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JUDGE BRIAN A. DAVIS DISCUSSES BUSINESS LITIGATION

Hon. Brian A. Davis is an associate justice of the Massachusetts Superior Court. Then-Gov. Deval Patrick nominated Davis in December 2012, and he was confirmed in January 2013. Prior to his appointment, Davis spent his entire legal career at Choate, Hall & Stewart LLP, where he specialized in litigation involving complex commercial disputes, torts, product liability defense, fraud and insurance litigation, and corporate governance matters, with significant experience in e-discovery. Davis is a graduate of Cornell University and Harvard Law School. Davis currently shares the Business Litigation Session (BLS) 1 with Hon. Mitchell H. Kaplan.

This article is based on an interview of Davis by ComCom Section member Michael J. Leard.

I. CONTACTING CHAMBERS

Q. Do you permit counsel to communicate directly with you? If so, under what circumstances?

A. Counsel are encouraged to direct questions to the session clerk, Helen Foley. On occasion, I will reach out to counsel via email.

Q. Do you prefer, require or prohibit courtesy copies of pleadings, motions and memoranda?

A. Generally, counsel need not provide courtesy copies, as we prefer not to have two sets of pleadings floating around the courthouse. Typically, filings make their way to my chambers within 24 to 48 hours. If a filing is time-sensitive, then it may be beneficial to receive a courtesy copy. For example, there is a fair amount of emergency preliminary injunction practice in the BLS, and in such cases it may be prudent for counsel to send a courtesy copy directly to the session clerk so that I receive the papers in a timely fashion.

Q. The Frequently Asked Questions section of the BLS website indicates that, "In any motion (summary judgment, preliminary injunction, etc.) with a particularly voluminous record, counsel are encouraged to supply electronic copies" to the court. In such a case, should counsel email electronic copies to the session clerk?

A. Electronic copies should be provided only upon request, in which case I will indicate the manner in which the electronic documents should be provided. For example, if there is a particularly voluminous proposed order that the parties want me to consider, I will typically ask counsel to submit the order to the clerk in Word format so that I may modify the document as I deem necessary.

II. BLS PROCEDURAL ORDERS AND FORMAL GUIDANCE

Q. The standard Notice of Scheduled Appearance for BLS Rule 16 Litigation Control Conference requires counsel to bring a proposed tracking order to the conference. Do you require or prefer the parties to file a proposed tracking order in advance of the conference?

A. Anything that counsel can provide to me in advance is appreciated, and it is my practice to review the papers prior to the conference.

Q. Do you have a required format to which the parties' proposed tracking order must adhere?

A. I do not have a set format, and generally I am not a stickler for formatting. The proposed tracking order should address all relevant dates.

Q. In the BLS, judges sit for six-month sessions; however, judges have the discretion to retain control over a case where close oversight is required. Under what circumstances would you be inclined to retain control over a case after your six-month session?

A. This is my first session with the BLS; however, prior to joining the BLS, I retained cases on a few occasions when I determined that, for logistical or efficiency reasons, it made the most sense for me to continue to handle the matter so that another judge did not have to learn the case anew. I suspect that this will be less of an issue in the BLS because the two judges that share each session communicate a great deal in an effort to provide consistency to the parties. However, my retention of a particular BLS case still may make sense in some circumstances.

Hon. Brian A. Davis

Q. The BLS's "Procedural Order Regarding Partial Dispositive Motions" requires the moving party to request a status conference in advance of filing a partial dispositive motion, at which time

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the "Court will decide whether to permit such a motion." What considerations do you take into account when deciding whether to permit the filing of a partial dispositive motion?

A. I consider the effect that a partially dispositive motion may have on the case if it were allowed, particularly from an efficiency perspective. I ask, for example, "Will the partially dispositive motion materially impact the prospects for settlement?" "Will the motion reduce the scope or amount of discovery, and/or, "Will the motion reduce the length of trial?" I consider such motions on a case-by-case basis.

III. DISCOVERY

Q. Do you have established guidelines for discovery of electronically-stored information (ESI)?

A. I do not have any established guidelines. One ESI issue that interested me while I was in private practice was computer-aided discovery, such as predictive coding. In my experience, predictive coding often is more efficient and reliable than using search terms. I would certainly be open to parties using computer-assisted review in appropriate cases.

