Cir. 2004); *Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 670 n. 6 (D.C. Cir. 1996); *Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424, 1435 (9th Cir. 1995); *United States v. LBS Bank-N.Y., Inc.*, 757 F. Supp. 496, 501 n. 7 (E.D. Pa. 1990)).
34. *Id.* at 835-36. See also *Commonwealth v. Springfield Terminal Ry. Co.*, 77 Mass. App. Ct. 225, 230 (2010) (declining to stay execution of a sentence pending appeal by corporate criminal defendant where company had failed to notify DEP about diesel fuel leak and statute at issue was therefore a regulatory offense requiring only proof of knowledge of release of hazardous material).
35. *Springfield Terminal, supra*, 77 Mass. App. Ct. at 230.
36. *Life Care Centers, supra*, 456 Mass. at 834 n. 12.
37. In these circumstances the government also often shares a similar concern but in the other direction — that a criminal defendant may use civil discovery to reach beyond what would be allowed under criminal discovery proceedings, or otherwise interfere with the government's own investigation. See, e.g. *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963); *United States v. Maine Lobstermen's Ass'n*, 22 F.R.D. 199, 201 (D. Me. 1958) (defendants in criminal antitrust cases cannot take advantage of companion civil case to obtain prosecution evidence); *LaRouche Campaign v. FBI*, 106 F.R.D. 500 (D. Mass. 1985) (granting government's and bank's motion to stay due to pending criminal investigation); *Del Valle v. Bechtel Corp.*, No. 06-3654, *reprinted at*, 2008 Mass. Super. LEXIS 248, 24 Mass. L. Rep. 410 (Mass. Super. – Suffolk, July 29, 2008) (government motion to stay civil action denied).
38. *Digital Equipment Corp. v. Currie Enterprises*, 142 F.R.D. 8, 12 (D. Mass. 1991) (citations omitted). See also *Int'l Floor Crafts, Inc. v. Adams*, 529 F. Supp. 2d 174, 176 (D. Mass. 2007) (individual employee's motion to stay civil action due to pending criminal investigation denied).
39. *Wilson v. United States*, 221 U.S. 361, 382-83 (1911) (unlike private individuals, corporations have no privilege against self-incrimination); see also *United States v. Kordel*, 397 U.S. 1, 8 (1970) ("It would indeed be incongruous to permit a corporation to select an individual to verify the corporation's answers who, because he fears self-incrimination, may thus secure for the corporation the benefits of a privilege it does not have.").
40. *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1202 (Fed. Cir. 1987). (citations omitted).

VIOLATING THE “ALCOHOL-FREE” PROBATION REQUIREMENT — LEARNING FROM THE *GALLUCCIO* MATTER*

By Thomas E. Workman Jr.

*This article first appeared in the July 2010 issue of *Lawyers Journal*.

Probationers rarely take extraordinary steps to demonstrate that they did not violate the terms of their probation when confronted by a machine that suggests that they consumed alcohol. Such was the case in the *Commonwealth v. Anthony Galluccio* probation surrender case in January of 2010, currently under appeal to the Appeals Court.¹ In preparing this article, I reviewed the probation surrender hearing transcript, the hearing exhibits, technical specifications for the fuel cell in an alcohol breath-testing device, over 20 scientific journals which documented the science of EtG testing for ethanol use,² and the appellate brief filed by Charles Ogletree.³

On Friday, Dec. 18, 2009, former Massachusetts state Sen. Anthony D. Galluccio was placed on probation in a matter that involved leaving the scene of an accident. The court ordered him to remain alcohol free, and submit to random testing for alcohol.

In the afternoon of Monday, Dec. 21, 2009, Galluccio was working in his home office when Cambridge's chief probation officer arrived at his home in order to install a device referred to as a "Sobriotor." The Sobriotor is a machine that obtains, measures and reports the alcohol content of a breath sample from the probationer. The machine verifies the identity of the person through a voice recognition system built into the machine.⁴

At the surrender hearing, Michael Jacobs, the program manager for the Boston Electronic Monitoring Center who installed the Sobriotor, testified about his interactions with Galluccio — that he did not observe any of the indicia of alcoholic beverages — no odor of an alcoholic beverage, no slurred speech, glassy eyes or any indication of impairment.

Jacobs testified at the probation surrender hearing that when Galluccio first learned that the Sobriotor reported positive results, that Galluccio asked for a blood test. Galluccio could not have his blood tested without the permission of the Probation Department, and his requests that day were not allowed.

The Sobriotor is not an evidentiary testing device.⁵ By regula-

tion, results from a Sobriotor breath test are not admissible in a criminal trial.⁶ When an approved evidentiary machine is used to test breath for alcohol, such measurements are acknowledged to be imprecise.⁷

Galluccio's first test registered a .037 on the Sobriotor. Three minutes after the first reading, a second value of .033 was obtained on the same Sobriotor. If these two readings were precise and accurate, then Galluccio would have been eliminating ethanol from his body at a rate of .004 in three minutes, or .08 per hour. An elimination rate of .08 g/dL per hour would be unprecedented in the science,⁸ and the rate is more likely attributed to the error in the reported results themselves.

If Galluccio had been tested on an evidentiary machine, a second reading at or between a .01 and a .059 would have been a "precise" measurement by Massachusetts standards, and would have reported the lower of the two measurements (either a .01, .02 or a .03).⁹ The Sobriotor is not certified to this degree of precision, but is configured by default so that results at or below a .025 are considered to be below the level of detection for the machine.¹⁰

The Sobriotor evidence was the sole evidence of a violation of probation, the court found he violated the condition that required he abstain from alcohol, and Galluccio was sentenced to a year in the house of correction. His motion for a stay of sentence was denied.

In criminal driving under the influence cases, a defendant has the right to be "immediately" seen by a physician, for the purpose of having an independent test.¹¹ Such due process rights exist because measurement of blood is the "gold standard" scientific method for measuring the amount of ethanol in the blood of a subject.¹²

The need to be tested immediately is important. In the *Commonwealth v. Colturi* decision, the Supreme Judicial Court defined a three-hour interval between driving and measuring alcohol on the driver's breath to be a reasonable time to take a measurement of ethanol.¹³

The Massachusetts legal press recently reported "SJC justice: 'Melendez-Diaz' doesn't apply to OUI case," discussing why a blood test can be introduced at a DUI trial without a live witness after the medical records are subpoenaed by the commonwealth.¹⁴ While the *Commonwealth v. Parmenter* decision might be seen to chill the exercise of an independent test (after all, the government may know about the test, and may even have transported the defendant to the hospital), an independent test is likely to be distinguished from *Parmenter*, in that the independent test was performed explicitly for a court proceeding. Whether the commonwealth would be entitled to the test results, or would know absent introduction by the defendant that they were not favorable, has yet to be determined.

Of perhaps greater concern is the illusory nature of the right to an independent test. In probation matters, it is rare for the probation officer to be present when a Sobriotor tests positive, even rarer



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**Workman was retained by and consulted with friends of Anthony D. Galluccio, but did not consult with counsel at trial or on appeal, and was not compensated for writing this article.*

for the probationer to ask for an independent blood test, and perhaps even rarer for the probation officer to remember that request and testify that the probationer asked for an independent test.¹⁵

The logistics of obtaining an independent test are often insurmountable. Most physicians do not draw blood in their offices. Most DUI arrests occur between midnight and 4 a.m., and at that time of morning, the only physicians on duty are in an emergency room at a hospital. Getting to see a physician by navigating through the triage of an emergency room, being seen by a doctor, making an appointment for a blood draw, and having blood drawn for a blood test — all within the three hours mandated by *Colturi* for relevance — is difficult during the daylight hours, and is likely impossible in the early hours of the morning. Fortunately, there are tests that can look back more than three hours.

There is often confusion over what is prohibited when a probationer is required to remain “alcohol free.” The judiciary’s use of the term “alcohol” is often assumed to mean the chemical compound “ethanol” or “ethyl alcohol.” Ethanol is the form of alcohol found in distilled spirits, beer and wine. There are more than 1,500 chemical compounds in the alcohol family¹⁶ that have nothing to do with alcoholic beverages.

Since a probationer is prohibited from having “ethanol” in their body, the first question is how ethanol might come to be present in the body. The most obvious way is by drinking a beverage such as beer, wine or spirits. But this is not the only way that ethanol can enter the body through the mouth.

Other drinks are not ethanol free, despite the commonly held belief that they are. For example, Diet Seven-Up¹⁷ contains ethanol in small portions. High-energy drinks, such as Monster and 180 Energy, contain several times as much ethanol as Diet Seven-Up. Some foods contain ethanol, such as breads, pizza, English muffins, wheat bread and apple walnut roll (in increasing concentrations).¹⁸ While you are not likely to become impaired from the ethanol in these drinks and foods, you will not remain alcohol free if you eat or drink them.

Ethanol is generated when sugars are fermented, and this can occur in the human body when yeast and carbohydrates are present. This has been inconsistently demonstrated at DUI seminars and workshops, with some results above the legal limit (.08 g/100 ml) on varieties of pizza, Wonder Bread or hot dog rolls.¹⁹

Ethanol can be absorbed into the body in other ways as well. Ethanol is medically administered as an antidote for some poisons.²⁰ A material safety datasheet for ethanol describes the effects of inhalation of ethanol fumes, which can result in coma or death in high concentrations, and will result in absorption of ethanol into the body in lower concentrations.²¹ Finally, small amounts of ethanol are absorbed when hand sanitizers, such as Purell,²² are applied to the skin.

Some manufacturers of machines designed to detect ethanol on the breath have freely interchanged the term “alcohol” and “ethanol” in their literature and training. The interchangeability of the two terms has been introduced into the statutes in many states, including Massachusetts.²³ The historic intoxication provision has always required impairment from “intoxicating liquor” or an enumerated drug, yet the newer “*per se*” prohibition is for “alcohol” in the body, not “ethanol.”

In 2004, the National Highway Transportation Safety Administration quietly announced its new mission with regard to approving machines that are designed to measure ethanol in the breath.²⁴

In placing machines on the conforming products list, which Massachusetts relies upon for approval, NHTSA no longer requires measurement of “intoxicating liquor” or “ethanol.” Approved machines now measure and report any kind of alcohol.

There are two basic classes of machines that measure human breath for alcohol. One class uses infrared light, and takes advantage of the manner in which molecules behave with respect to energy from that light. These machines are the only ones authorized by the Office of Alcohol Testing.²⁵

The second class of machines uses an electrochemical fuel cell to measure alcohol. The Sobrieter used in the *Galluccio* surrender is one of these devices. Fuel cells respond to different kinds of “alcohol.” While the judge and most lawyers laughed at the proposition that toothpaste would register on the Sobrieter, Sensodyne toothpaste (the kind shown by *Galluccio* to the probation officer when the positive results were first detected) has Sorbitol as a main ingredient.²⁶ Sorbitol is an alcohol,²⁷ as are most chemicals that end in the sound “-ol,” such as menthol.

The *Boston Herald* confirmed that toothpaste does register on a fuel cell breath test machine that it purchased, but that the readings went away after several minutes.²⁸ Jacobs gave no special instructions to *Galluccio* regarding any interference that might elevate readings on the Sobrieter. If a whitening toothpaste is partially retained in the mouth, to extend the whitening affect, then a positive reading on the Sobrieter is not such a silly possibility.

In the case of other probationers, the random request for a test could arrive just as the probationer was brushing their teeth. If the probationer supplies a prompt sample, the procedure would result in a false positive test. If an unexplained positive result were reported, it would not be unreasonable for a probationer to try to clear their mouth of whatever was causing the reading, and that could result in brushing one’s teeth. Using mouthwash before a sample is far worse.

Of greater concern in this case, and not raised at the hearing or in the appeal, is the manner in which the Sobrieter came to be set up in *Galluccio*’s home. The issues of repair of the machine were well developed in the appeal, and are of concern, as are the issues that the machine is not an approved device in Massachusetts.

Assuming that Sobrietors work correctly, *Galluccio*’s situation bears a significant risk of contamination from the chemicals used to “clean” the device after it was received from another department the day *Galluccio* got it. The mask on the device resembles a court stenographer’s mask, and if cleaning is done to sanitize and kill germs,²⁹ then the cleaning chemicals could linger on the mask.

The Sobrieter manufacturer purchases its fuel cells from Draeger,³⁰ and these fuel cells respond to alcohols other than ethanol.³¹ If the cleaning was done in this manner,³² then one would expect the machine to respond exactly as it did in the *Galluccio* matter.³³

Galluccio was not allowed to provide a contemporaneous blood sample to rebut the readings of the Sobrieter. Within a few days, *Galluccio* was able to submit biological samples at a forensic center, which supervised the collection of samples of urine and hair, so that these biological samples could be evaluated for ethyl glucuronide, or EtG. EtG is produced in the liver when ethanol is metabolized. Absence of EtG can confirm the absence of ethanol several days after a suspected incorrect breath measurement is reported.³⁴

Courts routinely accept the results of tests for metabolites of

substances, rather than the substances themselves. Such is the manner in which cocaine is routinely tested and reported, through a urine screen that tests for the metabolite benzoylgonine, rather than for the cocaine itself.³⁵

In the last year for which statistics were published by probation, 184,775 urine samples were tested by Massachusetts probation departments for the metabolite of cocaine.³⁶ These tests produce immediate results, by means of chemical reactions to strips of test paper that are exposed to the urine sample. The probationer has an opportunity to request a more specific and scientific analysis, using a GC/MS (gas chromatograph/mass spec) test. It is with some irony that the court in the *Galluccio* matter found the testing of biological samples for the metabolite of a substance to be controversial, when the court routinely accepts tests for the metabolite of cocaine, using a detection mechanism that is not as accurate as what was used in Galluccio's case.³⁷

EtG testing is controversial because of false positives. A very small amount of EtG can mean that an alcoholic drink was consumed several days ago, or that Purell hand sanitizer was recently used.³⁸ A zero reading of EtG in a subject's urine or blood can only mean that the individual did not have any ethanol in their system within a three-day look-back. Assuming that the analysis was performed in a competent lab, by competent scientists, and that collection of samples was performed correctly, the proper chain of custody was maintained, and that there is no evidence of tampering with the hair, urine or blood — then a zero reading is generally accepted as scientific proof of abstinence for a window of 72 hours.

Galluccio had samples of hair and urine taken by a forensic lab in Boston, and those samples were properly preserved and transported to two labs,³⁹ where the results for both hair and urine resulted in a zero reading for EtG.⁴⁰

The Massachusetts Appeals Court will soon decide whether a positive result on the Sobriotor, which conflicts with observations of the probation officer and zero results from laboratory-tested urine and hair, is sufficient to support a finding of a violation of probation. Attorneys who practice in the area of probation surrenders should know that EtG tests permit the analysis of biological samples well after the client has naturally eliminated all traces of ethanol in their system.

For the client who drinks, but claims they were not drinking that night, EtG testing may be of limited value. For the client who claims they never drink or have not had an alcoholic beverage in many days or weeks, EtG testing may be one of the only ways to challenge an evidential breath test or a breath test on a machine like the Sobriotor.

Notes

1. *Commonwealth v. Galluccio*, No. 2010-P-0327 (Mass. App. Ct. 2010). Galluccio is represented on appeal by Harvard Law Professor Charles Ogletree. The government was recently granted a 40-day extension to file its reply brief, and Galluccio's motion for a stay of sentence was denied. The current case status is available at the Appeals Court Web site. Supreme Judicial Court and Appeals Court of Massachusetts, Public Case Information, www.ma-appellatecourts.org/search_number.php?dno=2010-P-0327&get=Search (last visited June 9, 2010).

