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CRIMINAL JUSTICE

SHOULD MASSACHUSETTS JAILS AND PRISONS FOLLOW THE DANISH MODEL?

BY PETER T. ELIKANN

It would be naive to think that we could adapt our jails and prisons to the way they are run in a variety of countries such as Denmark. In a number of ways, this would be like comparing apples to oranges since we are different societies with distinctly dissimilar dynamics.

Still, there are a number of interesting takeaways to be learned from taking a look at the culture of Danish prisons. There, prisoners do their own shopping and cooking, wear their own clothes, have abundant visiting hours and are required to work a standard workweek, frequently outside the prison walls. They even go to classes on the outside. Their connections to the outside world are encouraged in every aspect of their lives.

The idea is that, if inmates live in a way that they have responsibilities closer to those of the good law-abiding people on the outside and also everyday contact with regular society, once released, their transition to life beyond the prison walls is much easier and therefore their recidivism rate is radically lower. So, the main purpose of the more humane treatment practiced by Danish prisons is not so much to be nicer and kinder to offenders; it is to lower the re-arrest rate in order to make the public safer.

This, as opposed to some models here on the other extreme — prisoners who become what is referred to as "prisonized" where they have a horribly unsuccessful adjustment to the outside world because, from one day to the next, they are released from maximum security to complete freedom without any transition after years of little contact with visitors, work or programming. They are so removed from mainstream American life that they just can't get used to it once they are thrown back into the public. Some have been so dehumanized and stripped of dignity by years of not just physical or mental abuse, but by having everything done for them, standing in cafeteria lines and entering bleak cells, as opposed to Danish prisoners, who live in much pleasanter facilities and are not locked in their cells. Though the Danish prisoners have so many more responsibilities, such as washing their own clothes and cleaning their own cells, it does result in an incrementally greater sense of independence, self-worth and dignity.

Obviously, an argument can be made that it is still difficult to correlate recidivism rates since the cultures of Denmark and the United States are dramatically different. For its regular citizens, Denmark in general has low poverty, less income disparity, virtually no access to guns and a huge, wide-ranging social safety net that includes everything from free education to medical care for all. There is subsidized child care, subsidized rents and fuel for the elderly, and a generous pension system. Of course, the Danes pay higher taxes. Yet re-entering a society with so many safety nets might be partially responsible for an easier post-release transition, and it is likely that it cannot be attributed solely to the different prison model.

Incidentally, the demographic profile of the Danish prisoner is not as homogeneous as one would think. About 40 percent of Danish prisoners are not Danish ethnics. The fact that this is quadruple the number of non-Danes living in the general population of Denmark raises the same questions that are asked about whether injustice can be found in the disproportionate number of nonwhites that make up the American prison population.

An obvious question everyone raises is — it sounds nice in theory for certain prisoners, but aren't there offenders so dangerous or violent that the risk is too great for them to have such freedom and contact with the outside world? The answer is yes. About 60 percent of Danish inmates are in these "open prisons," while the rest, who might include terrorists, psychopaths, more violent criminals and repeat offenders, are in "closed prisons." Even those in Denmark's closed prisons may be treated more humanely and given a plethora of educational opportunities and programming to prepare them for eventual release, but, while incarcerated, they will not experience freedoms that will put anyone else at risk. Yet there is always an effort to eventually move those in closed prisons to open prison toward the end of their sentences to better prepare them for their release. Even those in closed prisons are going to school or working to better prepare themselves for their adjustment back out into the world.

The Danish system is not perfect, and it cannot be claimed that there are never fights, smuggled contraband and escapes. Just less.

PETER T. ELIKANN is a criminal defense attorney and instructor in criminal law at Bridgewater State University, who is a former chair of the MBA's Criminal Justice Section Council. He also serves as a member of the MBA's *Massachusetts Law Review* board.

Recidivism rates of released Danish prisoners are one third of those of American prisoners. The recidivism rate of those in open prisons is 19 percent, but that is balanced out by the recidivism rate of those in their closed prisons, which is 40 percent. That gives prisoners in Denmark an overall recidivism rate of 24 percent. This, as opposed to the recidivism rate in the United States of 68 percent within three years of release and 77 percent after five years.