Q. Do you consider the concept of proportionality in resolving discovery disputes?

A. I do not consider proportionality as a primary factor in resolving discovery disputes. Proportionality is something that you always have to consider; however, the primary inquiry is: "Is the request within the bounds of relevancy?" A request that seeks relevant information generally is permissible.

Q. Do you have any procedures or practices for streamlining discovery disputes?

A. I am happy to try to facilitate a more expeditious and cost-effective discovery process. If counsel believe that a particular discovery dispute could be resolved by way of a conference with the court, I would encourage counsel to submit a short letter requesting a conference. The letter should not contain argument for or against the requested discovery, but it should describe the issue that requires resolution. I will schedule a conference if it seems likely to be productive. If, at the end of the conference, the issue is unresolved, I will request that the parties brief the issue by way of a motion.

Q. Under what circumstances, if any, are you likely to impose sanctions in discovery disputes? What form do these sanctions usually take?

A. I impose sanctions, in the form of attorneys' fees or otherwise, on a case-by-case basis, and have done so in appropriate cases. As a general matter, I am unlikely to impose sanctions where a party can demonstrate its good-faith attempt to comply with the governing rules. Game-playing and repeated failures to comply, however, may warrant some form of sanction.

IV. FINAL TRIAL CONFERENCE

Q. What topics do you typically discuss at the final trial conference?

A. I inform counsel of my process for handling jury instructions. I write out my jury instructions and stick to the "script" when I read my instructions to the jury at trial. This process has a number of advantages. First, seeing the instructions set out on paper helps to ensure that I do not miss anything. Second, it enables me to provide counsel with my script — or at least a draft of my script — in advance of our charge conference, and allows us to resolve any issues that counsel may have with my instructions prior to the charge conference. Third, since my oral instructions will match the written instructions, I can send a set of written instructions into the jury room during deliberations. I will usually have a copy of my written instructions marked for identification and sent into the jury room. In my experience, jurors find this very helpful and it dramatically reduces the number of juror questions that I receive.

Other topics discussed during the final trial conference include exhibits (discussed below) and the timing of openings. While the length of openings may depend upon the needs of the case, most attorneys should expect somewhere between 15 to 20 minutes for the opening.

We will also discuss any scheduling and logistical issues, such as the availability of experts or the extent to which technology is going to be used. As to technology, I encourage the parties to share equipment (ELMOs, LCD projectors, etc.) in the courtroom.

Finally, one of the questions I almost always ask is: "Anything else, counsel?" I give counsel the opportunity to make me aware of any other issues that we have not yet addressed.

Q. Do you require or prefer trial exhibits to be pre-marked?

A. As to any agreed-upon exhibits, I tell counsel to pre-mark them and then I deem them admitted, i.e., there is no need to offer them at trial. All pre-marked exhibits are admitted as of the commencement of trial by agreement. Exhibits should be marked numerically, and the first objected-to exhibit should follow sequentially to the pre-marked exhibits.

V. TRIAL

Q. Massachusetts permits attorney-conducted voir dire, upon request by counsel, pursuant to Superior Court Rule 6. The judge "may impose reasonable restrictions on the subject matter, time, or method of attorney or party voir dire." Superior Court Rule 6(3)(f). Do you permit panel voir dire or individual voir dire? Under what circumstances?

A. I do not permit panel voir dire. Instead, I allow attorneys to conduct a modified individual voir dire at side bar, which gives counsel a better opportunity to observe individual reactions from prospective jurors and to better focus their questions.

My modified individual voir dire process is as follows: At the final trial conference, I invite counsel to provide two types of questions: 1) questions that counsel would like me to ask; and 2) questions that counsel wish to ask themselves. I will then prepare a set of questions that I will ask, which may be in questionnaire form depending upon the case. Regardless of whether the questions are presented in written form or whether I ask them orally, I will provide my voir dire questions to counsel in advance.