2. The author is indebted to attorney Justin McShane of Harrisburg, Pa., for his assistance in providing articles from scientific journals that described the science of EtG detection, a method of detecting ethanol use in a multiple-day window of time.

3. The probation surrender hearing was before Judge Nestor on Jan. 4,

2010. The hearing transcript is 254 pages, and the defendant-appellant's brief is 48 pages.

4. A video of the Sobriotor used for probation is available on YouTube. Youtube, Sobriotor Demonstration, www.youtube.com/watch?v=wUrQ-34Yc2k.

5. The Office of Alcohol Testing maintains the list of approved machines that can be used to test human breath. 501 MASS. CODE REGS. 2.38 (2010) sets forth the requirements that machines must meet to be approved, which includes the presence of a machine on the National Highway Safety Transportation Administration's conforming products list, as published in the federal register.

6. Code of Massachusetts Regulations 501 CMR 2.38 requires that only machines that employ infrared technology be utilized to test human breath for ethanol, which prohibits the use of breath testing machines that utilize a fuel cell as their measurement mechanism. The Sobriotor uses a fuel cell to measure alcohol.

7. 501 MASS. CODE REGS. 2.57 (2010) requires the reporting of the lower of two samples which, after truncation to two digits, agree with one another by .02. Thus a .037 and a .010 would be said to be in compliance, and a .01 would be reported.

8. GARRIOTT'S MEDICOLEGAL ASPECTS OF ALCOHOL, Fifth Edition, Section 3.7 Characteristics of Blood-Alcohol Curves, A W Jones, page 95. The highest elimination rates observed are in the .03 range, well below the .08 value observed if the Sobriotor readings were correct.

9. *Id.*

10. Sobriotor User Manual, page 34 (provided as Page 44 of the Appellant's Exhibits, filed with his brief), states that the Sobriotor "can detect down to .010 percent; however, following up on indications of less than .025 is generally discouraged unless the officer can perform an on-site test using a Personal Breath Test within 15 to 30 minutes" and at page 16 "The lowest level that Sobriotor can detect and report is .010, but the default setting is .025."

11. MGL Chapter 263: Section 5A. Driving while intoxicated; right to medical examination; notice

"Section 5A. A person held in custody at a police station or other place of detention, charged with operating a motor vehicle while under the influence of intoxicating liquor, shall have the right, at his request and at his expense, to be examined immediately by a physician selected by him. The police official in charge of such station or place of detention, or his designee, shall inform him of such right immediately upon being booked, and shall afford him a reasonable opportunity to exercise it."

12. GARRIOTT'S MEDICOLEGAL ASPECTS OF ALCOHOL, Fifth Edition, Section 3.4 (D) Analysis of Ethanol in Body Fluids, A W Jones.

13. *Commonwealth v. Colturi*, 448 Mass. 809, 818, 864 N.E.2d 498 (2007).

14. Jack Dew, *SJC Justice: 'Melendez-Diaz' Doesn't Apply to OUI Case*, MASS. LAWYERS WEEKLY, April 26, 2010 available at www.masslawyer-weekly.com/index.cfm/archive/view/id/455826 (discussing Judge Botsford's decision in *Commonwealth v. Parmenter*, No. SJ-2009-0633 (Botsford, J., sitting as single justice) (S.J.C. Apr. 14, 2010)).

15. The probation officer who installed the Sobriotor testified at the probation surrender, and testified that Galluccio had asked for an independent blood test. Most probation surrender hearings proceed without the testimony of a percipient witness (as to the breath test) from the probation department.

16. Probation surrender transcript testimony of Dr Ernest D Lykissa, page 154, line 16-17.

17. Material presented by Dr Barry Logan at the May 2009 Borkestein Institute in Indianapolis, Indiana. Taken from the author's course material when he attended the course.

18. *Id.* Apple Walnut Roll contained just under 1 percent ethanol by weight and a Hostess Twinkie contained .03 percent, or one-thirtieth as much ethanol by weight. Eating either would violate a court-imposed condition that one “abstain from alcohol.”
19. The author has personally witnessed a breath test over the .08 legal limit, after the subject ate several slices of deluxe pizza, and drank no alcoholic beverages.
20. Brent R. Ekins, Douglas E. Rollins & Douglas P. Duffy et al., *Standardized Treatment of Severe Methanol Poisoning With Ethanol and Hemodialysis*, 142 W.J. MED. 337-337-340 (Mar. 1985) available at www.ncbi.nlm.nih.gov/pmc/articles/PMC1306022/ (last visited June 9, 2010).
21. North American Fire Arts Association, Material Safety Data Sheet, available at www.nafaa.org/ethanol.pdf (last visited June 9, 2010). Those who work around chemicals that contain ethanol, such as hair dressers, are susceptible to inhalation of fumes containing ethanol, and they will develop levels of ethanol in their bodies as a result of their employment.
22. FAQs for Purell from the manufacturing, according to Answer #9, Purell is 62 percent ethyl alcohol. See: www.prodhelp.com/purell/content/faq.htm (last visited June 9, 2010).
23. MASS. GEN. LAWS ch. 90 § 24(1)(a)(1) (2010) states: “Whoever ... operates a motor vehicle with a percentage, by weight, of alcohol in their blood of eight one-hundredths or greater, or while under the influence of intoxicating liquor, or of marijuana ... shall be punished” (emphasis added).
24. The NHTSA “expanded the definition of alcohol to include other low molecular weight alcohols, including methyl and isopropyl.” 69 Fed. Reg. 42237, (July 14, 2004) available at www.nhtsa.gov/people/injury/alcohol/ehtcpl040714fr.pdf (last visited June 9, 2010).
25. 501 MASS. CODE REGS. 2.38.
26. Sorbitol, a sugar alcohol, is a main ingredient according to the Physician’s Desk Reference for non-prescription drugs. See Drugs.com, Sensodyne Original Flavor Patient Advice Including Side Effects, www.drugs.com/pdr/sensodyne-original-flavor.html (last visited June 9, 2010).
27. See <http://en.wikipedia.org/wiki/Sorbitol> (last visited June 9, 2010).
28. Joe Dwinell, *Anthony Galluccio’s Alibi Just Evaporates*, BOSTON HERALD, Dec. 25, 2009, available at http://bostonherald.com/news/politics/view/20091225anthony_galluccios_alibi_just_evaporates/srvc (last visited June 9, 2010). The Herald “experiment” demonstrates that it is possible to place toothpaste in the mouth of one individual, wait an unspecified period of minutes, and then blow into a different machine that utilizes a fuel cell, and not register any alcohol reading. To suggest that one can conclude that Galluccio’s toothpaste did not cause any reading is scientifically irresponsible, in the author’s opinion. In real scientific testing, as in FDA drug approvals, we never let the proponent do their own testing on a subject population of one person, that being the proponent. Such an FDA approval process, which is important, would be deemed irresponsible.
29. The Sobrietor Manual, entered into evidence as Exhibit 4 at page 34: “The area of the handset that comes into contact with the face can be cleaned with hospital foam disinfectant, a solution of bleach and water, or alcohol swabs.” (emphasis added).
30. According to an affidavit entered into evidence as Exhibit 8, authored by an officer of the company that manufactures the Sobrietor.
31. According to training provided by Draeger, the 9510 and 7110 use the same fuel cell. The Draeger 7110, which by affidavit introduced by the commonwealth in Galluccio’s surrender matter as Exhibit 8, uses the same fuel cell as the Sobrietor. The Draeger 9510 manual, at page 14, contains charts that show the fuel cell response to alcohols which are not ethanol.
32. Isopropanol is known to be a problem for machines like the Sobrietor. See A.W. Jones & S. Rössner, *False-Positive Breath-Alcohol Test after a Ketogenic Diet*, 31 INT’L J. OF OBESITY 559, 559-61 (2007). Dr. A.W. Jones documented the experience of a dieting patient who was unable to operate a motor vehicle equipped with an ignition interlock, because of false positives associated with the diet-induced production of isopropanol. *Id.* The driver was a subject who had never drunk intoxicating liquor, the ignition interlock was not installed because of any prior activity of that driver, and the documented false-positive caused an ignition interlock to disable a motor vehicle driven by him. *Id.* Both the Sobrietor and the fuel cell used in ignition interlocks evaluate the breath in the same way, and both would interpret isopropanol as “alcohol.” *Id.*
33. If isopropyl alcohol was used to sanitize the mask, and if Galluccio got a unit that normally would have sat on the shelf for a time, he would have received a unit that still had isopropyl alcohol in the mask. That alcohol could have accounted for the low readings which rapidly declined, and then disappeared. Because of the special processing Galluccio received, other probationers are not likely to experience this problem.
34. EtG has a half-life of two to three hours, which means that it can be found in the hair and urine for a period of several days after the ethanol was metabolized. See John P. Allen, Pekka Sillanaukee & Nuria Strid et al., *Biomarkers of Heavy Drinking, in ASSESSING ALCOHOL PROBLEMS: A GUIDE FOR CLINICIANS AND RESEARCHERS*, 41 & Table 2 (John P. Allen & Veronic B. Wilson eds., 2003), available at <http://pubs.niaaa.nih.gov/publications/assessing%20Alcohol/allen.pdf>. (last visited June 9, 2010).
35. Massachusetts probation does not test for cocaine, but rather for the metabolite of cocaine. See Sam Bellistri, Phyllis Bucio-Nutaro & Jonathan Randall, Massachusetts Community Corrections Drug Testing Protocol, 21, (2001) available at www.mass.gov/courts/admin/occ/drugtest.pdf, slide 21 (last visited June 9, 2010).
36. Steven V. Price, Utilization of Community Corrections Centers Statistical Report, FY 2008, vi (Jan., 2009), available at www.mass.gov/courts/admin/occ/fy2008report.pdf (last visited June 9, 2010).
37. Galluccio’s hair and urine were tested with the more scientific GC/MS method, which is generally considered to be the gold standard for measuring metabolites for cocaine and ethanol in biological samples.
38. Gregory Skipper, Frieder Wurst & Wolfgang Weinmann et al., *Ethanol Based Hand Sanitizing Gel Vapor Causes Positive Alcohol Marker, Ethylglucuronide (EtG), and Positive Breathalyzer*, available at <http://etg.weebly.com/uploads/7/4/7/5/74751/ethgel.study.pdf>.
39. While Galluccio’s urine was shipped Fed Ex with an ice pack, EtG is stable in the urine at room temperature. Friedrich Wurst, Christoph Kempter & Stephan Siedl et al., *Ethyl Glucuronide — A Marker of Alcohol Consumption and a Relapse Marker with Clinical and Forensic Implications*, 34 ALCOHOL & ALCOHOLISM 71, 75 (1999) available at alcalc.oxford-journals.org/cgi/reprint/34/1/71.pdf.
- Furthermore we have investigated the stability of EtG in urine by measuring and remeasuring the ethanol metabolite [EtG] in a sample at room temperature every hour for 140 h. As shown in Fig. 2, the results fall within a very narrow range. This stability will be particularly useful for storage and transport if use of the EtG test becomes widespread.
- Id.* at 75.
40. Hair from the head grows about half an inch a month, so that hair samples of a half an inch in length can demonstrate abstinence for a month. Hairfinder, How Fast Does Hair Grow, www.hairfinder.com/hair-questions/how_fast_does_hair_grow.htm (last visited June 9, 2010).

WHEN OVER ISN'T OVER: GETTING YOUR IMMIGRATION CLIENT BACK INTO COURT

By Marisa A. DeFranco

In immigration litigation, finality means deportation, and often, your client is facing hostile and downright deadly conditions back in her home country. An immigration practitioner must keep a laser focus on strict limitations and statutory bars. However, you must also be aware of the very few exceptions that do exist that may give your client another chance to seek relief in court.

The motion to reopen could mean the difference between life and death for some immigrant clients, and all practitioners should know the elements cold so that when that one person does walk into your office who does have a good case for a motion to reopen, you recognize it and are ready to move on her behalf.

Motion to reopen proceedings based on changed country conditions: Case study Uganda

When someone has received a final order of removal, their only available relief from removal is to reopen their proceedings. However, only a few ways exist to reopen such proceedings. Motions are subject to time and number limitations, but there are a few exceptions to the limits.

If a person had an in absentia order, they could file the motion to reopen based on lack of notice. Because the Department of Homeland Security (DHS) can now effectuate notice by regular mail, rather than the certified mail required under the old rules, proving lack of notice can be difficult (but don't discount the possibility of lack of notice until you have fully analyzed it). Other avenues include ineffective assistance of counsel (IAC) and changed country conditions.

For changed country conditions, you can file a motion at any time if you meet the burden of proving the conditions of your client's home country have changed to the point that your client now qualifies for asylum, withholding of removal, or protection under the Convention Against Torture. You must:

- Provide evidence of the changed conditions;
- Demonstrate that such evidence was not previously available;

- Show that it is material; and
- Prove that this evidence now makes your client eligible for one of these forms of relief.

This motion, as with any motion, must include an application for asylum, withholding or Convention Against Torture protection, complete with affidavits and supporting documentation.

I recently had success with a motion to reopen based on changed country conditions, based on the increased levels of persecution of gay citizens in Uganda. In October 2009, the Uganda Parliament proposed a bill entitled "The Anti-Homosexuality Bill."¹ This bill calls for the death penalty for people who are "serial offenders."² The bill defines "serial offender" as "a person who has previous convictions of the offence of homosexuality or related offenses."³ Although Uganda already has laws on the books that are hostile to its gay citizens, this bill marked the first time that the government was seeking to kill its own citizens for being gay.

I argued that this new bill was so violent that it rose to a completely new level of persecution by the state, and thus qualified as a changed country condition. The immigration judge agreed and granted my motion to reopen my client's proceedings. Now, for the time being, DHS cannot remove my client, and we will have the opportunity to argue the substance of my client's asylum claim before the court.

For clients who are in immigration detention with a prior order of removal, it is important to note that you need to file the motion to reopen the in absentia order, in addition to any other motion, because your client's removal will be stayed automatically pending disposition by the immigration judge. Other motions do not carry the benefit of an automatic stay; in those other motions, the stay is only discretionary.

Motion to reopen, ineffective assistance of counsel

Once somebody has a final order of deportation, they can seek appeal to the Board of Immigration Appeals (BIA) and then to the circuit court if the BIA affirms the immigration judge's decision. However, if an appeal is weak because proper evidence wasn't submitted at the trial level, the only avenue for introducing new evidence is to file a motion to reopen (MTR).

If your case does not meet the criteria to reopen based on lack of notice or changed country conditions, another way someone can file an MTR is one based on ineffective assistance of counsel (IAC). For many years, *Matter of Lozada* was the case that dictated the terms of an MTR based on IAC.⁴ Then, in the last year of the Bush administration, Attorney General Michael B. Mukasey instituted new and more restrictive measures with his ruling in *Matter of Compean*.⁵ Among other changes, *Compean* gutted the precedence of *Lozada* by eliminating the mandate to judges to reopen a case if a person proves the underlying elements of her case, instead giving immigration judges the *discretion* to reopen the case.⁶ However, on June 3, 2009, Attorney General Eric Holder vacated



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Compean, thus reinstating *Lozada*.⁷

“Ineffective assistance of counsel in a deportation proceeding is a denial of due process only if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case.”⁸ In addition, a person must prove that her attorney’s actions, or lack thereof, prejudiced her case.