So, while acknowledging that it would be foolish to automatically conclude with certainty that the Danish model of prisons could be readily transferrable to our prisons and jails with results anywhere near as successful, there is research out there to show that those general principles existing in Denmark that we have already adopted, though perhaps to a lesser extent, might have at least some effect on our recidivism rate if we expanded them even further.

For example, here studies have shown that those who have greater contact with the world beyond prison walls, perhaps with frequent visits from family and friends or easier access to inexpensive phone calls, tend to have an easier re-entry to life outside prison as it is not as jarring a transition. Also, those here who have access to programming and education while incarcerated and those who have held the few coveted prison jobs have been shown to be better equipped to segue into life on the outside and have lower recidivism rates.

One thing that makes the Danish system easier to enact and maintain there is that, by all accounts, Danish correctional policy rarely encounters political debate. Best practices are evidence-based and formulated by criminologists and professionals in the field. It might be difficult for many here to conceive,

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but there is something about the Scandinavian culture that politicians don't run on "I'm tougher on crime than you" platforms and the media rarely sensationalizes a particular crime. They let the evidence lead to where it may in a whatever-works-best effectiveness mode. Here in Massachusetts, as well as most jurisdictions throughout the United States, the reality is that political considerations, indeed, remain a factor to be weighed.

The overall lesson to be gleaned from studying the Denmark humane prison model is not that we should imitate it here by rote as it is not definitively settled either way that its methods and processes would translate perfectly to our own mode of operation. There is a larger tenet here that is simply worth consideration if nothing more — that, in Denmark, the punishment is solely the restriction of liberty and, beyond that, they believe that life inside should resemble life on the outside as much as is reasonably possible since the important goal is to prepare the offender for eventual release to the community in a way that he or she will not recidivate and be a danger to the public. They do this not primarily to be kind to an often-unsympathetic lawbreaker, but, even more importantly, because it is in the self-interest of the public safety of the good law-abiding citizens who deserve better. ■

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DISPUTE RESOLUTION

NOTE FROM THE DISPUTE RESOLUTION CHAIR

BY SARAH E. WORLEY

I am privileged to begin my second year as chair of the Dispute Resolution Section of the Massachusetts Bar Association. Through the hard work of the MBA's officers and our immediate past chair, Brian Jerome, the membership of our section has grown exponentially, and we look forward to a lively and exciting year of stimulating programming and professional development. We will be partnering with other MBA sections to cosponsor programs and panels at the MBA, and we look forward to supporting our colleagues through attendance and contributions to presentations that are scheduled to be offered by the MBA.

In addition to our collaborative programming, the DR Section celebrated Conflict Resolution Week in October with three days of dynamic programming. On Tuesday, Oct. 15, 2019, Judge David G. Sacks led our court-based event at the Brockton Trial Court, where we recognized the Southeastern Massachusetts court-connected dispute resolution programs. On Wednesday, Oct. 16, 2019, the DR Section hosted a panel presentation at the MBA offices on West Street titled "Perspectives: Exploring Prejudice, Cultural Bias and Experience. How They Play a Part in Negotiation, Dispute Resolution and Restorative Justice." On Thursday, Oct. 17, 2019, we hosted Conflict Resolution Day, which began with the reading of Gov. Charlie Baker's proclamation and included the awarding of the annual Frank Sander Award to Christine Yurgelun, Esq. Douglas Reynolds, Esq. offered a keynote address on restorative justice that evening to an enthusiastic audience.

Moving forward, we will work to support MBA President John J. Morrissey's focus on wellness. We recognize that the daily work of neutrals takes a toll; as mediators and facilitators, we encounter litigants who are reliving some of the worst moments of their lives as they cycle through the litigation process. This year, we will explore strategies that neutrals can tap into to develop deeper awareness and balance in their practice. We hope that you will join us at our monthly meetings and at our programs that will be advertised throughout the year. ■

SARAH E. WORLEY is the chair of the MBA's Dispute Resolution Section. She is a full-time mediator/arbitrator and the owner of Sarah E. Worley Conflict Resolution PC in Boston.

HOW MAKING A BUSINESS MEDIATION LOOK AND FEEL LIKE A BUSINESS NEGOTIATION CAN HELP YOU AVOID LITIGATION

BY CONNA A. WEINER

Businesses are increasingly mediating complex business disputes before filing a lawsuit or going to arbitration. Sometimes this is required by a contract clause, but businesses can also choose to mediate without one.