During voir dire, I will first ask my questions of the venire. I will then call each individual prospective juror to side bar, regardless of how he/she answered. At side bar, I will ask follow-up questions and I will also give counsel the opportunity to ask their own questions of the prospective juror. Usually, I allow each attorney to ask three questions.

Once counsel have asked their questions of a prospective juror, I ask the juror to step aside, at which point I entertain challenges, first for cause, and then, if there are no challenges for cause, preemptory challenges. On the civil side, I usually require the parties to alternate in exercising preemptory challenges. Preemptory challenges must be exercised at side bar; there will not be another opportunity. In other words, once a prospective juror is seated in the box, he/she is in the box to stay. There is no further opportunity to exercise preemptory challenges once the entire panel has been seated.

Q. Do you require counsel to submit their voir dire questions to you in advance for approval?

A. Yes, although in some cases I will allow counsel to provide only the subject area of their expected inquiries in advance; however, I reserve the right at the time of questioning to require counsel to use specific wording.

Q. Do you impose time limits on counsel? If so, how much time do you permit?

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DEVELOPING A STRONG PRESENCE IN THE COURTROOM

BY PAUL E. WHITE

What can you do to ensure that you have a strong presence in the courtroom? A strong courtroom presence means that, as an advocate, your actions throughout a trial should cause the jury to look at you and listen to you with respect because its members think you are credible. No single personality type equates with having a strong courtroom presence. While being meek won't work very well, it would be a mistake to think that a good trial lawyer needs to be aggressive or pushy to impress the jury. Those behaviors certainly won't make you an effective presence in the courtroom if the jury thinks you are a jerk. You are much better off being yourself and learning the skills that will enable you to be comfortable and confident at trial. Make sure that everything you do and say in the courtroom builds your credibility so that the jurors care about what you say and are more likely to believe it. Put bluntly, developing a strong courtroom presence means building your reputation with the jury during trial so that its members will want to buy what you are selling to them. Some of those qualities are undoubtedly intangible, and some people naturally have more charisma than others, but there are also certain habits or techniques that you can develop as a trial lawyer that will enhance your reputation and stature in the eyes of the jury (and probably with the judge too). Here are seven tips for enhancing your courtroom presence.

HAVE AN EFFECTIVE STORY TO TELL AT TRIAL

Having an effective story to tell at trial will not only increase your own confidence, but it will also enhance your stature with the jury. The jury wants to be interested in the case, not bored. Everyone likes to hear a good story. Your chances of impressing the jury naturally rise if you can present your case as a good story. Although this may sound simple, presenting an effective story at trial takes work and practice. It involves doing at least the following: a) you must master the facts of the case, b) the story you plan to tell at trial must fit the facts, c) your story must be one that ordinary people can relate to, and d) if possible, your story should have some human drama or interest that the jury will care about. The process of developing a good story takes time, and you will discard scripts along the way until you are satisfied. Not all the facts in the case will be good ones, but your story cannot ignore them. If it does, you will lose credibility with the jury. And at trial, credibility is gold. You should do this early in the case, not on the eve of trial, so that you take all the necessary discovery to present that story. By the time of trial, you should not only have figured out what story you will present, but you will also have accumulated the evidence and deposition testimony needed to enable you to do it effectively. Having a good story to tell that you know will be consistent with and supported by the evidence you will offer will make you more confident and comfortable in the courtroom. The jury will see that from day one.

BE A GOOD STORYTELLER

A civil trial is a contest between competing stories, so it's important that you not only have a good story to tell, but that you are able to deliver it effectively. You must learn how to be a good storyteller. There are many articles and books about this. Study them and, above all, practice. These skills are not just important for your opening statement and closing argument, but for how you question witnesses. You need to get into the habit of speaking without notes. When you do so, it becomes easier to make eye contact with the jury. Use gestures as well as speech. Learn the importance of pace and pause. Use the active voice. Ask rhetorical questions. Above all, lose the terrible habit of speaking like a lawyer — learn to say "hit" instead of "strike" and "car" instead of "vehicle." The jury wants to be interested in your case, so don't squander the opportunity to make the case interesting for them. Be the lawyer who makes the jury pay attention when you stand up.