The basic requirements for filing an MTR based on IAC are: (1) The person’s allegations must be supported by a detailed affidavit; (2) Before filing the motion, the person must inform prior counsel of her intent to file the motion and give counsel an opportunity to respond; and (3) The person must indicate in the motion whether she has filed a complaint against the attorney with bar counsel, and if not, why not.⁹

These motions often fail because the second attorney fails to properly prepare the motion. An MTR based on IAC is time-intensive and serious, and must be accompanied by thorough evidence documenting every act or omission of the original counsel and a heavily detailed, complete affidavit that documents a week-by-week timeline of the client’s interaction with original counsel.

When a prospective client comes to you with a possible IAC claim, you must diligently analyze the situation. In the field of immigration, there are practitioners who dabble in immigration, don’t know what they are doing and completely foreclose an immigrant’s legitimate benefit or claim of relief. We must take these violations seriously. On the other hand, a choice in legal strategy, when all options are almost impossible, that ultimately fails may not necessarily be IAC.

If you do decide to file an MTR based on IAC, you must also be aware of the applicable time limits and possible equitable tolling. Generally, a person must file any MTR within 90 days after her final order, or 180 days after an in absentia order if failure to appear was due to exceptional circumstances. While the BIA has

determined that IAC is not an exception to the time limits, circuit courts have ruled that IAC does toll the time limit.

However, some circuits require that the person demonstrate that she exercised due diligence once she discovers that her former counsel was ineffective. The U.S. Court of Appeals for the First Circuit has not determined whether equitable tolling applies. In one case, the court did make such a determination, but upon rehearing, it withdrew this decision, found that the respondent had not exercised due diligence, and then declined to decide the issue of tolling.¹⁰

A MTR based on IAC is a tool that practitioners must use in order to preserve the rights of immigrants, but they must use them wisely and only when appropriate.

Notes

1. The Anti-Homosexuality Bill, Bill No. 18 (Uganda Gazette No. 47, Volume CII, Sept. 25, 2009), *available at* <https://docs.google.com/leaf?id=0B7pFotabJnTmYzFiMWJmY2UtYWYxMi00MDY2LW14NWYtYTViOWU1OTEzMzk0&hl=en>
2. *Id.* at Part I.3.
3. *Id.* at Part I.1.
4. 19 I&N Dec. 637 (BIA 1988).
5. 24 I&N Dec. 710 (A.G. 2009).
6. *Id.* at 727-728.
7. *Matter of Compean*, 25 I&N Dec. 1, 3 (A.G. 2009).
8. *Lozada*, 19 I&N Dec. at 638, (citing *Ramirez-Durazo v. INS*, 794 F.2d 491 (9th Cir. 1986)).
9. *Id.* at 639.
10. *Jobe v. INS*, 212 F.3d 674, 683 (1st Cir. 2000), *rev’d en banc* 238 F.3d 96 (1st Cir. 2001).

MESSAGE FROM THE CHAIR

MIDSUMMER REPORT – LABOR & EMPLOYMENT SECTION

By *Dahlia C. Rudavsky*

One of the pleasures of summer is the opportunity to reflect on the previous “year’s” activities and to look forward to the upcoming year. As one of the 2009-10 co-chairs of the MBA’s Labor & Employment Section, I have much to report. I hope you will enjoy a short stroll with me down memory lane, and will then peruse the itinerary for next fall and beyond. (We will return to substantive topics in the next issue of the *Section Review*. Thanks to all the writers who contributed this year.)

To begin that stroll ... as any active practitioner in our field of law knows, labor and employment law can be — pardon the mixed metaphor — a minefield. The law is complex and constantly changing, not only because of new legislation, but also because of the frequent surprises found in court decisions. Accordingly, a major activity of our section during 2009-10 was to explore changes in the law. We held almost-monthly open fora on both labor and employment topics. These ranged broadly, from the technical to the topical, including analysis of the changes wrought by the *14 Penn Plaza* case, to representing transgender employees, to negotiating collective bargaining agreements against a background of a discrimination award.

We also held luncheon roundtables, such as sessions on the new proposed state statute on non-competition agreements and on social networking. The intellectual quality of all these offerings was consistently high, and participants reported favorably on both the presentations and the open discussions.

The highlight of the past year’s offerings, not surprisingly, was the 31st Annual Spring Conference. This year’s conference included a luncheon address by Stuart Ishimaru, one of the commissioners serving on the federal EEOC; the program also featured a series of stimulating panels on key developments from the past year, summary judgment, arbitration, discrimination and wage and hour law.

Among our guest panelists was the Hon. William G. Young of the U.S. District Court, who joined in a discussion of how courts do and should approach summary judgment motions. In connection with that session, speaker Rob Mantell had submitted an article entitled “Summary Judgment: The Real World.” In what must be a first, Judge Young cited and quoted from Rob’s article in a decision issued

a few weeks after the conference (see *Williams v. City of White Plains, et al.*, slip opin. at 2). Kudos to Rob. Future annual conference panelists will have a new goal to shoot for — being cited in a federal court opinion! Thanks are due, of course, to Cathy Reuben and Dave Belcourt, who put together a superb conference, and to the outstanding faculty, who kept the almost 150 attendees (the largest MBA section conference attendance for the year!) riveted all day long.

For next year, we have structured our planned activities for regular monthly times to encourage healthy attendance at all of our programs. The section will hold an open forum the first Tuesday of every month, beginning in October, and alternating between labor and employment topics. The first open forum, which we will cosponsor with the ABA, will take place on Oct. 5. The program will focus on practice before region one of the National Labor Relations Board. Regional Director Rosemary Pye and her able staff will present news from the region and be available to discuss concerns raised by attendees.

The November open forum, to be held on Nov. 2, will feature an employment topic, to be determined by the section council in the fall. During the course of the year, we plan to invite the commonwealth’s secretary of labor, Joanne Goldstein, to headline one of our monthly gatherings. Like invitations will be extended to key actors in other key executive agencies and Legislature. Stay tuned.

Members of the section are always welcome to attend the section council’s monthly meetings, which will take place on the third Tuesday of each month, beginning at 4:30. At these meetings, in addition to handling section business, we discuss new developments in the law, legislative initiatives and matters raised within the MBA generally, such as whether Massachusetts should require new lawyers to take a course in professional conduct during their early years of practice. The section council meetings often feature a presentation by a guest speaker. The first meeting of next year will take place on Sept. 21. We will announce speakers and topics to be discussed through the MBA’s e-mail system in advance of each meeting.

Finally, this past year featured a highly successful program in the pro bono arena. Dozens of lawyers trained to represent low-income unemployed workers in unemployment hearings, in a program led by Greater Boston Legal Services. We hope to repeat this and similar programs in the next year, to provide a structure within which members of our section can use their skills to assist area residents who cannot afford private counsel.

We are indeed busy in the Labor and Employment Section. Members are invited to attend any of our programs, and some programs may be accessed remotely in real time via the MBA’s new interactive Web technology. We especially want our colleagues in the central and western part of the state to know about this option. There will be opportunities to become more actively involved through the section’s Leadership Team, which augments the section council in running the section. Tom Gallitano, our 2010-11 chair, and I look forward to your participation in the section’s activities next fall.



Dahlia C. Rudavsky is a partner at Messing, Rudavsky & Weliky PC, a Boston firm that represents employees and unions in workplace matters. Rudavsky served as co-chair of the MBA’s Labor and Employment Section Council for 2009-10, and will serve as vice chair in 2010-11. She is also an active member of the Massachusetts Employment Lawyers Association and its MCAD Committee.

HOW A YOUNG LAWYER CAN RUN A SUCCESSFUL LAW FIRM

By Gabriel Cheong

If you're one of the many young attorneys, with JD in hand and no job in sight, you might be thinking about opening your own law practice. Starting a law firm is easy — print some business cards and you're open for business. Running it successfully (and enjoyably) is hard. Jumping in without a plan is a recipe for failure. Law school taught you the theory of law, but to be successful as the owner of a law firm, you also have to learn both the practice of law and the business of law.

The practice of law

The practice of law is something that law schools don't prepare students well for. How do you file or caption a motion? How do you comply with Superior Court Rule 9A? How do you schedule a hearing date? Those are issues that come up in practice every day in addition to knowing the laws, rules and procedure of your chosen practice area.

The traditional advice given to young lawyers is that you must first find a mentor. It's good advice, but other lawyers are busy, and young lawyers, who are typically not well-connected, may have difficulty finding a lawyer willing to spend the time mentoring them and answering all their questions. Solosez (operated by the ABA) is an online listserv that works like communal mentorship. Instead of having one mentor, you can have thousands of mentors from across the country. You simply post a question to the Solosez listserv and, usually within the hour, you'll get an answer or even forms for your particular question. Along those same lines, MASSFORUM (operated by *Massachusetts Lawyer's Weekly*) is a local Solosez just for Massachusetts lawyers.

When you're a young attorney, chances are you have a lot of free time. A good way to learn the practice of law and help other people at the same time is to do volunteer work. The Massachusetts Bar Association hosts a monthly Dial-A-Lawyer night where you can give free legal advice to callers, which in turn enhances your confidence in giving legal advice. Volunteer for Lawyer of the Day at the probate courts if you're a family attorney. The clerks will help and teach you while you're also helping *pro se* litigants. Help with The Volunteer Lawyers Project and Senior Partners for

Justice to take on civil cases. They will give you administrative support, free training and free MCLE classes in return. For criminal practice, try getting on the CPCS (Committee for Public Counsel Services) list for criminal defense practice.

The business of law

One thing that law schools do worse than teaching the practice of law is teaching the business of law. There are only a handful of law schools in the country that offer a course on law practice management, yet a majority of attorneys practice in solo or small firm settings. The business of law — how to run a law practice, manage employees and marketing — is just as important as knowing the practice of law. After all, if you don't have clients, it doesn't matter how great your legal skills are.

Before hanging your shingle, first prepare a business plan. It doesn't have to be formal. Just write down what resources you have to fund your firm, the projected start-up costs, income sources, firm structure (LLC, PC, partnership, etc.) and location (shared suite, virtual office, home office, etc.)

The next step is to write down a marketing plan. What are the different ways you plan on marketing your law firm and what is the cost for each of those activities? Think about a Web site, blog, networking groups (such as Chamber of Commerce, local trade groups, StartingOutSolo.com, Women Attorneys Network), free online directories (Avvo, Justia, JDSupra), LinkedIn, Facebook, Twitter, print advertisements, church and faith-based groups, seminars, newsletters and mailings.

Some activities will be costly in terms of money and/or time. The key is to keep track of where your business is coming from so that you can adjust your marketing plan accordingly to get the most return for your marketing dollar.

Marketing is a continuous process. You cannot implement a marketing idea, sit back and relax, and hope that the money continues to flow in. If you stop marketing, the business will eventually stop. If you market only when you see your business dry up, you will lose credibility with your clients; they will smell your desperation and won't engage you. If you put all your marketing eggs in one basket, you run the risk of sinking your firm when the referral source dries up. As with investments, diversify.

Starting a law firm and running it successfully takes hard work, long hours and dedication. Any young attorney can do it, but it is not for every young attorney. Make sure you have what it takes before taking the plunge.



Gabriel Cheong owns Infinity Law Group LLC. For more information about how he started a practice straight from law school, visit www.infinitylawgroup.com and www.startingoutsolo.com.

MARKETING AND NETWORKING WITHOUT SPENDING A DIME

By Andrea Goldman and Leanna Hamill

Now, more than ever, lawyers need to focus on effective marketing and networking in order to maintain and build their practices. After suffering through one of the worst economic climates in recent history, business is starting to improve. Lawyers need to concentrate on their roles as rainmakers and home in on the activities that provide the best returns on investment (ROI) for their business.

Fortunately, given the advent of the Internet, and the “old-fashioned” activity of cultivating relationships, the most effective means of attracting clients are free. That means that there is no excuse for not making a marketing plan now, trying something new and following through in order to nurture and grow your practice.

When creating a marketing plan, the first step is to determine where your current clients are coming from. Make a list of your clients over the past three years and organize it by income. Which clients have brought in the most money? Which clients have brought you the most satisfaction? Which clients fall within your definition of your ideal client?

Take a hard look at your practice. Are there any areas you would like to grow and any you would like to eliminate? Do you want to do something new? Determine the ideal composition of your practice areas and look at your current clients and the categories that they fall into.



Andrea Goldman is the principal in the Law Office of Andrea Goldman. She focuses on helping parties resolve disputes in construction and business matters through litigation, arbitration and mediation. Goldman also advises construction and corporate clients on contracts and other legal issues in managing their businesses. She is the co-chair of the Law Practice Management Section.



Leanna Hamill graduated cum laude from Suffolk University Law School. Prior to practicing law, she worked at Tufts Health Plan in the Appeals and Grievances Department. She is a member of the Massachusetts Bar Association, the National Academy of Elder Law Attorneys and the South Shore Coalition of Workers with the Elderly. She is a co-founder of the Women Attorneys Network of the South Shore.

Where are the best clients coming from? Now, how can you get more of those kinds of clients?

Networking with others

Studies show that it is much easier to get new work from existing clients than to bring in new business. So, it is very important to cultivate your relationships with current clients. When was the last time you called a client just to see how things were going? Go visit your client’s place of business. Take them out for lunch (not free, but a worthwhile investment) or dinner. Make sure that you let your clients know the full range of your services. They might have legal needs that they have never even mentioned that you can provide.

Join trade associations. Although a membership is not free, branching out and becoming involved in a trade association is a great way to network and become known as an expert. Be involved and join a committee. Invest your time and form relationships with members. Offer to speak at their meetings or special events. Then, when legal issues do arise, they will think of you first.

Network with allied professionals. Make a list of all the professionals your clients might need. If you are a divorce attorney these might include: real estate agent, mortgage broker, therapist, divorce coach, child therapist, move coordinator, image consultant (yes, you should be stretching here). If you are a small business attorney, these might include accountants, bankers, IT consultants, Web designers and public relations firms. Reach out to these folks to brainstorm ways to help your mutual clients. Ask them to write a guest post for your newsletter or blog, gather a panel to speak with you at a seminar or form a networking group.

Attend lunches and dinners with other attorneys. Numerous groups have cropped up that meet for lunches and dinners. Goldman runs a monthly dinner along the 128 belt from Dedham to Burlington where, for the price of your meal, you can meet and network with other attorneys. There is a large variety of practice areas, and they now refer work to each other all the time. There is a North Shore lunch group and a South Shore dinner group. Simply e-mail one of us (ajg@andreagoldmanlaw.com or leannahamill@mac.com) and we will put you on the dinner notification list.

Hamill runs a networking group for women attorneys on the South Shore, and there are several other small groups for solo and small firms around. If you don’t have one in your area, they are free and easy to start. With an e-mail list, office space from a member for the meeting location and shared food and drink costs, you’ll be on your way in no time.

Consider joining bar associations. The Women’s Bar Association has active county committees that meet for lunches and special events. They also run listservs where members post questions and inquiries. Again, many lawyers thrive on referrals from other attorneys, which makes bar association membership well worth it.

Writing articles

Most publications are hungry for articles and welcome submis-

sions from experts in given areas. If you like to write, start a blog for your practice area. First, it pays to see what else is out there in order to see if you can fill a void. You can set up a blog for free using blogger.com or wordpress.com. Typepad.com charges a small fee, but it is also very popular.