Mediation before litigation can make tremendous business sense; the opportunity should be taken seriously, particularly in the life sciences, health care and other technical fields. Business leaders desire to preserve current and potential business relationships; avoid public fights with collaborators, customers or regulators that can negatively affect their businesses; and focus on driving their business objectives rather than dealing with a multi-year, expensive public litigation. Even the initiation of litigation — ostensibly to gain "leverage" in a dispute or "force" a party to the table — has a tendency to exacerbate conflict and harden positions, making it more difficult to focus on reaching a smart business solution. It may also inspire the other party to file a surprise retaliatory counterclaim.

Done right, pre-litigation mediation can serve as the confidential extension of business negotiations through the help of an experienced, business-oriented neutral who helps bring perspective and objectivity to the parties' deliberations.

The following tips are helpful in all complex business mediations but are particularly important in a pre-litigation context:

1. PREPARE FOR AND CONDUCT THE MEDIATION LIKE YOU WOULD A BUSINESS NEGOTIATION

The mediation of a relatively simple litigated matter emphasizes an in-person session in which no one goes home until a settlement is reached. A pre-session confidential mediation memo for the mediator only and perhaps a short call are often part of the process, but

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DON'T TOLERATE A BAD MEDIATOR

BY JULIE RISING BRYAN

Not all neutrals are alike. There is a vast range of styles and personalities among mediators, and having a resume that looks good on paper does not mean that person will serve your needs well. Often, attorneys will send out an email to their firm asking about a particular mediator and will get a short response such as "good — helped us settle a case last year" or "did a decent job, but we didn't settle" or "good. I've used him/her several times." Don't just rely on others who say they have used a mediator in the past and they settled the case — that does not give you any useful information. Some cases will settle regardless of what the mediator does and, conversely, some won't settle no matter how brilliant or skillful the mediator is in the room. Don't rely simply on a cursory stamp of approval from others. Consider the type of mediator you want and try to find someone who fits the bill.

There are lots of ways to approach mediation, and for the simplest cases, not much inquiry as to personality and style may be required. If liability is already determined, you might want someone with a truly neutral stance who is all business and will get straight to the heart of the negotiations on the dollar values. But these mediations are few and far between. It is far more likely that you will want to find someone who will help you achieve a settlement in the midst of complex facts and varied personalities.

The number one thing you should think about when choosing a mediator is *style*. Is the mediator someone who will actively engage with the parties about the strengths and weaknesses of the case? Someone who will discuss the law and how it applies to the facts of the case, educating the parties and party representatives about the relevant "sticky issues?" Or is the mediator someone who will be more passive and let the parties and lawyers do the vast majority of the work? Is the mediator tough in their approach or someone with a softer touch? Do you want someone who will be creative with solutions or someone who will drill down to the numbers from the beginning? You want someone who can read people and use the personalities in the room to help move the needle, someone who is willing to prepare by doing some legal research and doing a deep dive into the mediation briefs. Someone who understands how personalities, bias and personal experience play into the negotiations. Someone willing to adapt their style to the personalities in the room, and someone who can find creative options when there appears to be an impasse.

How do you find this unicorn of a mediator? Do your research!

- Talk to colleagues about their experiences with mediation, and not just what mediator helped get a good result, but *how* they helped get that result, and what techniques were used to help achieve a settlement. Ask about the personality of the mediator and whether he or she had to deal with any difficult personality conflicts.
- Talk to the mediator. Even a brief conversation about their style can give you a sense of their process and personality, which may tell you everything you need to know about how that mediator will interact with the parties. Make sure you keep this conversation neutral so no conflicts are created that would keep the mediator from being able to accept the job.
- Review the mediator's CV, LinkedIn profile and website. Although this seems intuitive, not everyone bothers with researching their potential mediators, relying solely on peer references and nothing more. A review of the mediator's experience, not just as a neutral but also as an attorney or other practitioner, can give you insight regarding that mediator's ability to work through the tough issues that may arise during mediation.