KNOW THE RULES

Confidence is a critical ingredient to having a strong courtroom presence, but to be confident in the courtroom, you must know the rules of the game. You can certainly never expect to be a commanding presence in the courtroom if you don't even know where to stand! No amount of reading can substitute for practical experience. We all know that civil trials are increasingly rare, so it is vital to take every opportunity to get trial experience. Where possible, do the real thing (there are numerous pro bono opportunities that enable you to get a short trial) but, short of that, find opportunities to practice trial techniques by teaching or by doing mock trials. Go to watch good trial lawyers in action. Learn when and how to object so you can do it with confidence. Learn how to ask well-formed questions. Learn how to conduct a cross-examination so that you look competent in front of the jury. Learn where to stand. Pretty soon you will be comfortable doing all these things and, as a consequence, you will look and sound like a worthy advocate. It's not rocket science. By the way, none of these skills require you to be loud, aggressive or obnoxious.

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CREDIBILITY MATTERS

You must do everything in your power to gain more credibility than your opponent in the eyes of the jury. Think of it this way: At the start of a trial, you and your opponent each have a neutral credibility rating with the jury. The jury has no idea who either of you are and no reason to believe one of you over the other, hence the neutral rating. After that point, however, your credibility rating will either go up or down. Everything you do in the courtroom after the jury first sees you (even before they hear you speak) either enhances your credibility or diminishes it in the jurors' eyes. When the time comes for you to give your closing, the jurors are going to decide whether they believe you — or whether they believe your opponent. That will depend not just on what evidence they have heard, but also on what you have said and done in their presence between the start of trial and your closing. Everything you do affects your credibility, including how you address the judge, how you address witnesses, how you make objections and how you handle exhibits. Credibility matters. Numerous actions build or destroy credibility, but the following two habits are critical.

DON'T OVER-PROMISE

Nobody believes someone who doesn't keep his or her promises. So don't say you will produce evidence that you don't have and don't exaggerate evidence that you do have. If you are tempted to make these mistakes, it is probably because you haven't developed an effective story for the case — since an effective story would be

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MASSACHUSETTS' NEW NON-COMPETE LAW: AN OVERVIEW

BY LINDSAY M. BURKE

After years of fitful attempts, the Massachusetts Legislature finally passed a bill regulating non-compete agreements. Gov. Charlie Baker signed the "Act relative to the judicial enforcement of noncompetition agreements" (M.G.L. c. 149, § 24L) on Aug. 10, 2018, and it took effect on Oct. 1, 2018. The act ushers in a new era in the enforcement of non-competes, and is likely to cause some misunderstandings (and a host of litigation) as employers and employees adjust. This article highlights the most important aspects of the new law.

'NONCOMPETITION AGREEMENT' DEFINED

The law defines a "noncompetition agreement" as:

"[A]n agreement between an employer and an employee, or otherwise arising out of an existing or anticipated employment relationship, under which the employee or expected employee agrees that the employee will not engage in certain specified activities competitive with the employee's employer after the employment relationship has ended[.]"

Even more importantly, perhaps, the act identifies other types of agreements that are not considered "noncompetition agreements," and which will continue to be evaluated under Massachusetts common law. These include:

- Non-competes made in connection with the sale of a business;
- Severance agreements (provided the employee is given seven business days to rescind acceptance);
- Non-solicitation agreements; and
- Non-disclosure agreements.

'EMPLOYEE' DEFINED

An "employee" is anyone performing any service. The act also specifies that "employee" in this context, and unlike other employment laws, includes independent contractors. Importantly, employers cannot impose non-competes on any of the following categories of employees:

- Employees who are classified as non-exempt under the Fair Labor Standards Act (in other words, hourly employees);
- Undergraduate or graduate students who are engaged in short-term employment;
- Employees who have been terminated without cause or laid off; or
- Employees who are 18 years of age or younger.

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THE GARDEN LEAVE REQUIREMENT

The act also requires employers to compensate departing employees with "garden leave pay" during the non-compete time period. *See* "Down the Garden Path." The employer, during the restricted period, must continue paying the former employee an amount defined as "at least 50 percent of the employee's highest annualized base salary paid by the employer within the two years preceding the employee's termination."