Just start writing. Soon you will build up a body of knowledge that will be useful for others. You can track how people are finding your blog by using statcounter.com or feedburner.com. By looking at the keywords they use to find you, you can generate more topics of interest and drive traffic to your site. You can start out by commenting on other people's blogs as a way to get yourself known.

In addition, look for writing opportunities for trade journals, bar association magazines and legal newspapers. The American Bar Association offers many publications and they need articles for all of them. People are now looking for a huge percentage of their service providers online, and writing articles is one way of attracting them to your practice.

Listservs

Do not overlook joining a listserv as an opportunity for free marketing. *Massachusetts Lawyers Weekly* runs an online listserv called the Massforum where attorneys post questions and responses. You can probably also find a listserv run by the trade

association for your practice area. Start out by "lurking" and see what other lawyers are talking about. Subjects frequently include bankruptcy, real estate, family law and civil litigation questions. Once you feel comfortable, start to respond. As you answer more and more questions, you will become known for your practice area, and people will think of you when they have referrals.

In addition, you can respond to queries for referrals. Keep in mind that these listservs are often accessible by the public and are another way for you to project your image to possible referral sources. Posting questions that show you have made some effort to find the answer and keeping posts on-topic will make people more likely to answer your questions and send referrals your way.

Lawyers frequently become overwhelmed by the myriad options available for marketing their practices. They also become so ensconced in their work that they set marketing aside for another day when they are not so busy. However, now that the economy is improving, it is time to become proactive and create the type of practice that you desire. In order to do that, determine who your best clients are and follow the steps listed above to attract more of those types of clients. With the number of free resources available, there is no excuse for not getting started. You do not have to do everything, but you should do something. So, e-mail us and join us for lunch or dinner! That is a good place to start.

Site	Why You'd Use It	Get The Most Out of It
Avvo www.avvo.com Online lawyer directory	<ul style="list-style-type: none"> • Clients are using it • Way to have a full profile online • Opportunity to publish legal guides which can be repurposed 	<ul style="list-style-type: none"> • Complete your listing • Answer questions • Write legal guides • Endorse other attorneys • Ask other attorneys to endorse you • Keep your listing updated with speaking engagements, case examples, publications • Follow @ConradSaam, @Mark_Britton, and on Twitter
JD Supra www.jdsupra.com Online repository of legal documents, filings, pleadings	<ul style="list-style-type: none"> • Good ammunition • Reputation management • Opposing counsel will see you • Google loves the documents • People who don't know you will find out • Journalists find it • Goes out in e-mail digest to targeted audience • Not that many attorneys in Mass. yet so you'd stand out 	<ul style="list-style-type: none"> • Upload your work to showcase your expertise • Publish your filings, decisions, briefs, • Publish your newsletter • Set up a profile • 10–15 min. a week to post documents • Repurpose articles • If you add a document to JD Supra, add that publication to your Avvo profile • Follow @JDTwitt on Twitter
Justia www.justia.com Online attorney directory	<ul style="list-style-type: none"> • Way to have a full profile online 	<ul style="list-style-type: none"> • Complete your listing • Keep your listing updated with speaking engagements, case examples, publications
LinkedIn www.linkedin.com Online directory	<ul style="list-style-type: none"> • Everyone is on it • Low maintenance 	<ul style="list-style-type: none"> • Set up a complete profile • Add picture • Update your profile if things change • Connect with people you know • Join a group • Answer questions

Site	Why You'd Use It	Get The Most Out of It
<p>Law Guru www.lawguru.com Online lawyer directory, question and answer forum</p>	<ul style="list-style-type: none"> • Opportunity to reach clients 	<ul style="list-style-type: none"> • Set up a complete profile • Answer questions
<p>Google Local www.google.com/local</p>	<ul style="list-style-type: none"> • It's Google • It's quick to set up 	<ul style="list-style-type: none"> • Complete your profile
<p>Merchant Circle www.merchantcircle.com Online business directory</p>	<ul style="list-style-type: none"> • Indexed by Google • Free • Easy • Use as lead generation to drive people to your site 	<ul style="list-style-type: none"> • Add a photo • Use a complete profile
<p>Craigslist www.craigslist.org</p>	<ul style="list-style-type: none"> • Indexed by Google • Free • Easy • Use as lead generation 	<ul style="list-style-type: none"> • Make sure it's right for your market (BK, DUI, etc.) • Use your name and real phone number • Use an ad that will make clients take you seriously • Check out the ads by your competition and make yours better • Use it to get people to your site and give their information for something of value. • Provide a link to your site, or your profile on a directory • Renew regularly
<p>Twitter www.twitter.com Microblogging site</p>	<ul style="list-style-type: none"> • It's fun! • Connect with people near you • Talk about what you are doing • "Know, like & trust" 	<ul style="list-style-type: none"> • Complete your profile, add a picture • Say hi to people who follow you • "Retweet" things that others put out there • Use "Tweetdeck" to manage groups • Don't have to be on constantly, can check a few times a day like e-mail
<p>Facebook www.facebook.com Business "fan" page</p>	<ul style="list-style-type: none"> • It's free • Another avenue to get your content noticed • Interaction with others 	<ul style="list-style-type: none"> • Have a complete profile • Offer something to fans like a report, etc., don't just say "be a fan!" • Update regularly with useful information – Tip of the Day, link to article relevant to your practice

“ADEQUATE NOTICE” OF A BUILDING PERMIT AND THE RIGHT TO FILE AN ENFORCEMENT ACTION UNDER THE MASSACHUSETTS ZONING ACT

By Karl P. Baker

On its face, the Massachusetts Zoning Act (the “zoning act”) appears to provide abutters aggrieved by the issuance of a building permit with a choice between two avenues of appeal: (1) filing a direct appeal with the permit granting authority under Chapter 40A, section 8 of the Massachusetts General Laws (a “direct appeal”); or (2) filing a request for enforcement with the building inspector under Chapter 40A, section 7 of the Massachusetts General Laws, and then appealing the building inspector’s decision to the permit granting authority (an “enforcement action”).

Such a reading of the statute, however, has always been problematic. This is because while direct appeals must be filed within 30 days, enforcement actions may be filed up to six years after the issuance of a building permit.¹ Reading the zoning act to permit a choice between a direct appeal and an enforcement action is, thus, hard to square with any rational legislative intent as such a reading would render the 30-day deadline for direct appeals inconsequential.

Gallivan v. Zoning Board of Appeals of Wellesley (“*Gallivan*”) put to rest any notion that the zoning act allows aggrieved abutters to freely choose between filing a direct appeal and an enforcement action.² Upholding a Land Court decision, the Appeals Court held for the first time that “an aggrieved person with adequate notice that issuance of a building permit will violate a zoning provision must avail herself of the right to file a timely appeal from the issuance of that permit, and may not lawfully substitute for that remedy a subsequent request for zoning enforcement.”³

Intentionally left unanswered in *Gallivan* was the substantial question of what constitutes “adequate notice that issuance of a building permit will violate a zoning provision.” This article addresses that question by analyzing the series of Land Court decisions that have followed *Gallivan*. This analysis is preceded by a brief synopsis of the court’s reasoning in *Gallivan* and some of the key facts at issue in that case. This article concludes with a brief discussion of some of the implications of these cases and the “ad-

equate notice” rule announced in *Gallivan* for abutters, developers and municipalities.

*Gallivan v. Zoning Board of Appeals of Wellesley*⁴

While establishing that “an aggrieved person with adequate notice” must file a direct appeal within 30 days and cannot later bring an enforcement action, the Appeals Court acknowledged that its holding was not compelled by the language of the zoning act or any extant case law.⁵

Instead, the *Gallivan* decision rested on straight-forward equitable considerations. The court determined that enforcement actions existed to protect parties who had not received adequate notice of the issuance of a building permit or some other appealable action and were, therefore, unable to file a direct appeal.⁶

When a party had received “adequate notice,” on the other hand, the court reasoned that it would make “little sense” to allow that party to choose between a direct appeal and an enforcement action. According to the court, allowing such a choice would “substitute[] one unfairness for another by allowing an aggrieved party to take no action for as long as six years, and then undertake proceedings that threaten to undo long-settled expectations and their consequences.”⁷

The Appeals Court expressly disclaimed any guidance on “what does or does not constitute adequate notice for this purpose,” finding only that the notice in its particular case had been “sufficient to place the plaintiff on notice of a duty of inquiry.”⁸ Under what the Land Court had referred to as “unusual facts,”⁹ the plaintiff in this case had received notice that a building permit had been issued to her neighbor pursuant to a Town of Wellesley bylaw that required notice of certain kinds of building to be mailed to abutters within 300 feet and published in the local newspaper.¹⁰

While there was no evidence that the notices contained “specific measurements demonstrating [the alleged] zoning violation,” the Appeals Court found that it could not be “reasonably disputed that the plaintiff became at least constructively aware of a potential zoning violation” when they received this notice.¹¹ According to the court, the notice had established “a duty of inquiry” on the part of the plaintiffs to visit the building department to ascertain the location of their planned building on their neighbor’s property, which would have disclosed the alleged zoning violation.¹²

Land Court decisions following *Gallivan*

*Goncalves v. Zoning Board of Appeals of Wareham*¹³

In its first decision following *Gallivan*, the Land Court held that an enforcement action was not barred as untimely where there was no evidence that the aggrieved party had received notice of the building permit application.¹⁴ The Land Court specifically noted the lack of “any local law or regulation which routinely provides notice to neighbors of requests for, or the issuance of, building per-



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mits on nearby properties.¹⁵

This notation could have been construed as a suggestion that *Gallivan* announced a relatively narrow rule which would only apply only in cities and towns, such as Wellesley, where official and routine notice of building permits was delivered pursuant to a local bylaw or other legal requirement. Such a narrow reading would have accorded with the Land Court's reference in *Gallivan* to the plaintiff there falling within a "narrow category of people" that could not bring enforcement actions.¹⁶

***North Chelmsford Water District v. Chelmsford Zoning Board of Appeals*¹⁷**

The next Land Court decision disrupted any notion that notice had to be official or routine in order to be "adequate" under *Gallivan*. Here, the Land Court cited *Gallivan* in a decision holding that an enforcement action was untimely despite the fact that the plaintiffs did not receive notice of the building permit application through any standardized procedure. Rather, notice in this case was provided through what might be accurately described as a 'courtesy letter' from the building inspector to an interested party.¹⁸

This case also illustrated the necessity of acting both promptly and *precisely* when raising objections to a building permit. This case was nothing like the proverbial situation where an "aggrieved person, armed with knowledge of a zoning violation" chose to "sit on her rights while the recipient of the permit incurs substantial expense by undertaking authorized construction, only to have the aggrieved person spring into action sometime in the next six years."¹⁹

In fact, the permit recipient had constructed the contested structure before it even sought a building permit, mooting any concern about the plaintiff's "delay" causing the permit recipient to incur substantial expenses. Moreover, the plaintiff had raised its objections to the building permit with the building inspector before and during the 30-day appeal period.²⁰ The plaintiff's fatal mistake, it seems, was having contested the building permit with the building inspector, rather than filing a direct appeal with the ZBA.²¹ The outcome of this case illustrates how, despite its equitable foundations, *Gallivan* set up what can be a rather harsh procedural rule.

***McGrath v. Chatham Zoning Board of Appeals*²²**

In this case, the Land Court found that *Gallivan* did not apply where it was "undisputed" that the plaintiff did not have any "knowledge" of the issuance of that building permit.²³ In support of this finding, the court cited not only the fact that there had been "no public notice," but also that there had not been "any activity on the property that would suggest that a building permit had issued during those 30 days following the issuance of the building permit."²⁴

This consideration of "activity on the property" is important because it suggests that "adequate notice" might include more than direct communication, extending perhaps to actions, such as construction activity, that would "suggest" that a building permit had been issued.

***Sim v. Burlington Zoning Board of Appeals*²⁵**

This Land Court decision dealt with the implications of the *Gallivan* decision on aggrieved parties who receive "notice," but only after the expiration of the 30-day appeal period. While there had been no official or even courtesy notice provided to the plaintiffs in this case, the defendants argued that their appeal was not

timely because they should have been "put on notice by the excavation of the new footprint of the structure ... nine feet from the parties' common boundary line."²⁶

The court sidestepped the question of whether "this event" provided "adequate notice" by focusing instead on how this excavation had taken place after the expiration of the 30-day appeal period (one day after). On this basis, the court reasoned that the "plaintiffs had not been afforded a fair opportunity to appeal the issuance of the permit pursuant to § 8" and thus "had six years in which to bring a mandamus action against the building inspector to enforce the bylaws."²⁷

To highlight the implications of this reasoning, it may be useful to contrast *Sim* with *North Chelmsford Water District*. In *Sim*, the plaintiffs could reasonably be charged with knowledge that a building permit had issued on April 18, 2006, when excavation of the new footprint of the structure began, but did not file an enforcement request until 134 days later. In *North Chelmsford Water District*, on the other hand, the plaintiff brought its concerns to the building inspector 29 days before the building permit issued and 16 days after the building permit issued, and appealed the matter to the zoning board of appeals 41 days after the building permit issued.

Thus, it appears that while an abutter who receives notice of a building permit when issued must respond within 30 days by filing a direct appeal, an abutter who receives notice outside the 30-day appeal period may have up to six years to file an enforcement action. It is unclear how parties that receive notice during the 30-day appeal period (e.g., 15 or 20 days after issuance) would be treated.

Implications for abutters, developers and municipalities

For abutters

Those concerned with nearby development activity need to be acutely aware of the *Gallivan* decision, which charges them with a "duty of inquiry" to investigate potential zoning violations upon receiving "adequate notice" of the issuance of a building permit. While no clear definition of "adequate notice" has emerged, this concept extends beyond the kind of formal notice pursuant to a local bylaw at issue in *Gallivan*. Following *North Chelmsford Water District*, it seems that "adequate notice" also encompasses informal notice provided by the building inspector. It remains unclear whether "adequate notice" may be provided through "actions" on the property that serve to notify the world that a building permit has been issued or voluntarily by the permit recipient.

In light of this uncertainty, abutters would be well advised to treat any knowledge of a building permit or building activity acquired within 30 days as "adequate notice" triggering an obligation to file a direct appeal under M.G.L. c. 40A, § 8. Abutters should also take particular note of the *North Chelmsford Water District* case, which shows the pitfalls of trying to resolve objections to a building permit with the building inspector instead of through a direct appeal to the permit granting authority.

For developers

As the right to bring enforcement actions up to six years after the issuance of a building permit has been identified as being "responsible [in Massachusetts] for much of the complexity and rigourousness of zoning practice today,"²⁸ any opportunity to eliminate this right should be at least somewhat attractive to developers.

Under *Gallivan*, there may be some advantage to be gained by voluntarily notifying all abutters that a building permit has issued. While there is no case yet upholding the adequacy of notice provided voluntarily by the permit recipient, it is hard to conjure the legal and policy arguments for why abutters should be free to disregard notice provided by developers and then choose to file an enforcement action weeks, months or years later.

Furthermore, a single case confirming that voluntary developer notice is “adequate” could provide other developer who provided this kind of notice with a level of protection for their project that would otherwise take six years to achieve.