There are an infinite number of different mediator styles and approaches, and finding the right mediator can make the difference between a productive mediation where, regardless of whether settlement is achieved, everyone feels they gained a better understanding of the issues, facts and/or damages that are truly at play in the dispute, and a mediation where everyone walks away feeling that they wasted a day (or more) of their busy lives. Take the time to find the perfect mediator for you and it will pay off in the long run. ■

JULIE RISING BRYAN is a mediator, investigator and litigator at the Boston law firm of Casner & Edwards LLP. Bryan focuses her practice on resolving business and employment disputes and conducting independent investigations. She has a wide variety of experience ranging from corporate governance issues, manufacturing/supply contracts, construction contracts, trade secret disputes, probate litigation and employment disputes. Bryan currently serves as a hearing officer for the Board of Bar Overseers, serves as a member of the MBA's Dispute Resolution Section and is on the board of Lawyers for Civil Rights.

IT'S TIME FOR LESS 'BUTs' IN MEDIATION

BY JUSTIN KELSEY

Use "and" instead of "but." It's a simple change that in conversation and writing can mean a world of difference. That difference is inherent in how we hear and read the word "but."

"But" has a negating connotation, implying that everything that came before it isn't true.

> I think this is a valuable lesson, *but* it's not revolutionary.
>
> I think this is a valuable lesson, *and* it's not revolutionary.

Which one of those sentences gives you the impression I think both things are true (which I, in fact, do believe)? Obviously the "and" changes the way we read that sentence. In fact, you only have to search Google for the phrase "and instead of but" to see that many people have shared this idea before me. It's not revolutionary, and it remains a valuable lesson, especially for mediators and negotiators.

Frankie, a contributor on Medium (medium.com/the-place-between/we-need-to-learn-the-word-dialectic-asap-6bbbc-cf134b4), highlighted that the importance of making this change is rooted in the fact that two things can be true at once, even when sometimes those things seem at odds. Imagine how powerful this idea of dialectic truths can be in mediation:

> I love you, *but* I don't want to be married anymore.
>
> I love you, *and* I don't want to be married anymore.

The "and" makes the "I love you" seem genuine. It's another thing that's true despite the second truth. Now imagine how different these two sentences might be received in a divorce mediation. Just knowing the difference could significantly change the tone of a conversation.

As mediators, we are often modeling good communication for our clients, and this is another opportunity to do that. In addition, it's often important to validate our clients' concerns as part of effective active listening. If we, as mediators, acknowledge a concern and redirect with the word "but," we are potentially signaling to that client that we don't think that concern is important:

> I hear that you have concerns about being equal parents, *but* I think it might help if we discuss the specifics of the parenting schedule.
>
> I hear that you have concerns about being equal parents, *and* I think it might help if we discuss the specifics of the parenting schedule.

The first option implies that the mediator is trying to change the subject, while the second option, with only the one-word difference, suggests that the mediator believes the specifics could help address the parents' concern. The mediator is redirecting the client to a more specific topic that might help them make progress, and at the same time validating the concern rather than dismissing it. It can both be true that the client has parenting concerns, and that addressing the schedule could alleviate some of those concerns.

This has become one of the tips and tricks we share in mediation training, and we encourage you to try it out in your personal and professional life.

If you're interested in learning more about upcoming mediation trainings, you can view Divorce Mediation Training Associates' information at dmtatraining.com/the-mediation-training/.

Thank you to Amy Martell of Whole Family Law & Mediation, who first brought this issue to my attention at a collaborative law training.

If you're interested in learning more about upcoming collaborative law trainings, you can visit Massachusetts Collaborative Law Council's information and registration page at massclc.org/civicrm/event/info%3Fid%3D683%26reset%3D1. ■

JUSTIN KELSEY is a collaborative divorce attorney and mediator, QDRO consultant and mediation trainer. He is a partner at Skylark Law & Mediation PC, Gray Jay Endeavors LLC and Divorce Mediation Training Associates. Learn more at SkylarkLaw.com, GrayJayQDROS.com or DMTAtraining.com.

HOW TO SUBMIT ARTICLES

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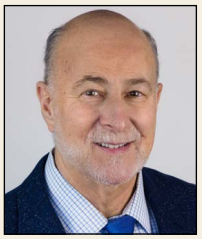
FIVE THINGS A MEDIATOR WOULD LIKE YOUR CLIENT TO KNOW

BY KENNETH A. REICH

Whether or not represented by a lawyer, many parties are nervous about mediation and may have a number of misconceptions about the process. While a good mediator normally explains some or all of the following points at the mediation, it is helpful to the mediator and the process if the client is aware of them ahead of time. This non-exhaustive list is the product of the author's experience both as a mediator and as a lawyer representing parties in mediation.