Garden leave is required unless the employer and employee agree to some "other mutually-agreed upon consideration." This language may cause confusion because, unlike the 2017 garden leave bills, the act imposes no specific requirements on the value or timing of "other mutually-agreed upon consideration" that could serve as an alternative to garden leave. In fact, one could argue that a hiring bonus is "other mutually-agreed upon consideration," an interpretation that would render garden leave a negotiable contractual provision.

REASONABLENESS REQUIREMENTS

Any non-compete must be reasonable, meaning it must be:

- *No broader than necessary to protect a legitimate business interest.* "Legitimate business interests" are the employer's trade secrets, other confidential information, and goodwill. Courts will presume that the non-compete is "reasonable" if the employer can show that no other type of restrictive covenant (such as a non-solicitation or non-disclosure agreement) would be enough to protect the employer's legitimate business interest.
- *No longer than 12 months.* The only exception to the 12-month rule is if an employee is shown to have breached a fiduciary duty to the employer, or has unlawfully taken property belonging to the employer. In that case, the restricted period may be tolled for up to two years from the date the employment ended.
- *Reasonable in geographic scope.* If the noncompete is limited to the geographic "areas" in which the employee, "during any time within the last two years of employment, provided services or had a material presence or influence," it will be considered "reasonable." The word "areas" is not defined, and that ambiguity, along with the increasing use of telecommuting and remote work, likely will lead to litigation about this provision.
- *Reasonable in scope of prohibited services.* If the non-compete's "proscription on activities … protects a legitimate business interest and is limited to only the specific types of services provided by the employee at any time during the last two years of employment," this limitation will be presumed reasonable. This is codification of the "janitor rule," in which non-competes were often deemed unreasonable if they were so broad as to prevent a CEO from working as a janitor for a competitor.

TECHNICAL AND ADVANCE NOTICE REQUIREMENTS

In addition to containing a written promise of garden leave or "other" consideration, all non-competes must:

- Be in writing;
- Be signed by both the employer and employee; and
- Expressly affirm the employee's right to consult with an attorney prior to signing.

If the non-compete is presented to an employee when he or she starts work, the employer must present it to them at the time the offer of employment is made, or 10 days before the employment begins, whichever is earlier. If a non-compete is signed after the employment begins, however, it must be "supported by fair and reasonable consideration independent from the continuation of employment." This appears to mean something more than the otherwise-required "garden leave" or "mutually agreed upon consideration." The sufficiency of consideration could be another point of confusion and contention.

THE ACT PERMITS BLUE-PENCILING AND SEVERANCE

Under the new law, courts can "blue-pencil," or edit, overly-broad non-competes, rather than requiring them to declare the non-competes null. Further, should a court declare the non-compete null rather than blue-penciling it, the act provides that only the non-compete portion of the agreement will be severed,

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SJC REMOVES INTENTIONAL BREACH BAR TO QUANTUM MERUIT RECOVERY IN CONSTRUCTION CASES

BY ROBERT F. CALLAHAN JR.

In *G4S Technology LLC v. Massachusetts Technology Park Corp.*, SJC-12397 (Mass. June 13, 2018), the Supreme Judicial Court overruled a "rigid" and outdated rule that automatically barred quantum meruit for a party intentionally breaching a construction contract. The ruling requires trial courts to evaluate a quantum meruit claim in the broader context of the entire construction contract.

G4S Technology arose from a construction project that involved building an extensive fiber optic network in western Massachusetts. As with many large infrastructure projects, the completion of the fiber optic network was delayed and the parties assigned fault to each other. The contractor sued the other party to the construction contract, a state development agency, seeking the withheld portion of the contract value and additional compensation for work required to complete the project. Discovery revealed that the contractor intentionally, and repeatedly, submitted false certifications that it was paying its subcontractors on time. Failing to timely compensate the subcontractors breached the construction contract.