For municipalities

Acknowledging that there would likely be “disputes that center on whether an aggrieved person actually has sufficient notice of a permit to require that she appeal at that time,” the Appeals Court suggested that “municipalities are free, if they wish, to create by means of bylaw provisions notice requirements that would eliminate many disagreements over whether adequate notice has been received.”²⁹

One can read this statement as an invitation for municipalities to reduce the statute of limitations for challenges to building permits from six years to 30 days. Any municipality that accepts this invitation may find it a rather inexpensive way to make itself more attractive to new development.

Notes

1. See MASS. GEN. LAWS ch. 40A, § 15 (2009) (providing that appeals under MASS. GEN. LAWS ch. 40A, § 8 (2009) must be “taken within thirty days from the date of the order or decision which is being appealed”; MASS. GEN. LAWS ch. 40A, § 7 (2009) (providing for enforcement actions and stating that “if real property has been improved and used in accordance with the terms of the original building permit ... no action, criminal or civil, the effect or purpose of which is to compel the abandonment, limitation or modification of the use allowed by said permit or the removal, alteration or relocation of any structure erected in reliance upon said permit by reason of any alleged violation of the provisions of this chapter, or of any ordinance or by-law adopted thereunder, shall be maintained, unless such action, suit or proceeding is commenced and notice thereof recorded in the registry of deeds for each county or district in which the land lies within six years next after the commencement of the alleged violation of law.”).
2. 71 Mass. App. Ct. 850 (2008); *review denied* 452 Mass. 1104.
3. *Id.* at 851.
4. 71 Mass. App. Ct. 850 (2008).
5. The court acknowledged that the zoning act appeared to “superficially” support the plaintiff’s position, and that the “cases that have addressed the two statutory remedies have not directly disposed of the plaintiff’s contention that she may choose either remedy at her pleasure.” *Id.* at 854-855.
6. The court discussed the origin of enforcement actions in mandamus actions and stated that the existence of enforcement actions “derives from the fact that there is no public notice of the issuance of a building permit. If a section 15 appeal were the sole remedy for a party aggrieved, the recipient of a permit could keep the permit under wraps for 30 days and then would have succeeded in foreclosing any challenge.” *Id.* at 855-856 (quoting *Fitch v. Bd. of Appeals of Concord*, 55 Mass. App. Ct. 748, 750-753 (2002)).
7. *Id.* at 857-858. While the court acknowledged the possibility of a laches defense in this situation, it dismissed this as “a faint and uncertain remedy.” *Id.* at 857.
8. *Id.* at 858.
9. *Gallivan v. Zoning Bd. of Appeals of Wellesley*, 15 LCR (Landlaw) 17, 21 (Mass. Land Ct. Jan. 5, 2007).
10. *Id.* at 18. The bylaws provision required notice before the issuance of any building permit except for work on an existing structure or a new structure of less than 300 feet. This notice was to be given by the building inspector in the newspaper before issuing the permit and to be mailed to abutters within 300 feet of the property line at least 10 days before the issuance of the permit. *Id.*
11. *Gallivan*, 71 Mass. App. Ct. at 859.
12. *Id.*
13. 16 LCR (Landlaw) 439 (Mass. Land Ct. Jul. 8, 2008).
14. *Id.* at 444 n.3.
15. *Id.*
16. 15 LCR (Landlaw) at 22.
17. 16 LCR 707 (Landlaw) (Mass. Land Ct. Oct. 24, 2008).
18. The underlying zoning issue in this case concerned whether a Department of Public Works (DPW) emulsion tank, which was originally installed without a building permit, violated provisions of the local Aquifer Protection District (APD). *Id.* at 708. The “notice” provided to the plaintiffs was a letter sent by the building inspector one day after he issued a building permit for the emulsion tank. *Id.* It appears from the case that the building inspector sent this letter to the plaintiff because they had previously objected to the siting of the emulsion tank. *Id.* The case contains no discussion of any procedures for official or routine notice.
19. *Gallivan v. Zoning Bd. of Appeals of Wellesley*, 71 Mass. App. Ct. 850, 857.
20. The emulsion tank at the center of the dispute had been constructed without a building permit. *No. Chelmsford Water Dist.*, 16 LCR (Landlaw) at 708. The plaintiff had notified the building inspector of this purported violation as well as its contention that the emulsion tank violated the conditions of a watershed protection overlay district. *Id.* Sixteen days after the building permit issued, the plaintiff reiterated its concerns about the emulsion tank’s compliance with zoning. *Id.*
21. There was also no relief for the water district on account of the fact that this entire sequence of events occurred prior to the *Gallivan* decision was announced.
22. 17 LCR (Landlaw) 101 (Mass. Land Ct. Jan. 30, 2009).
23. *Id.* at 103.
24. *Id.*
25. 17 LCR (Landlaw) 158 (Mass. Land Ct. Feb. 27, 2009).
26. *Id.* at 160.
27. *Id.*
28. Richard J. Gallogly & Gareth I. Orsmond, *Enforcement of Zoning Requirements*, in MASSACHUSETTS ZONING MANUAL, 13-1, 13-7 (4th ed. 2007). (“By leaving the door open to enforcement actions brought years after construction is complete and irrevocable financial commitments are made, the six-year statute of limitations shifts the risk of the numerous ambiguities of zoning by-laws or ordinances onto landowners and precludes any real reliance on a building inspector’s interpretation. It is this potential vulnerability that causes real estate lenders to require rigorous zoning opinions even for projects that have required little or no zoning relief and that may have encountered no discernable opposition while in the preconstruction or construction phases.”)
29. *Gallivan v. Zoning Bd. of Appeals of Wellesley*, 71 Mass. App. Ct. 850, 858.

NOW WE KNOW THE RULES: THE SJC CLARIFIES JUDICIAL REVIEW OF ENVIRONMENTAL IMPACT REPORTS

By Douglas H. Wilkins¹

Certainty is good, at least when planning a project or evaluating prospects in a lawsuit. Over the years, the law governing suits under the Massachusetts Environmental Policy Act (“MEPA”),² however, has left many experienced attorneys shaking their heads. Recently, in *Canton v. Commissioner of the Massachusetts Highway Department*,³ the Supreme Judicial Court at least gave us substantial certainty about the rules governing statute of limitations, standing and notice in MEPA lawsuits.

Whether all of those rules make doctrinal sense has generated debate, but we can now advise our clients with more confidence. Moreover, on balance, the development community should welcome the regime that *Canton* sets forth. The decision encourages early resolution of MEPA disputes, thereby reducing or eliminating contingencies that may hinder financing and other necessary steps.

To understand *Canton*'s significance, a little background helps. Chapter 30, section 62H of the Massachusetts General Laws governs civil actions “alleging that a final environmental impact report fails to comply with” MEPA. It mandates exhaustion of administrative proceedings within the MEPA Office of the Executive Office of Energy and Environmental Affairs (“MEPA office”), and requires plaintiffs to file a notice of intent to sue with the MEPA office within 60 days after notice in the Environmental Monitor of the availability of the final environmental impact report (“FEIR”).

Once the MEPA office determines whether the FEIR adequately complies with MEPA,⁴ its determination is subject to limited review under the arbitrary and capricious test.⁵ Yet, the SJC held early on that the secretary and the MEPA office cannot be sued under MEPA.⁶ The Court later held that a plaintiff lacks standing to sue until she suffers harm cognizable by MEPA, which does not include the MEPA office's determination that an FEIR is adequate.⁷ Given these decisions, many of us wondered whether a MEPA suit could ever be maintained beyond the pleadings stage, let alone succeed.

The SJC later entertained two MEPA suits on the merits, finding for the developer in *Sierra Club v. Commissioner of the Department of Environmental Management*,⁸ and for the project opponents in *Allen*

v. Boston Redevelopment Authority.⁹ These cases left open a number of issues, however, one of which *Canton* addressed: how the statute of limitations operates in challenges to the adequacy of an FEIR for a private project. Under section 62H, such an action must “commence no later than thirty days following the first issuance of a permit or grant of financial assistance by an agency for a private project.”¹⁰

Canton's core ruling is that “the first issuance of a permit or grant of financial assistance” means what it says. Accordingly, a plaintiff must sue within 30 days of that first permit no matter what that permit is. The Court concluded “that the words ‘first issuance of a permit’ refer, at the very least, to the issuance of the first permit issued from those listed in the FEIR as required.”¹¹ In most cases, this rule will provide a clear mandate, since the FEIR must list all state permits required for the project.¹² One cannot wait for a permit that raises issues that the plaintiff cares about or has cited in the requisite notice of intent.

More broadly, *Canton*'s arguments required the Court to clarify its previous, confusing decisions regarding standing to sue and the duty of inquiry that falls upon those who contemplate MEPA suits. *Canton* asserted that *Sierra Club*¹³ and *Enos v. Secretary of Environmental Affairs*¹⁴ established a rule that plaintiffs lack standing until they are aggrieved by a permit. It argued, accordingly, that it could not have sued until a highway permit issued, because the town was only concerned about traffic. The Court in *Canton*, however, stated that neither *Enos* nor *Sierra Club* addressed the deadline that section 62H placed upon bringing a lawsuit.¹⁵ It rejected the plaintiffs' argument, because the town (and 10 citizens) have standing to sue to enjoin a MEPA violation under chapter 214, section 7A of the Massachusetts General Laws — under section 7A what counts is harm to the environment, not harm to particular plaintiffs. Relying upon prior holdings that a MEPA violation makes environmental harm “about to occur” for purposes of section 7A, the Court harmonized section 62H with section 7A by ruling:

We also disagree with the town's contention that it would have been premature for it to file suit after the sewer permit was issued because environmental harm specific to traffic was not “about to occur” within the meaning of § 7A. Reading § 7A, third par., and § 62H, second par., together and considering MEPA's purpose of expediting environmental approvals, we conclude that the logical interpretation is that the “first issuance of a permit” pursuant to § 62H, second par., marks the time when alleged environmental harm is “about to occur” pursuant to § 7A, third par.¹⁶

This affirmation of standing to sue when the first permit issues removes any previous confusion about what, to some, appeared to be a very restrictive standing doctrine articulated in *Enos*.

The SJC also clarified issues of notice and duty of inquiry. *Canton* argued that its suit should not be deemed untimely, because it did not receive notice of the issuance of the DEP permits. According to the



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record on the motion to dismiss, neither DEP nor the applicant filed copies of DEP's section 61 findings with MEPA office, as required by 301 CMR 11.12(5)(e) (2009).

The Court ruled that fact to be irrelevant under section 62H, which speaks of "issuance" of a permit, not of notice or receipt of notice. "Although it is true that no permit is supposed to issue before an agency makes a section 61 finding and files it, it does not follow that the filing and publication notice requirement can be grafted onto the provision in section 62H, second par."¹⁷

This burden is consistent with the duty of inquiry imposed under other statutory time limits that do not run from "notice." The Court cited "duty of inquiry" principles that are well known to zoning practitioners and, instructively, listed a number of actions that Canton could have taken to inform itself, "including requesting, from CCF or the Department of Environmental Protection, a copy of the § 61 finding that had to precede the issuance of the sewer permit or requesting that the Department of Environmental Protection notify it of the permit itself. See respectively 301 Code Mass. Regs. § 11.12(5)(e); 314 Code Mass. Regs. § 2.06(3)(b) (2009)."¹⁸

Those who contemplate a lawsuit challenging the adequacy of an FEIR for a private project now know several steps that they must take. They must first examine at least the FEIR and FEIR certificate for a list of permits that the project will require.

Second, they must investigate and inquire into the date of issuance of each such permit. For a major project, this may impose a fairly hefty burden of inquiry regarding issuance of numerous permits, but the alternative would place project proponents at risk for lawsuits well into the project's design and permitting. The Legislature has placed risk of lack of notice upon plaintiffs, not developers, consistent with its policy of expediting environmental permitting.

The third step is to file suit within 30 days of the first issuance of a permit. Whether section 62H sets forth a wise policy or not, the practitioner's duty is clear. The lesson for counsel is to pay heed to these rules and to follow the guidance and practices set forth in *Canton*, for uncertainty no longer reigns.

Of course, *Canton* did not decide many issues that may arise in the future. Still open is the question whether section 62H is a traditional statute of limitations or is a jurisdictional — and therefore non-waivable — limit for suit akin to other deadlines for challenging decisions of state agencies.¹⁹ The SJC specifically reserved the question whether certain determinations qualify as "permits" for purposes of section 62H.²⁰

It also reserved the question whether issuance of a permit not mentioned in the FEIR could constitute the "first permit" under section 62H. Nor did it address whether a plaintiff who availed itself of all means to learn of the first permit — but did not succeed in doing so until after *Canton's* deadline — may bring a timely suit even after 30 days from issuance of the first permit, by analogy to *Kramer v. Zoning Board of Appeals of Somerville*.^{21,22}

But these issues are unlikely to arise often. When they do, counsel for prospective plaintiffs must take a proactive approach by identifying all potentially necessary approvals that might constitute a permit, investigating the issuance of each permit and filing suit at the issuance of the first approval that might arguably be deemed a permit.

Some have argued that section 62H, as construed in *Canton*, will promote lawsuits that otherwise would not be filed. The Legislature, however, chose clear language to force plaintiffs to decide whether to sue shortly after the first permit issues. Faced with that early choice,

some plaintiffs will choose not to sue, providing finality and certainty to the developer on that score. Other plaintiffs will file suit earlier than they might wish, but the Legislature's choice at least arguably promotes early resolution of litigation that might lurk unasserted for months or years, creating a risk of unknown magnitude that would destroy or impair a project's prospects for financing and other support.

On balance, the Court's application of section 62H, as compelled by the statutory language, will likely serve the statute's purpose "to expedite environmental approvals" including resolution of resulting litigation.²³

Notes

1. Wilkins was counsel for the defendant developer, Cabot, Cabot & Forbes in the trial court and on appeal in the Supreme Judicial Court in the case discussed in this article, *Canton v. Comm'r of the Mass. Highway Dept.*, 455 Mass. 783 (2010).
2. Massachusetts Environmental Policy Act, MASS. GEN. LAWS ch. 30, §§ 61 et seq. (2009).
3. 455 Mass. 783 (2010).
4. See MASS. GEN. LAWS ch. 30, § 62C (2009).
5. *Allen v. Boston Redev. Auth.*, 450 Mass. 242, 254 (2007).
6. *Cummings v. Sec'y of Executive Office of Env'tl. Affairs*, 402 Mass. 611, 615-619 (1988).
7. *Enos v. Sec'y of Env'tl. Affairs*, 432 Mass. 132, 138-139 (2000).
8. 439 Mass. 738, 758 (2003).
9. 450 Mass. at 254.
10. *Canton* did not address the seemingly uncontroversial statute of limitations for a public project. Compare *Canton v. Comm'r of Mass. Highway Dept.*, 455 Mass. 783, 794 n.5 (2010) (120 days after notice of availability of the FEIR for a public project). *But see Cummings*, 301 Mass. at 627 (Abrams, J., dissenting) ("The original issue presented in this appeal was whether the sixty-day notice period in the first paragraph of § 62H began on the date the secretary issued a certificate determining that no EIR was required under § 62A, or the date on which notice of the secretary's determination was published in the Environmental Monitor.").
11. *Canton*, 455 Mass. at 789.
12. 301 CMR 11.07(6)(d)(3) (2009).
13. 439 Mass. 738.
14. 432 Mass. 132 (2000).
15. *Canton*, 455 Mass. at 790.
16. *Id.* at 791.
17. *Id.* at 793-794.
18. *Id.* at 795 (citing *Cappuccio v. Zoning Bd. of Appeals of Spencer*, 398 Mass. 304, 313 (1986) (plaintiff who received notice of the proceeding had a duty of inquiry under c. 40A)); *Kramer v. Zoning Bd. of Appeals of Somerville*, 65 Mass. App. Ct. 186, 194-195 (2005) (allowing "late" suit by a plaintiff who received no notice of the proceeding or decision).
19. See, e.g. *Sch. Comm. of Franklin v. Comm'r of Ed.*, 395 Mass. 800, 801 n.8 (1985) (30-day limit under G.L. c. 30A, § 14 is jurisdictional); *Flynn v. Contributory Retirement Bd.*, 17 Mass. App. Ct. 668, 670 (1984) (same; deadline not waivable by Court).
20. See 301 CMR 11.02(2) (2009) (defining "Permit. (a) Any permit, license, certificate, variance, approval, or other entitlement for use, granted by an Agency for or by reason of a Project"); *Canton*, 455 Mass. at 787 n.7 (declining to determine whether a "permit" for purposes of § 62H includes a "beneficial use determination" under 310 CMR 19.06(1), (5) (2005) allowing reuse of de-

molition debris on site).

preamble to 1977 amendment to MEPA))).