1. Unlike a judge/jury or arbitrator, a mediator does not decide the merits of your case. The sole purpose of a mediation is to assist the parties in reaching their own voluntary settlement.
2. Unlike the litigation process, where communications are normally lawyer to lawyer, in a mediation you and the opposite party have an opportunity to explain your case to each other directly and/or through the mediator.
3. A mediation is completely confidential. In addition, during the mediation you have the absolute right to instruct the mediator not to disclose certain facts, opinions or settlement positions to the opposite party. Therefore, subject to your lawyer's advice, you should tell the mediator your side of the story and not withhold certain details you might believe are damaging to your case, because the mediator can best do his/her job if they are fully aware of all relevant facts.
4. Mediators are independent and do not represent either side to the dispute. If a mediator appears to be critical of the merits of your position, you can be sure that they are taking the same tack with the opposite party. The mediator is simply doing their job in trying to convince each party of the wisdom of a settlement.
5. Mediators appreciate and need the parties' input and assistance to do their job effectively. If you and the opposite party have done business in the past or have another existing relationship that you expect to continue, there may be creative ways to settle the case that the mediator would not otherwise think of, so please share your thoughts with the mediator. ■



KENNETH A. REICH is an experienced lawyer as well as an experienced mediator. He is an appointed member of the Dispute Resolution Section Council of the MBA. He has taught a seminar in dispute resolution at Boston University School of Law for a number of years.

BUSINESS MEDIATION CONTINUED FROM PAGE 3

are not the focal point.

For a pre-litigation complex business case, think of mediation as a six-phase, overlapping process involving the assistance of the mediator at each step: (a) defining in writing the issues to be addressed, the parties' respective positions, and any additional entities that ought to be at the table; (b) preparing for the discussions internally by interviewing key participants and in-house or external experts (I have participated in such sessions) and obtaining stakeholder buy-in from both executive and functional (such as tax and finance) personnel — regarding acceptable outcomes and required approvals; (c) preparing for the discussions with the other party(ies) through exchanging information and perhaps even external expert opinions on disputed technical issues, substituting for the litigation discovery phase to the extent practical and necessary to ensure the sharing of facts materially affecting any business deal and case settlement value; (d) identifying and perhaps drafting key components of the multiple documents and side letters often required to implement any business solution; (e) meeting in person to discuss the disputed issues and define a detailed term sheet; and (f) conducting email and telephone follow-up sessions (involving the mediator as an observer or sounding board as appropriate) to draft definitive agreements.

This deliberately expanded phasing is often more realistic and certainly more consistent with the look and feel of a business negotiation. Complex contracts simply are not and cannot be negotiated in one day. It also helps ameliorate some of the concerns about "not knowing enough" to achieve a settlement before litigation. The internal and external preparation — supplemented by written and oral confidential mediator communications — during the preparation period helps the parties understand and critique their respective positions — without taking time from the in-person sessions — and helps the lawyers learn the strengths and weaknesses of their potential court case.

2. SELECT THE RIGHT MEDIATOR

Different mediators have different experiences and skill sets. For a complex business case that will involve, for example, a significant adjustment/renegotiation of a business arrangement or a multiple-part negotiated termination, a mediator with both litigation and hands-on transactional and business negotiation experience may well be preferred. A two-track mediation analysis, consisting of an assessment of chances in court and a detailed, informed discussion of business terms and workarounds — two related but very different discussions — could be critical to achieving success. A mediator with hands-on business negotiation and even industry experience has many tools with which to assist the parties in considering their options and to run a mediation business negotiation session.

CONNA A. WEINER is mediator, arbitrator and special master at JAMS. She arbitrates and mediates a wide variety of complex commercial and employment disputes but has special expertise in the life sciences (pharmaceuticals, medical devices, vaccines, diagnostics) and health care. Learn more at www.jamsadr.com/weiner.

3. BUSINESS REPRESENTATIVES, INSIDE COUNSEL AND TRANSACTIONAL ATTORNEYS SHOULD PLAY MAJOR ROLES

To keep the mediation focused on business solutions, consider having business representatives (both executives and functional personnel), inside counsel and transactional lawyers play major roles. In several of my matters, litigators have played important roles behind the scenes, but they elected not to attend the in-person sessions. Although not always appropriate, this can help set the tone to ensure that the business decision-makers and experts are guiding the business negotiations. ■

WHAT CAN A MEDICAL NEUTRAL BRING TO COLLABORATIVE LAW?