Based on this information, the state development agency moved for summary judgment on the contractor's quantum meruit claim. The motion judge granted summary judgment in favor of the state development agency, holding that the repeated, intentional breaches of contract precluded the contractor from establishing good faith, a prerequisite to quantum meruit recovery. The motion judge relied upon a long line of older decisions enforcing the general rule that intentional breaches of contract are inherently inconsistent with quantum meruit's good faith requirement, thereby barring recovery. This rule was known as the "*Sipley* doctrine," after the 1906 case to which it largely traces its origins.

Leading contract treatises, such as Corbin and Williston, roundly criticized the *Sipley* doctrine as too severe and limiting to a court's ability to craft an equitable resolution. Specifically, the rule placed too much emphasis on "clean hands" without considering whether another party received an unjustified windfall. Despite these criticisms and some distinguishing case law, the court had never overruled *Sipley*, leaving the "rigid" rule in place.

On appeal, the SJC seized the opportunity to finally overrule *Sipley*. While noting that existing case law supported the motion judge's analysis, the SJC reversed summary judgment on the contractor's quantum meruit claim, holding that, "Intentional breaches, even those involving material breaches, alone are not dispositive of the right to equitable relief, at least when such breaches do not relate to the construction work itself."

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In place of the *Sipley* doctrine, the SJC prescribed a new, broader equity analysis. *G4S Technology* directs trial courts to consider both parties' entire contract performance, the various contractual breaches and corresponding damage and, "most importantly," the project's value compared to the amount already paid for the work. The SJC summarized the goal of this broader analysis as "balanc[ing] the equities and produc[ing] a just result."

Applying the new analysis to the case before it, the SJC contemplated circumstances affecting the equity analysis, such as if the state development agency wrongfully withheld the remainder of the contract's value or caused construction delays. The SJC also emphasized the need for the trial court to consider the relationship between the construction and the contractor's false certifications and delayed payments to subcontractors. The SJC remanded the case for the trial court to make the necessary factual determinations and reconsider the contractor's quantum meruit claim.

G4S Technology constitutes a change in construction law and requires parties to construction contracts to reassess their litigation risk with respect to equitable claims. For contractors, the decision opens a door to recovery even when they have intentionally breached a construction contract. But given the number of broad considerations trial courts have at their disposal for rendering just resolutions, the demise of the *Sipley* doctrine does not necessarily mean contractors will have an easy road to quantum meruit recovery. ■

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NON-COMPETE LAW CONTINUED FROM P. 4

and the remainder of the agreement will remain in effect.

VENUE AND CHOICE OF LAW

Under the act, parties must bring non-compete cases in the county where the employee resides or, if the parties mutually agree, in Suffolk County. Any actions in Suffolk County must be brought in the state-level "superior court or the business litigation session of the superior court."

The act gives the state superior court exclusive jurisdiction over any non-compete cases brought in Suffolk County only, and thus appears to prohibit parties from bringing such actions in, or removing them to, the federal court located in that county (though the act imposes no similar restrictions on actions brought in the other 13 Massachusetts counties). It is unclear whether courts will uphold the act's apparent restriction on the right to bring a case in federal court where the action involves a federal claim or diversity of parties.

Finally, choice of law provisions designating another state will be ineffective if the employee is, and has been for the past 30 days, a resident of or employed in Massachusetts at the time of termination.

TAKEAWAYS

The goal of the new non-compete legislation was to reform the use of non-competes to apply only in those instances where a business interest could not be protected using less severe means, and where the employer was even willing to pay for the benefit of keeping the former employee away from competitors. In that regard, it has succeeded. However, another goal was to provide simplicity and clarity in the application and enforcement of non-competes. Whether the act can simplify non-compete disputes, given the ambiguity surrounding reasonable scope, reasonable consideration, and proper venue, is yet to be seen. ■

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MASSACHUSETTS ADOPTS NEW TRADE SECRETS ACT

BY ANDREW O'CONNOR

After years of debate, effective Oct. 1, 2018, Massachusetts is now the 49th state to adopt a modified version of the Uniform Trade Secrets Act (New York is the final holdout). There are several important changes in the new Massachusetts Trade Secrets Act (MTSA), which replaces the prior iteration of M.G.L. c. 93, § 42, that litigators and corporate counsel should keep in mind.