21. *Kramer*, 65 Mass. App. Ct. at 190, 194-195.

22. *Canton*, 445 Mass. at 795.

23. *Id.* at 784 (citing *Hull v. Massachusetts Port Auth.*, 441 Mass. 508, 517 (2004) (quoting *Enos v. Sec'y of Env'tl. Affairs*, 432 Mass. 132, 137 (discussing

NOTICE: PLEASANTVILLE CONSIDERS NEW OPEN MEETING LAW

By Christopher J. Petrini and Heather W. Kingsbury

As part of Chapter 28 of the Acts of 2009 entitled “An Act to Improve the Law Relating to Campaign Finance, Ethics and Lobbying,” the Massachusetts Legislature rewrote the Open Meeting Law, applicable to all state, county and local governments. The new Open Meeting Law and the attorney general’s emergency regulations promulgated pursuant thereto took effect July 1, 2010. The changes applicable to municipalities are presented below in an example of meeting minutes in compliance with the new law in the fictitious Town of Pleasantville. Any resemblance to a real municipality is purely coincidental.

TOWN OF PLEASANTVILLE BOARD OF SELECTMEN

MEETING MINUTES

JULY 20, 2010

1 MAIN ST., PLEASANTVILLE, MA

The meeting was called to order at 7:00 p.m.

Attendance: John Smith, chair; Mary Jones; Jane Williams

Documents used by the public body during the meeting:

1. G.L. c. 30A, §§18-25: Open Meeting Law

2. 940 CMR 29.00: Open Meeting Law (promulgated as emergency regulations)

3. Attorney general’s Open Meeting Law guide (July 1, 2010)

4. Certificate of receipt of Open Meeting Law materials

5. AGO Open Meeting Law complaint form

Meeting called to order at 7:03 p.m.

Mr. Smith opened the meeting with a discussion of new business:

A new Open Meeting Law (referred to as “new OML” throughout the meeting) applicable to all state, county and local governments, G.L. c. 30A, §§18-25, took effect on July 1, 2010. The prior version of the OML applicable to local governments, set forth in G.L. c. 39, §§23A-23C (referred to as “old OML” throughout the meeting), was repealed as of that date.

The new OML contains significant changes from the prior version. Some of the changes are intended to address advances in technology since enactment of the old OML in 1958, while others are simply aimed at increasing the effectiveness of the law in ensuring open government. The members discussed a summary of the key changes applicable to local governments:

Ms. Jones summarized the new definitions as follows:

1. G.L. c. 30A, §18 — DEFINITIONS

A. Deliberation — The new definition of “deliberation” encompasses communication through “any medium,” and specifically includes e-mail. The new definition was read as follows:

[A]n oral or written communication through any medium, including electronic mail, between or among a quorum of a public body on any public business within its jurisdiction; provided, however, that “deliberation” shall not include the distribution of a meeting agenda, scheduling information or distribution of other procedural meeting or the distribution of reports or documents that may be discussed at a meeting, provided that no opinion of a member is expressed. G.L. c. 30A, §18.

B. Intentional violation — This term was not previously defined and is defined in the new OML as follows:

An act or omission by a public body or a member thereof, in knowing by violating the Open Meeting Law. G.L. c. 30A, §18.

Unlike the old OML, the new OML allows the attorney general to issue civil penalty fines of up to \$1,000 per violation to be paid by the public body (not the individual) for intentional violations.

C. Meeting — The prior definition was limited to a “corporal convening.” The new definition has been broadened, presumably to encompass electronic discussions and remote participation. Within this broad definition, certain meetings for specific purposes have been excluded. Attendance of a quorum of a public body at another public body’s advertised meeting is excluded as long as the



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Heather W. Kingsbury is an associate with Petrini & Associates PC focusing on municipal law. She is a member of the executive committee of the City Solicitors and Town Counsel Association.

visiting members communicate by open participation and do not deliberate. Ms. Jones gave an example that this exemption would allow a quorum of the board of selectmen to attend and participate openly in an advertised planning board meeting without also advertising a board of selectmen's meeting, so long as no deliberation occurs among the Selectmen at such a meeting. Other exemptions include:

- on-site inspection of a project or program, so long as the members do not deliberate;
- attendance by a quorum of a public body at a public or private gathering, including conference or training program or a media, social or other event, so long as the members do not deliberate;
- a meeting of a quasi-judicial board or commission held for the sole purpose of making a decision required in an adjudicatory proceeding brought before it; or
- a session of a town meeting convened under section 10 of chapter 39 which would include the attendance by a quorum of a public body at any such session.

D. Preliminary screening — Ms. Jones pointed out that this term was previously undefined. It is used in the context of an exemption from the OML which allows a committee to enter executive session for purposes of conducting a preliminary screening of job applicants. Ms. Jones read the new definition as follows:

[T]he initial stage of screening applicants conducted by a committee or subcommittee of a public body solely for the purpose of providing to the public body a list of those applicants qualified for further consideration or interview. G.L. c. 30A, §18.

E. Public body — This term replaces the term “governmental body” as it was used throughout the old OML and includes “a multiple-member board, commission, committee or subcommittee within a ... town.” Ms. Jones stated that this is a sweeping definition that effectively encompasses all bodies consisting of more than one member created pursuant to some legal authority, i.e. statute, bylaw or executive order. Ms. Jones questioned whether this new definition changes the law established in *Connelly v. Sch. Comm. of Hanover*, 409 Mass. 232 (1991), which excluded from the OML a group appointed by a staff member solely for the purpose of advising the staff member.

Mr. Smith summarized Sections 19 and 20 as follows:

2. G.L. c. 30A, §19 — ATTORNEY GENERAL'S ROLE

Mr. Smith explained that this section establishes the new Division of Open Government (referred to as “DOG”) within the attorney general's office to enforce and provide education and training on the new OML. Enforcement authority previously delegated to local district attorney's offices is now centralized in the office of the attorney general. Robert A. Nasdor has been appointed director of DOG.

3. G.L. c. 30A, §20 and 940 C.M.R. 24.04 — GENERAL RULE AND NOTICE

This section creates the general rule that, except as otherwise provided in Section 21, all meetings of a public body shall be open to the public. Except in an emergency, the public body is required to post notice at least 48 hours in advance. The calculation of time for posting notice now excludes Saturdays as well as Sundays and legal holidays. The notice must include not only the date, time and place of the meeting, but also a listing of topics that the chair rea-

sonably anticipates will be discussed at the meeting. To meet this requirement, the board plans to post its agenda 48 hours in advance of any meeting.

The new OML requires notice to be posted in a manner conspicuously visible to the public at all hours in or on the municipal building in which the clerk's office is located. The attorney general has issued emergency regulations, found in 940 C.M.R. 29.00, authorizing various alternatives to this posting requirement. Specific combinations of posting notices on a municipal Web site, audio recording, newspaper, outward-facing computer monitor or electronic bulletin board in a window of the municipal building, cable television and alternate municipal buildings, such as a police or fire station, are authorized by the regulations. The town must also post meeting notices in the town clerk's office; post in a visible location in town hall notice of the alternate posting location; and file notice with the attorney general's office of the chosen posting method.

Section 20 also allows the attorney general's office to authorize remote participation by members of a public body not present at the meeting location, so long as a quorum and the chair are present at the physical meeting location. According to the attorney general's Open Meeting Law Guide, the attorney general's office is considering whether to authorize this practice. An adjustment has also been made to the provision authorizing recording of a meeting; the new law allows video or audio recording or transmission of the meeting through any medium and requires the chair to inform other attendees of any such recordings at the beginning of the meeting. This amendment brings the OML in line with the Anti-Wire Tap Law, G.L. c. 272, §99, which prohibits recording an individual without his knowledge.

Within two weeks of qualification for office, all persons serving on a public body must certify on a form prescribed by the AG the receipt of a copy of the OML, any regulations promulgated by the AG, and a copy of the educational materials prepared by the AG. Mr. Smith stated that copies of the certificate of receipt are available on the back table. The attorney general's office has taken the position that only persons taking office on or after July 1, 2010, have to comply with this requirement, although existing public body members should have already signed a written acknowledgment of receipt of a copy of the law in compliance with the old OML.

Ms. Williams summarized the remaining provisions as follows:

4. G.L. c. 30A, §21 — EXECUTIVE SESSIONS

Ms. Williams stated that there are no significant substantive changes to the purposes for which a public body may enter executive session. The purposes have been reorganized to combine certain exceptions that were previously separated and to separate certain exceptions that were previously combined within a particular exception number, but the substance remains substantially unchanged. However, significant procedural requirements have been changed. Before entering executive session, the chair must state all subjects that may be revealed without compromising the purpose for which the session was called. Additionally, the collective bargaining/litigation exemption (No. 3), the real estate purchase or lease exemption (No. 6), and the preliminary screening interview (No. 8) all require the chair to explicitly state prior to entering executive session that an open meeting may have a detrimental effect on the town's interests before going into executive session.

5. G.L. c. 30A, §22 — MINUTES

Prior to the new OML, minutes were required to include the date, time and place of the meeting, the identity of the members present or absent, and all actions taken. The new OML requires all of this information to be included, as well as a summary of the discussions on each subject, a list of documents and other exhibits used at the meeting, the decisions made, and the recording of all votes. The new OML provides that minutes must be created and approved in a timely manner. Minutes must be made available within 10 days of a request, whether in approved or draft form.

All documents and other exhibits used by the public body at an open or executive session now must be retained as part of the official record of the session. A list of such documents must be included in the minutes. In general, the minutes of an open session are public records, subject to the following exceptions:

1. Materials used in a performance evaluation of an individual bearing on his professional competence, provided they were not created by the members of the body for the purposes of the evaluation; and
2. Materials used in deliberations about employment or appointment of individuals, including applications and supporting materials; provided, however, that any résumé submitted by an applicant shall not be exempt.

G.L. c. 30A, §22.

Minutes of an executive session may be withheld only as long as publication may defeat the lawful purposes of the executive session and no longer, provided that the executive session was held in compliance with Section 21. When the purpose has been served, the minutes, preparatory materials and documents and exhibits of the executive session shall be disclosed.

The public body or its chair or designee shall, at reasonable intervals, review the minutes of executive sessions to determine whether continued non-disclosure is warranted. Such determination must be announced at the next meeting, and the announcement must be included in the minutes of that meeting. Boards, committees and commissions must periodically review minutes and vote to release minutes or excerpts of minutes where the purpose for non-disclosure no longer exists.

Upon request for executive session minutes, the public body must respond within 10 days and release any non-exempt minutes. If the body has not already performed the required review of such minutes, the review must then be performed and all non-exempt minutes must be released not later than the body's next meeting or 30 days, whichever occurs first. No fee may be assessed for this review time.

6. G.L. c. 30A, §23 and 940 C.M.R. 29.05, 29.07 — ENFORCEMENT

Section 23 establishes a procedure for filing a complaint alleging a violation of the OML. The complaint must first be filed in writing with the town clerk pursuant to the attorney general's emergency regulations, at least 30 days prior to filing with the attorney general's office and no later than 30 days after the date of the alleged violation. The attorney general has prepared a form for such complaints, which is available to any person upon request. The public body must send a copy of the complaint to the attorney general's office within 14 business days of receipt, along with notification of any remedial action taken, and notify the complainant that notice has been sent to the attorney general. The public body may request additional information from the complainant, which will extend this deadline.

The attorney general's office will then review the complaint and must hold a hearing before imposing any civil penalty on the public body. The attorney general's office must determine whether the body as a whole or one or members is responsible, and whether the violation was intentional or unintentional. Penalties may include an order compelling immediate and future compliance with the new OML or compelling attendance at a training session authorized by the attorney general; nullification of the action taken at the meeting; civil penalties; reinstatement of an employee without loss of compensation, seniority, tenure or other benefits; an order compelling minutes, records or other materials to be made public; or other appropriate action. It shall be a defense to the imposition of a penalty that the public body, after full disclosure, acted in good faith compliance with the advice of the public body's legal counsel. G.L. c. 30A, §23.

A person aggrieved by the attorney general's order may file an appeal in Superior Court within 21 days of receipt of the order. The order shall be stayed pending judicial review, except that the public body shall not implement any action pending judicial review if the order nullifies such action. The attorney general's office has authority to file an action in Superior Court to compel compliance with its orders. As an alternative to the administrative review by the attorney general's office described above, the attorney general or three or more registered voters may initiate a civil action to enforce the OML in Superior Court.

7.G.L.c.30A,§24and940C.M.R.29.06—INVESTIGATIONS

Section 24 establishes a procedure whereby the attorney general may conduct an investigation to ascertain whether a violation of the OML has occurred. Public bodies and officials are required to cooperate with such investigations by making information available. The regulations authorize the attorney general to issue subpoenas to obtain information in the event the subject of an investigation fails to provide it voluntarily.

8. G.L. c. 30A, §25 and 940 C.M.R. 29.08 — INTERPRETATION

Section 25 authorizes the attorney general's office to promulgate rules and regulations to carry out enforcement of the OML, to interpret the OML, and to issue letter rulings or advisory opinions. Draft advisory opinions will be available 60 days in advance on the attorney general's Web site, with a 30-day comment period. Action taken by a public body in good faith compliance with an advisory opinion, provided that the circumstances are not materially different, will not be considered an intentional violation.

CONCLUSION

The board members duly voted to comply with the new Open Meeting Law.

MOVED:	To comply with the new Open Meeting Law
Motion:	Ms. Williams
Second:	Mr. Smith
Vote:	3-0-0
MOVED:	To adjourn
Motion:	Ms. Williams
Second:	Ms. Jones
Vote:	3-0-0

The meeting was adjourned at 9:00 p.m.

GIFTS OF PARTNERSHIP OR LLC INTERESTS: ANNUAL EXCLUSION GIFTS?

By Lisa M. Rico

Many parents establish family limited partnerships (“FLPs”) or limited liability companies (“LLCs”) for a variety of reasons, including, but not limited to, centralizing management of family investments and asset protection. As part of the parents’ wealth transfer plan, parents gift entity interests to their children.

Let’s assume parents, who have eight children, have created an LLC. If interests in the LLC are transferred outright to the children, will the transfers qualify for the gift tax annual exclusion? If so, parents are able to move a significant amount (\$208,000 a year in discounted LLC interests) to the next generation. But, do the transfers qualify as annual exclusion gifts? The answer to this question may not be as easy as one may think.