BY WENDIE HOWLAND

People familiar with collaborative law (CL) understand the most common roles involved: collaboratively trained attorneys and a coach/facilitator with a background in counseling. When circumstances dictate, the CL process can also include an appropriate financial professional, a financial neutral, to help all parties understand financial implications of the process, for example, a business valuation, tax implications, or instruments like insurance or trusts, and help them reach agreements on future management after divorce, partnership disputes and the like.

I would like to introduce another resource for cases involving aspects of health and safety, the medical neutral. The medical neutral would help all parties understand any medical or developmental conditions. Most importantly, a medical neutral brings expertise in assessing needs for present and future care, equipment, architectural modifications, specialized services like home nursing or assisted living, and particular needs related to catastrophic or chronic conditions. This also means looking at existing or future funding sources, like health insurance, other benefit programs like Medicare/Medicaid, children transitioning from school-based supports when they reach adulthood, and private educational or custodial settings.

It's important to realize that this skill set is not found in medical curricula. Physicians may have expertise in medical care, and some may even be able to project future medical needs. However, this kind of specialized information, collaboration, teaching and planning is best provided by a health care professional experienced in life care planning and case management for the particular person(s) involved, such as a nurse life care planner.

Nurse life care planners are steeped in the collaborative model from the beginning of their nursing education. While we come from any number of strictly clinical disciplines, nurses have always, historically, practiced the collaborative philosophy, working with specialists in many disciplines as part of daily work in any setting. Most important, though, we keep the main thing as the main thing: the person's care and safety needs always come first. We can help the other members of the collaborative process by clarifying these needs and resources. This is a tremendous opportunity to contribute to openness, avoid pitfalls and, most of all, to help the parties be confident that what are often the most important things remain priorities.

Some examples:

- A brain-injured man lives with his parents. They are aging and can foresee the time when they will no longer be able to care for him. How can the family work out a plan for his future after the family business ends with the parents' retirement? The medical neutral can research the options and present them, with advantages and drawbacks, and help develop a path forward.
- One of the parties planning divorce has a permanent musculoskeletal condition and wants more than half of the marital assets to compensate for inability to work. The medical neutral can consult with his physician(s) and his health insurer to clarify what can be expected.
- A divorcing couple needs to understand what resources will be needed and can be brought to bear for their disabled child as the child transitions into adulthood. A medical neutral can collect information about the child's individual education plan, medical and therapy plans of care, and identify possible placement options and costs.

The medical neutral role is just emerging as a resource for collaborative law. While less familiar to collaborative professionals, it's worth remembering if any health care-related issues arise. Practice groups who would like further information or a speaker for your next get-together are welcome to call me at the number listed above. ■

WENDIE HOWLAND MN, RN-BC, CCRN, CCM, CNLCP, LNCC is a legal nurse consultant and nurse life care planner with further certifications in rehabilitation and case management. She can be contacted at (508) 564-9556.

THE SJC HAS HELD THAT A RECORDED, CERTIFIED COMPLAINT IS NOT REQUIRED TO ENFORCE A TARGET LIEN BOND

BY KRISTEN R. RAGOSTA

The Supreme Judicial Court (SJC) in Massachusetts has held in the *City Electric* case that a party seeking to enforce a target lien bond, otherwise known as a lien dissolution bond, need not record a copy of a complaint in the registry of deeds as a condition precedent to enforcing the bond.[1] While this case permits practitioners to forgo a step in the lien process when pursuing recovery under a bond, for the reasons described below, it is not likely to have an immediate impact on the procedure that practitioners follow.

ENFORCEMENT OF MECHANIC'S LIEN

The mechanic's lien statute set forth in Massachusetts General Laws (G.L.), Chapter 254, governs the creation, perfection and dissolution of a mechanic's lien.[2] The primary purpose of the mechanic's lien statute is to provide a means for contractors, subcontractors, laborers and suppliers to secure the value of their services and goods that improve an owner's real estate.[3] The mechanic's lien statute is also designed to ensure that a person searching the land records can determine with certainty whether title to a particular parcel of land is encumbered.[4]

Because mechanic's liens were created by statute with the purpose of protecting these competing interests, they are enforced only by strict compliance with the statute and consistent with the goals the statute was created to protect.[5] Even a seasoned attorney can run afoul when seeking to enforce a lien, particularly when it comes to the timing and notice requirements set forth in sections 1, 2, 4, 5 and 8, which set strict timelines and rules for recording and transmitting to other parties the notice of contract, statement of account and civil action complaint.[6]

LIEN DISSOLUTION BOND

Section 14 of the mechanic's lien statute allows a party to execute and record a bond to dissolve a lien so that anyone possessing an interest in that land may keep the title free from liens and prevent the sale of the land to satisfy a lien.[7] Section 14 dictates how a perfected lien may be dissolved by the posting of a bond, and what a subcontractor must do to maintain his security.[8] General Laws c. 254, § 14, as amended through St. 2002, c. 400, § 2 (§ 14), provides, in relevant part:

> Any person in interest may dissolve a lien under this chapter by recording ... a bond ... in a penal sum equal to the amount of the lien sought to be dissolved conditioned for the payment of any sum which the claimant may recover on his claim for labor or labor and materials.... The claimant may enforce the bond by a civil action commenced within ninety days after the later of the filing of [the G.L. c. 254, § 8, statement of account] ... or receipt of notice of recording of the bond...."

'CITY ELECTRIC' CASE

In the *City Electric* case, the claimant, CES, was a subcontractor that supplied electrical materials for a construction project in Brookline. A payment dispute arose and CES filed a notice of contract pursuant to G.L. c. 254 § 4, after which the property owner obtained a target bond pursuant to G.L. c. 254 § 14. CES then timely filed suit against the general contractor and its surety to enforce the bond. The surety subsequently sought summary judgment dismissing the lawsuit on the basis that CES did not record a copy of its complaint as required under G.L. c. 254 § 5, which pertains to the procedure to enforce a lien.

The Superior Court judge granted the motion for summary judgment, but the SJC has overruled the lower court. While the lower court opined that G.L. c. 254 § 14 must be read in conjunction with the requirements in § 5, the SJC held that the two sections provide distinct theories of recovery. "After a target lien bond is recorded pursuant to the terms and procedural requirements of G.L. c. 254, § 14,[9] a claimant becomes newly able to 'recover on [its] claim for … labor and materials' by enforcing the target lien bond itself, as distinct from the then-dissolved mechanic's lien."

In so holding, the SJC relied in part on its interpretation of the plain language of the statute. G.L. c. 254 § 5 provides for dissolution of a lien as a consequence of a plaintiff's failure to record a complaint to enforce the lien. However, in an action under a § 14 target bond, the underlying lien already has been dissolved. Consequently, if the court enforced the requirements of § 5 in the context of § 14, it would render the phrase "or such liens shall be dissolved" from § 5 as meaningless, which the court must avoid.

The SJC's holding also relied on its review of legislative history. The legislature previously considered language for § 14 that referred to § 5, but then purposely chose not to include the § 5 reference in the current version. "Where the legislature has deleted language, apparently purposefully, the current version of the statute cannot be interpreted to include the rejected requirement." Consequently, the court cannot apply the requirements from § 5 within § 14.

FUTURE IMPACT

While the holding in *City Electric* draws a distinction between the procedural requirements for pursuing a lien claim versus a bond claim, it is likely that practitioners in Massachusetts who have been following the procedures set forth in § 5, even where the lien has been dissolved with a bond under § 14, will continue to do so until additional cases test the veracity and scope of the reasoning in *City Electric*. Hesitancy to forgo the strict requirements of § 5 is likely due to the precedent for Massachusetts courts to reject c. 254 claims due to even minor procedural infractions.

Moreover, the SJC decision in *City Electric* confirms that despite the distinction between the bond claim and the lien claim, the bond claim under § 14 is inextricably linked

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KRISTEN R. RAGOSTA is an associate attorney at Kenney & Sams PC in Boston and a member of the MBA's Development & Construction Law Practice Group Steering Committee.

REAL ESTATE LAW

WHOSE LAND IS IT ANYWAY? LESSONS IN LITIGATING ADVERSE POSSESSION DISPUTES

BY ADAM T. SHERWIN

Adverse possession isn't just for law school hypotheticals and bar examinations. It's a genuine legal claim that often arises in boundary disputes and other real estate litigation matters. Even if the property at stake is small, the consequences of these disputes are not: adverse possession cases are often heavily disputed and contentious among landowners. Properly preparing and trying an adverse possession claim is the key to a successful outcome.