Tax on gifts

Section 2501(a)(1) of the Internal Revenue Code of 1986, as amended (“IRC”), imposes a tax on the transfer of property by gift. IRC section 2503(b) provides an exception to the gift tax for transfers on the first \$13,000¹ of property to any donee, other than transfers of future interests in property. Treasury Regulation (“Treas. Reg.”) section 25.2503-3(a) provides that a future interest is an interest which is “limited to commence in use, possession, or enjoyment at some future date or time.” In addition, Treas. Reg. section 25.2503-3(b) defines present interest to mean “[a]n unrestricted right to the immediate use, possession, or enjoyment of property or the income from property.” The IRS has been disallowing the exclusion under IRC section 2503(b) for gifts of LLC interests as not qualifying as a gift of a present interest. The specific issue of whether a gift of an interest in an LLC or FLP is a gift of a present interest, qualifying for the gift tax annual exclusion under IRC section 2503(b), has been addressed in several cases.

The case law: *Hackl v. Commissioner*²

After retirement, A.J. Hackl purchased two tree farms. He contributed the farms and approximately \$8 million in cash and securities to Treeco LLC (“Treeco”), which was initially owned by Hackl and his wife, Christine. Treeco was a manager-managed LLC. The operating agreement provided that the manager serve for life (until death, resignation or incapacity). The manager could ap-

point a successor manager as well as dissolve the LLC. Further, the operating agreement empowered the manager to control financial distributions, approve members’ capital withdrawal or share sale.

If shares were sold without the manager’s approval, the purchaser would receive the purchased shares’ economic rights, but would not receive any membership or voting rights. Members also waived the right to have the LLC’s property partitioned. Hackl was the initial manager.

Beginning in December 1995, the Hackls began a yearly gifting program transferring voting and nonvoting interests of Treeco to their eight children, the children’s spouses and a trust for the benefit of their grandchildren. The Hackls filed timely gift tax returns reporting the transfers, in which the transfers were treated as annual exclusion gifts under IRC § 2503(b). The IRS disallowed the annual exclusions, contending that gifts of the LLC interests were not gifts of a present interest.

The Hackls contended that “they made direct, outright transfers of Treeco units,” qualifying as gifts of present interests because the units had substantial and stipulated value, there were no restrictions placed on the transferred interests, and the donees received all rights in and to the gifted units identical to those the donor had in their retained units.

The Hackls further argued that the transfers did not involve postponement of rights, powers, or privileges that would cause the gifts to constitute future interests. The IRS argued that the transfers did not confer the requisite immediate and unconditional rights to the use, possession or enjoyment of property or income from property.

The Tax Court concluded, regardless of whether a gift is direct or indirect, whether the transferred interest is a present interest requires meaningful economic, rather than merely paper rights, rejecting the Hackls contention that no further analysis is required when a gift takes the form of an outright transfer of an equity interest in a business or property. The Tax Court cited to the Supreme Court’s explanation of a future interest versus a present interest, which explained that the “right presently to use, possess or enjoy the property” connotes the right to substantial present economic benefit.³ The question is of time, not when title vests, but when enjoyment begins. Accordingly, the Tax Court concluded that the Hackls must prove, from all the facts and circumstances, that in receiving the Treeco units, the donees obtained the immediate (i) use, possession, or enjoyment of the units or (ii) income from the units within the meaning of IRC section 2503(b).

Did the donees have the immediate use, possession or enjoyment of the Treeco units? The Tax Court held that the terms of the Treeco operating agreement foreclosed the donees’ ability to presently access any substantial economic or financial benefit that unit ownership might represent. The Tax Court noted numerous provisions in the operating agreement, including:

- a donee’s inability to unilaterally withdraw his or her capital;
- a member’s limited right to withdraw by offering his



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or her units for sale to the company with the manager having the exclusive authority to accept or reject the offer and to negotiate terms;

- a donee's inability to effectuate a dissolution without consent; and
- a donee's inability to transfer, assign, convey, sell, encumber or in any way alienate all or any part of the donee's interest in Treeco, except with the prior written consent of the manager, which consent may be given or withheld, conditioned or delayed as the manager may determine in the manager's sole discretion.

The Tax Court, therefore, concluded that receipt of the interests itself did not confer upon the donees a present interest within the meaning of IRC section 2503(b).

Did the donees have a present interest in income? The Tax Court determined that a three-part test must be met for an interest to qualify as a present interest in income. The donee must prove that (i) the trust will receive income, (ii) some portion of that income will flow steadily to the donee, and (iii) the portion of income flowing to the donee can be ascertained.⁴

The Tax Court concluded that a donee's interest in Treeco income was not a present interest. In reaching this conclusion, the Tax Court noted that the parties stipulated that the Treeco's primary business purpose was to acquire and manage timberland for long-term income and appreciation, "and not to produce immediate income." The Hackls anticipated Treeco to operate at a loss for several years, and therefore, they did not expect the entity to distribute to members during such years.

Furthermore, the Tax Court noted that, even if the Hackls had shown that Treeco would generate income at or near the time of the gifts, the record failed to establish that any ascertainable portion of such income would flow out to the donees as distributions were solely in the discretion of the manager.

As a result of the restrictive provisions in the operating agreement, the Tax Court in *Hackl* concluded that the gifts of Treeco interests were not present interest gifts under IRC section 2503(b).

Price v. Commissioner⁵

On Sept. 11, 1997, Walter and Sandra Price formed Price Investments Limited Partnership ("Price LP") as a limited partnership under Nebraska law. Price Management Corp., a Nebraska corporation, was its 1 percent general partner and the Walter M. Price Revocable Trust and the Sandra K. Price Revocable Trust were each 49.5 percent limited partners. Walter Price was president of Price Management Corp., and the Prices, through respective revocable trusts, held the shares in Price Management Corp.

The assets of Price LP initially consisted of Walter Price's company stock, Diesel Power Equipment Co. ("DPEC"), three parcels of commercial real estate leased under long-term leases to DPEC and another equipment company. On Jan. 5, 1998, the Price LP sold its DPEC stock and invested the sale proceeds in marketable securities. During the period beginning in 1997 through 2002, Walter Price and Sandra Price gave each of their three adult children interests in Price LP. Price LP made equal cash distributions to each child each year during that period, except in years 1997 and 2001.

The limited partnership agreement defined its primary purpose as achieving a reasonable rate of return on a long-term basis with respect to its investments, prohibited any partner from withdrawing capital contributions, restricted transfer and assignment

of partnership interests without the written consent of all partners, limited the position of a transferee to that of an assignee, and granted an option to purchase in the partnership and its remaining partners. In addition, the limited partnership agreement provided that profits could be distributed in the corporate general partner's discretion and did not require distributions to pay taxes on passed through income.

The Prices reported the gifts on their gift tax returns and treated portions as present interest annual exclusions under IRC section 2503(b). The IRS disallowed the annual exclusion gifts contending that the gifts were gifts of future interests because the limited partnership agreement effectively barred transfers to third parties and did not require income distributions to the limited partners. The Prices contended that each donee had immediate rights to partnership income and could freely assign income to third parties. The Prices also suggested that *Hackl* was decided incorrectly and, in any event, was distinguishable.

The Tax Court rejected the Prices' contention that *Hackl* was incorrectly decided and applied the analysis set forth in *Hackl*, indicating that an outright equity interest transfer in a business or property is not necessarily enough for the interest to qualify as a present interest. The Tax Court explained that there must be an examination of what present economic enjoyment or benefit the interest carries with it. Based on the restrictions in the limited partnership agreement, the Tax Court concluded that the gifts failed to give the donees the immediate use, possession or enjoyment of either the transferred property or the income therefrom.

Did the donees have the present use, possession or enjoyment of the Price LP? The Tax Court determined that under the limited partnership agreement, the donees did not have a unilateral right to withdraw their capital accounts and were prohibited from selling, assigning, transferring or otherwise encumbering their interests without all partners' written consent. Accordingly, the Tax Court concluded that the donees did not have a present interest in the transferred property.

Did the donees have a present interest in income? Applying the three-part test set forth in *Hackl*, which test requires the donor prove that (i) the trust will receive income, (ii) some portion of that income will flow steadily to the donee, and (iii) the income flowing out to the donee can be ascertained, the Tax Court concluded that, because distributions were in the general partner's discretion and the timing and amount of any distributions were purely speculative, the donees did not acquire a present interest in the transferred property's income.

The Tax Court held that because the donees' property interests and income transferred did not constitute present interests, the Prices were not entitled to exclusions under IRC section 2503(b).

Fisher v. United States⁶

Over a three-year period (2000, 2001 and 2002), John and Janice Fisher transferred membership interests in Good Harbor Partners LLC ("Good Harbor"), to each of their seven children. Good Harbor's principal asset was undeveloped land bordering a lake.

The Fishers initially claimed the annual exclusion for each transfer. Good Harbor's operating agreement provided that the management committee exercised or authorized all company powers and any management committee decisions made within its authority were binding upon the company and each member. The management committee had the authority to appoint a general

manager to supervise Good Harbor's day-to-day operations as well as to determine the timing and amount of all distributions.

The children could transfer their interests in Good Harbor, but such transfer was subject to a right of first refusal in Good Harbor. The children could unilaterally transfer their interest in their share of the profits and losses and their right to receive distributions from Good Harbor. The Fishers reported the gifts on their federal gift tax returns and claimed exclusion under IRC section 2503(b) for each gift.

On audit, the IRS disallowed the annual exclusion for each gift. The Fishers paid the deficiency assessed and filed a claim for refund in the U.S. District Court for the Southern District of Indiana, contending Good Harbor interests were present interest gifts.

First, the Fishers argued that, upon transfer, the children possessed the unrestricted right to receive distributions. The court rejected this argument because the general manager had discretion over distributions. Therefore, the children's right to receive distributions was not a right to a "substantial present economic benefit."

Second, the Fishers argued that upon transfer, the children possessed the unrestricted right to possess, use and enjoy Good Harbor's primary asset, the beachfront property. The court determined that the operating agreement did not indicate that this right was transferred to the children. The court further stated that regardless, the right to possess, use and enjoy property, without more, is not a right to a "substantial present economic benefit."

Lastly, the Fishers asserted that upon transfer, the children possessed the unrestricted right to unilaterally transfer their Good Harbor interests. The Fishers argued that this right is a present interest in property. The court pointed out that the children could unilaterally transfer their right to receive distributions from Good Harbor, but only if certain transfer conditions were satisfied (i.e., the right of first refusal). Therefore, due to the conditions restricting the children's right to transfer their Good Harbor interests, it is impossible for the children to presently realize a substantial economic benefit.

The court concluded that the Good Harbor interests transferred by the Fishers to their children were transfers of future interests in property and, therefore, not subject to the gift tax exclusion under IRC section 2503(b)(1).

Planning points

If the desired result is to qualify for annual exclusion gifts, advisors have numerous alternatives to consider. The provision alter-

natives include, but are not limited to:

- (a) permit transfers without restrictions, or subject to rights of first refusal with reasonable time limits, as opposed to prohibitions on transfers;
- (b) specific provisions directing that the general partner/manager owes other partners/members fiduciary duties;
- (c) no provisions favoring long-term asset over current distributions;
- (d) require annual distributions (caveat: this type of provision may make inclusion under IRC section 2036(a)(1) more likely if the parent retains FLP or LLC interests);
- (e) required "net cash flow" distributions (again, the IRS may argue that this indicates an implied agreement of retained enjoyment by the donor under IRC section 2036(a)(1));
- (f) crummey withdrawal power provisions enabling donees to withdraw the fair market value of their FLP or LLC interests for a limited period of time after each gift; or
- (g) grant limited time periods after transfers during which donee-partners are permitted time to sell the FLP or LLC interest, to the FLP or LLC, for its fair market value, determined without regard to the existence of the put right.

At the very least, advisors should caution their clients, such as the parents in our example, about overly restrictive provisions in operative agreements, i.e. that such provisions that the IRS may view as incompatible with the "present interest" requirements of section 2503(b).

Notes

1. IRC section 2503(b) provides that the annual exclusion amount is \$10,000 indexed for inflation. The current annual exclusion for a present interest gift is \$13,000.
2. 118 T.C. 279 (2002), *aff'd* 335 F. 3d 664 (7th Cir. 2003).
3. *Id.* at 291 (citing *Fondren v. United States*, 324 U. S. 18 (1945)).
4. *Id.* at 298 (citing *Calder v. Comm'r*, 85 T.C. 713, 727-728 (1985); *Md. Natl. Bank v. United States*, 609 F.2d 1078, 1080-1081 (4th Cir. 1979)).
5. T.C. Memo 2010-2, 2010 WL 10019 (Tax Ct. Jan. 4, 2010).
6. Civil Action No. 1:08-cv-0908, 2010 WL 935491 (S.D. Ind. Mar. 11, 2010).

AN INTRODUCTION TO THE NEW MEDICARE TAXES

By *Bunker L. Highmark*

Earlier this year, national healthcare reform legislation was enacted in the form of the Patient Protection and Affordable Care Act,¹ as amended by the Health Care and Education Reconciliation Act of 2010² (the "Reconciliation Act"). As seems to be true with a majority of legislation coming out of Washington, D.C., these days, the acts are exceedingly long, difficult to read, and, of course, contain language pertaining to taxes.

In this instance, the legislation increases the Medicare hospital insurance tax for "high-income" taxpayers and creates a new "unearned income" Medicare contribution tax, each of which goes into effect in 2013. Let's look at each of these in turn, and who will actually be affected by them.

Medicare hospital insurance tax increase (the .9 percent tax)³

The current Medicare hospital insurance tax under the Federal Insurance Contributions Act ("FICA") is 2.9 percent of wages earned, to which employer and employee each contribute 1.45 percent. The tax increase applies solely to the portion paid by the employee, increasing the rate by .9 percent to 2.35 percent under Internal Revenue Code (IRC) section 3101(b)(2).

However, the increase only applies to wages in excess of \$250,000 for couples filing jointly, \$125,000 for married individuals filing separately and \$200,000 for single filers. Employers are required to withhold this additional tax, but, in doing so, they may disregard the wages of an employee's spouse. This could potentially lead to a case of excess withholding where a married employee earns more than \$200,000, but when filing jointly with his or her spouse, reports total wages of less than \$250,000.

Of course, the opposite problem may also occur, in which each spouse earns less than \$200,000, but together have wages in excess of \$250,000. In this situation, the couple will have to pay the additional tax on their own, which could be a very unwelcome surprise.

This tax increase only applies to wages earned by individual taxpayers, and is not applicable to trusts, estates or corporations. Under the Self-Employment Contributions Act ("SECA"), specifically IRC section 1401(b)(2), parallel provisions add a similar tax

on the self-employed, including the same threshold amounts; however, as should be expected, the income tax deduction for net earnings from self-employment is "determined without regard" to the increased rate.⁴

New tax on net investment income (the 3.8 percent tax)⁵

The new tax, imposed by the Reconciliation Act by creating IRC section 1411, is a 3.8 percent tax on net investment income of individuals, trusts and estates, subject to certain thresholds.⁶ The tax, however, does not apply to nonresident aliens, trusts exempt from tax under IRC section 501 and certain other charitable trusts.⁷

For individuals, the 3.8 percent tax applies to the *lesser* of (1) net investment income for the taxable year and (2) the excess of modified adjusted gross income (which is adjusted gross income plus any amount excluded from income as foreign earned income)⁸ for the taxable year over the threshold amount.⁹ The threshold amounts are \$250,000 for couples filing jointly, \$125,000 for married individuals filing separately and \$200,000 for single filers.

Therefore, a couple with \$75,000 of net investment income and \$275,000 of modified adjusted gross income will pay a 3.8 percent tax on \$25,000 ($\$275,000 - \$250,000 = \$25,000$, which is less than \$75,000). Whereas an individual with \$10,000 of net investment income and \$350,000 of modified adjusted gross income will pay a 3.8 percent tax on \$10,000 (the total net investment income, which is less than modified adjusted gross income minus the threshold amount ($\$350,000 - \$200,000 = \$150,000$)).

For trusts and estates, the tax applies to the *lesser* of (1) undistributed net investment income for the taxable year and (2) the excess of adjusted gross income over the amount at which the highest tax bracket begins for the taxable year (i.e. \$11,200 in 2010).¹⁰

Unlike with individuals, trusts (and estates) that have net investment income, and generally do not distribute annual income to the beneficiaries, are almost always going to be subject to this new tax due to such a low threshold amount. In such instances, trustees who have discretionary powers over distributions may wish to consider distributing income to a beneficiary who is not subject to this tax as an individual (and won't be upon receipt of such distribution).

Of course, this new tax is only one of many considerations a trustee must weigh when deciding whether to make a distribution. For example, in the case of a special needs trust, a distribution of income may avoid the tax, but could also jeopardize the beneficiary's ability to qualify for various benefits.

Net investment income is investment income less any properly allocable deductions. Investment income is defined as (1) gross income from interest, dividends, annuities, royalties and rents¹¹ (other than income earned in the ordinary course of a trade or business to which the tax does not apply), (2) gross income derived from a trade or business engaged in either (i) a passive activity (with respect to the taxpayer) or (ii) trading financial instruments or commodities, and (3) net gain (to the extent taken into account in com-



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puting taxable income) attributable to the disposition of property, other than property held in a trade or business to which the tax does not apply.¹²

In the case of a disposition of an interest in a partnership or S corporation, gain (or loss), for purposes of “investment income,” is limited to the net amount that would be recognized if all of the partnership or S corporation property were sold for fair market value immediately before such disposition.¹³ In addition, net investment income does not include distributions from qualified plans or IRAs or income subject to self-employment tax.¹⁴

Planning strategies

How, and to what extent, taxpayers will be able to avoid or mitigate the impact of these taxes will no doubt vary considerably. Some may shift investments to tax-exempt bonds to reduce net investment income, while others may simply plan to realize modified adjusted gross income (“MAGI”) prior to 2013 (such as with a Roth IRA conversion), or stretch income payments via an installment sale to keep MAGI at certain levels.

Trustees may have to look more closely at annual trust income as well as the income of the trust beneficiaries prior to making decisions on distributions each year. Fortunately, there is sufficient time to analyze the impact of these taxes on our clients and implement a plan of action before they become effective.

Notes

1. Pub. L. No. 111-148, 124 Stat. 119 (2010).
2. Pub. L. No. 111-152, 124 Stat. 1029 (2010).
3. Patient Protection and Affordable Care Act, §§ 9015, 10906.
4. Patient Protection and Affordable Care Act, § 9015(b)(2)(B).
5. Health Care and Education Reconciliation Act, §1402 (which creates I.R.C. § 1411).
6. IRC section 1411(a) (West 2010).
7. IRC section 1411(e) (West 2010).
8. IRC section 1411(d) (West 2010).
9. IRC section 1411(a)(1) (West 2010).
10. IRC section 1411(a)(2) (West 2010).
11. Gross income does not include items that are excluded from income under the income tax, such as excluded gain from the sale of a principal residence and interest on tax-exempt bonds.
12. IRC section 1411(c)(2); *see also* JOINT COMMITTEE ON TAXATION – TECHNICAL EXPLANATION, HEALTH CARE AND EDUCATION RECONCILIATION ACT OF 2010, 134-137 (2010).
13. IRC section 1411(c)(4).
14. IRC section 1411(c)(5)-(6).

HOW TO CORRECT THE WORDING OF DEFERRAL ARRANGEMENTS TO MAKE THEM 409A COMPLIANTS

By Patricia Ann Metzger

Deferred compensation plans, as drafted, must avoid running afoul of the requirements of code section 409A. Scrivener's errors under documents intended to comport with the requirements of 409A can cause a deferred compensation plan to be 409A non-compliant.

In response to practitioner comments, the Internal Revenue Service has now issued procedures addressing the correction of plan document errors (notice 2010-6). This new notice is intended to encourage plan sponsors to identify and correct document failures, without unfairly advantaging noncompliant taxpayers. The notice supplements the IRS correction procedures published in 2008, dealing with plan operational failures (notice 2008-113).

PRACTITIONER ALERT: Under the notice, some document failures can be corrected without any current 409A income inclusion and additional tax — if the correction is made by Dec. 31, 2010.

General rules

The notice procedures are available only if certain general requirements are satisfied. An employer must take commercially reasonable steps to identify all of its non-qualified deferred compensation plans that have substantially similar document failures, and correct them consistent with the notice. The failure must be inadvertent and unintentional, and cannot relate to participation in a listed transaction. Relief is not available with respect to stock rights and so-called linked plans, or if a federal tax return of the employer or an affected employee is under examination with respect to non-qualified deferred compensation for any tax year in which the document failure existed.

If a failure is properly corrected, 409A will not adversely apply in any tax year before the correction year. Also, in each instance in which a 409A inclusion is required, the additional 20 percent tax (but not the premium interest tax) will apply.

Failures addressed



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Six types of plan document failure are addressed in the notice.

1. Certain ambiguous plan terms

The notice first deals with a few common drafting “errors” that will be disregarded under certain circumstances.

(a) *Payment as soon as reasonably practicable after a permissible payment event.* This impermissible provision will be OK so long as (i) payment is made by the end of the employee's tax year in which the payment event occurs or, if later, the 15th day of the third calendar month after the payment event, and (ii) there is no pattern of making late payments. Otherwise, there will be an operational failure or (in the case of a pattern of non-timeliness), a plan document failure.

(b) *Undefined or ambiguously defined permissible payment event.* Help is also provided when a payment may not satisfy the timing requirements because of an ambiguous reference (such as “termination of employment” in a plan that does not require its interpretation in a 409A compliant manner). If the term is consistently interpreted so as to comply with 409A, the drafting deficiency will be overlooked (and can be corrected prospectively by amendment). But if an improper payment occurs, relief is available. The employer can correct the problem by adding to its plan (i) a 409A compliant definition, or (ii) language requiring the plan to be interpreted so as to comply with 409A. The operational failure must also be corrected, and, by the end of the employer's tax year in which that occurs, the plan amendment must be in place.

2. Wrong definition of permissible payment event

The next section of the notice deals with bad definitions of three otherwise permissible payment events.

(a) *Separation from service.* If separation from service is not a payment event, it can be added under this provision. Impermissible service-related payment events can also be deleted. These include a change in (i) the level of services (e.g., from full-time to part-time), and (ii) the capacity in which services are rendered (e.g., as independent contractor rather than employee).

Under this provision, the correction must be in place before the bad payment event occurs, or before a separation from service (if not a current payment event). If, within one year thereafter, an event occurs that would (or would not) have caused a payment under the old language, 50 percent of the amount deferred will be taxable under 409A in the year the event occurs.

PRACTITIONER ALERT: If an employer fails to correct a bad definition before the first impermissible payment event occurs, the plan will be 409A non-compliant for prior years.

(b) *Change of control.* This provision helps plans under which payments can be made when an improperly defined change of control event occurs. The problem can be corrected by requiring a 409A compliant change of control event. The corrective amendment must be in place before the impermissible payment event

occurs. If, within one year thereafter, a transaction occurs that would have caused a payment under the old language, 25 percent of the amount deferred will be taxable under 409A when the event occurs.

(c) *Disability.* If a plan provides benefits when an employee becomes incapacitated (rather than “disabled”), it can be corrected by amendment before the employee becomes incapacitated within the meaning of the plan. The amendment can either remove the payment event, or define the payment event as disability within the meaning of 409A. If the plan is corrected by amendment after a non-compliant payment event occurs, any resulting operational failure must also be corrected.

PRACTITIONER ALERT: If the plan is not amended, it will remain 409A compliant only until the impermissible payment event occurs.

3. Wrong payment period after permissible payment event

Bad periods during which benefits may be paid after a good payment event are addressed in the following section of the notice.

(a) *Payment period longer than 90 days.* A bad plan provision allowing payment more than 90 days after a good payment event can be corrected by amendment. The amendment must either require payment on the date of the event, or set forth a 409A compliant payment period. If the employer does not act before a permissible payment event as to any employee occurs, the plan will still be OK — if the amendment is in place within a reasonable time thereafter, and the affected employee is actually paid on a timely basis. Then, however, 50 percent of the deferred amount will be subject to 409A in the year of the payment event.

(b) *Payment dependent on performance of certain employment-related activities.* Benefits dependent on an employee’s signing a non-compete or non-solicitation agreement, or a release of claims, can give an employee the impermissible ability to delay or accelerate the timing of payment. If payment is due *within* a designated period after the payment event, the corrective amendment must provide for payment on the last day of that period. If *no* payment period is designated, the amendment must provide for payment on a fixed date either 60 or 90 days after the payment event. The correction must occur before the payment event.

4. Certain wrong payment events and schedules

The notice also deals with six different situations involving wrongful payment events or schedules.

(a) *Permissible and impermissible payment events.* When there are both good and bad payment events, neither within the discretion of the employer or employee, the general correction is removal by amendment of the impermissible event before the employee elects it or before it has otherwise become applicable to the employee. If, however, the employee has already selected an impermissible payment event or such an event (like an IPO) otherwise has become applicable to the employee, the correction must be made before that event occurs. Also, if the deleted event occurs within one year of the correction, 50 percent of the amount deferred will be includible in the employee’s income under 409A for his tax year in which the event occurs.

(b) *Only impermissible payment events.* Impermissible payment events may be removed by amendment before they occur. The amendment must include a replacement provision, requiring payment on the later of (i) the employee’s separation from service,

and (ii) the sixth anniversary of the date of the correction. Also, the employee must include 50 percent of the amount deferred in his income under 409A for his tax year in which the correction occurs.

(c) *Impermissible alternative payment schedules.* Two situations are addressed here, the first being different payout methods, depending on whether an employee voluntarily or involuntarily separates from service. By amendment, the two payment methods must be made same before a separation from service occurs that could result in impermissible multiple forms. The involuntary separation method must be used. If, within one year after the correction, the employee leaves voluntarily and is affected by the change, 50 percent of his deferred amount will be subject to 409A in the year the event occurs.

This provision also deals with different payout methods dependent on other factors, such as job classification. Impermissible multiple forms of payment can be removed by amendment before a payment event occurs that could result in their applicability. The notice states what forms should be removed. If, within one year thereafter, a payment event occurs, an employee impacted by the change must treat 50 percent of his deferred amount as subject to 409A in the year the event occurs. However, an amendment is not needed for an employee who will never be impacted by the impermissible provision.

(d) *Impermissible discretion of employer or employee regarding payment schedule, including subsequent deferral elections.* Discretion to change the time or form of payment of benefits can cause a plan to be 409A non-compliant. If no harm results, the discretion will, in effect, be disregarded if three conditions are met (generally relevant to subsequent deferral elections) — i.e., there is a default distribution method if discretion is not exercised; the time or form of payment cannot be changed after a payment event; and the discretion is not exercised, or, if exercised, is revoked more than one year before the payment event occurs.

Otherwise, the problem can be corrected by amendment before the payment event occurs. Plans with a default method of distribution must remove the discretionary method. Plans with no default method must remove the discretion, and provide for a defined time or form of payment, in accordance with the notice guidelines. If, within one year thereafter, a payment event to which the correction applied occurs, an affected employee must treat 50 percent of his deferred amount as subject to 409A in the year the event occurs.

(e) *Impermissible ability of employer to accelerate payment.* Some provisions (such as discretion to terminate a plan) impermissibly allow an employer to accelerate and pay benefits, even though a payment event has not occurred. The problem can be corrected by amendment before the date on which the employer exercises its discretion to accelerate or, if earlier, the date a payment has been made under the plan pursuant to the exercise of discretion. Discretion can be removed or modified so as to be 409A compliant.

(f) *Impermissible reimbursement or in-kind benefit provisions.* Here, the corrective amendment must be in place before the occurrence of an event resulting in an employee’s becoming eligible to receive a 409A non-compliant reimbursement or in-kind benefit. If, within one year thereafter, an event occurs that would have given the affected employee more benefits under the pre-corrected plan, the affected employee must treat 50 percent of his deferred amount under the pre-correction plan provision as subject to 409A in the year the event occurs.

5. Omission of six-month payment delay for specified

employees

A failure to include the specified employee provision can be corrected by amendment adopted before the occurrence of an event that invokes the six-month delay. However, there is a price. The amount impacted cannot be paid until 18 months after the correction (if more than six months after the payment event). Also, if the affected employee separates from service within one year after the correction, 50 percent of his deferred amount delayed due to the correction will be subject to 409A in his tax year in which the separation occurs.

6. Impermissible deferral elections

If a non-compliant deferral election provision is not applied or, if applied, the improper election is revoked before the regulatory deadline, there will be no adverse consequences. If the bad provision is “applied,” the problem can be corrected by the end of the employee’s second tax year after that during which the deadline for the initial deferral election occurred. The ability to make an impermissible deferral must be removed by amendment, and any improper deferrals must be corrected under the operational correction procedures.

Special rule for new plan adopters

The notice encourages prompt correction of plan document failures appearing in new plans adopted by an employer. If a document failure is corrected by the end of the calendar year in which the first legally binding right to deferred compensation arises under all plans of the same type of an employer or, if later, the 15th day of the third calendar month after the date that right arises, the provisions under the notice relating to the triggering of a 409A inclusion on account of events occurring within one year after the correction will not apply. However, any resulting operational failure must be corrected by end of the calendar year in which the document failure is corrected.

Information reporting

An employer seeking to use the notice procedures must attach a statement to its timely filed original federal income tax return for the year in which it corrects, and the following year (if an employee has income inclusion that year), and it must provide a statement to each affected employee for each such year. An affected employee must also attach a statement to his timely filed original federal income return for his year in which the failure is corrected, and the following year (if he has income inclusion that year). Further, on audit, a taxpayer must make reasonable efforts to tell the examining agent upon commencement of the audit of the taxpayer’s reliance on the relief provided by the notice.

Transitional relief

The notice includes four transitional provisions. First, if a plan is corrected by appropriate amendment by Dec. 31, 2010, the provisions relating to the triggering of a 409A inclusion under the notice will not apply. However, resulting operational failures must be corrected.

The other three transitional provisions apply through Dec. 31, 2011. In particular:

(a) So-called linked plans that fail 409A can be corrected by Dec. 31, 2011, so both plans do not fail.

(b) Plans with payment provisions that would be permitted under the fixed schedule of payment rules, except for the failure to have an objective and non-discriminatory schedule, or a method of identification, can be amended to correct the problem by Dec. 31, 2011.

(c) A non-individual employer under examination for periods beginning on or before Dec. 31, 2011, will be treated as being under audit only with respect to a plan document failure specifically identified as an issue by the agent.

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