1. PLEAD ALTERNATIVE CAUSES OF ACTION

When preparing an adverse possession claim, take full advantage of Rule 8 of the Rules of Civil Procedure, allowing alternative pleading. With few exceptions, one should plead a claim of an easement by prescription along with adverse possession. An easement by prescription provides a party with a permanent right to use a portion of property. In contrast, adverse possession grants a party ownership of the disputed property. The principal distinction between these two causes of actions is the element of exclusive use, which is not required for an easement by prescription. Consider other forms of equitable relief to protect your client's interests if the court does not find that you met the elements of an adverse possession claim.

2. BE SPECIFIC ABOUT THE PROPERTY YOU ARE SEEKING

In preparing an adverse possession claim, stating the disputed property in general terms is usually sufficient. Include enough information to put the opposing party on notice about your claim, but providing a metes and bounds property description is unnecessary. However, most courts will probably want a more specific description of the disputed property as part of the final court order or judgment, in the form of a survey or plot plan. A survey or plot plan should be part of the discussion with your client about the costs of one of these cases, and should be ordered promptly. Pay attention to whether a survey or plot plan had previously been prepared for the property. If one had been, it can be cost-effective to engage the same surveyor, who will not need to "recreate the wheel" in preparing a survey or plot plan for the disputed property.

3. GET CREATIVE IN RESEARCHING THE CHAIN OF TITLE FOR THE DISPUTED PROPERTY

Adverse possession often requires the tacking of one's claim, by showing that prior persons used the disputed property years before, for the purpose of the required time period (anywhere from 10 to 21 years, depending on your state). Finding these prior owners can be a challenge. Land records, social media and online search services are helpful resources in tracking down these persons. Not surprisingly, some of these persons may no longer live in the area, and may not be easily accessible for a trial. If so, consider seeking leave to take their trial testimony by deposition.

ADAM T. SHERWIN is a Massachusetts real estate litigation attorney based in Charlestown and a member of the MBA's Real Estate Law Section Council. Learn more at www. sherwinlawfirm.com.

4. BENCH TRIAL OR JURY?

Depending on your jurisdiction, a jury trial may be an option for an adverse possession claim. If so, weigh the pros and cons of both a jury and bench trial. I have found that many non-lawyers (and even lawyers in different practice areas) do not grasp the concept of an adverse possession claim, and may be reluctant to award ownership of property to a so-called "trespasser." If your state has a specific court that specializes in real estate (such as Massachusetts's Land Court), consider the benefits that these specialty courts may provide for these types of disputes. ■

TARGET LIEN BOND

CONTINUED FROM PAGE 8

to the underlying lien claim. Consequently, it is likely that sureties will continue to rely on a claimant's procedural deficiencies in perfecting the lien to try to defend against the bond claim. Prudent plaintiffs' counsel will likely incur the nominal cost to follow the § 5 recording procedures to avoid having to litigate the sureties' defenses, even if those defenses are rendered meritless by the decision in *City Electric*. ■

1. *City Electric Supply Company v. Arch Insurance Co.*, (Norfolk) March 2019.
2. *NES Rentals v. Maine Drilling & Blasting Inc.*, 465 Mass. 856, 861, 992 N.E.2d 291, 295 (2013), citing *National Lumber Co. v. United Cas. & Sur. Ins. Co.*, 440 Mass. 723, 726, 802 N.E.2d 82 (2004) (*National Lumber II*), citing *Ng Bros. Constr. v. Cranney*, 436 Mass. 638, 644, 766 N.E.2d 864 (2002), and sets forth the procedures for execution and enforcement of a lien dissolution bond. *National Lumber II*, *supra* at 726, 802 N.E.2d 82.
3. M.G.L.A. c. 254, § 1, *NES Rentals v. Maine Drilling & Blasting Inc.*, 465 Mass. 856, 992 N.E.2d 291 (2013).
4. *Id.*
5. *Nat'l Lumber Co. v. United Cas. & Sur. Ins. Co.*, 440 Mass. 723, 802 N.E.2d 82 (2004).
6. M.G.L.A. c. 254, §§ 1,2, 4, 5 and 8.
7. M.G.L.A. c. 254, § 14.
8. *Id.*
9. Contrast this with the requirements under § 12 that expressly require that a complaint be recorded with regard to a blanket lien bond.

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