MORE PARTICULARIZED CLAIMS OF MISAPPROPRIATION OF TRADE SECRETS

The new MTSA aims to dissuade vague claims of misappropriation. The definition of "trade secret" requires that the trade secret comprise "specified or specifiable information." In addition, a complaint must allege "with reasonable particularity the circumstances" of the misappropriation, and a plaintiff must "identify the trade secret with sufficient particularity" prior to taking discovery of the defendant. The definition of "trade secret" also requires that, "at the time of the alleged misappropriation," there were reasonable efforts under the circumstances to keep the information protected, including "reasonable notice." Companies may satisfy the reasonable notice element by requiring employees to sign non-disclosure agreements or employee handbooks acknowledging that certain information is confidential and cannot be disclosed. Taken together, these added requirements highlight the importance of keeping track of all trade secret information and the methods by which such information is kept confidential.

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THE 'INEVITABLE DISCLOSURE' DOCTRINE

The "inevitable disclosure" doctrine enables courts to enter preliminary injunctions preventing former employees from working for a competitor because of the nature of their employment, without direct proof or evidence of misappropriation. Prior to the new MTSA, Massachusetts courts had effectively rejected (or at least discredited) the "inevitable disclosure" doctrine. The new MTSA, however, adopts a form of the inevitable disclosure doctrine, stating that, "Threatened misappropriation may be enjoined upon principles of equity, including but not limited to consideration of prior party conduct and circumstances of potential use." This provision is broader than the federal Defend Trade Secrets Act, which may restrict, rather than prevent, new employment. The MTSA's inevitable disclosure principles may become a powerful tool for plaintiffs in Massachusetts, but it remains to be seen how Massachusetts courts will apply them.

AWARD OF ATTORNEYS' FEES

The new MTSA provides for an award of attorneys' fees if the claim was brought or defended in bad faith, a motion to enter or terminate an injunction was made in bad faith, or if willful and malicious misappropriation exists. Attorneys' fees were not available under the previous MTSA, resulting in many plaintiffs filing an additional claim of violation of the Massachusetts unfair competition laws, M.G.L. c. 93A. Because there were often impediments to bringing c. 93A claims against employees or former employees, the availability of attorneys' fees in the new MTSA may provide companies seeking to protect their trade secrets additional tools by which to protect their assets and enforce their rights.

'CUSTOMER DATA' AND 'CUSTOMER LIST' INCLUDED IN DEFINITION OF 'TRADE SECRET'

The new MTSA includes "customer list" and "customer data" in the definition of "trade secret." While the case law previously recognized certain customer data as a trade secret, such as customer lists, purchase preferences and other commercially competitive customer information, the new MTSA may provide more predictability when basing a trade secret claim on customer information.

EVALUATE TRADE SECRETS AND CONFIDENTIALITY PROTOCOLS

Now is an ideal time for companies to audit their confidential information, including customer information, software, source code, and other information that provides a competitive advantage in the marketplace. This is also a good time to review and update internal security protocols to ensure the information is current and remains confidential. Form non-disclosure agreements and employee handbooks should also be reviewed to ensure they adequately identify trade secret information and the obligation not to disclose. Finally, companies should evaluate their methods of keeping their information protected in order to ensure maximum trade secret protection in the future. ■

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A. I typically do not impose time limits on attorney voir dire; instead, I usually limit counsel to no more than three questions for each prospective juror. I recognize that sometimes counsel need more time with a particular prospective juror in order to resolve an issue. I'm flexible and I often make adjustments as we go. For example, if the process is dragging, I may cut the questioning back a bit. On the whole, however, I haven't run into too many problems.

VI. CONCLUSION

Q. Do you encourage participation by "young" lawyers during court proceedings?

A. Absolutely. I am very thankful for the judges I encountered early in my career who, in my opinion, would "teach" from the bench. I recognize the need for young lawyers to gain experience in the courtroom, and I try to be patient and appropriately forgiving during this learning process.

Q. Any additional advice for business litigation practitioners who appear before you?

A. I want to thank counsel, in advance, for cooperating whenever possible. I recognize that some disagreements between the parties are inevitable — that is why we are all here — but it makes everyone's job, including mine, much easier and it makes our legal system more efficient when counsel cooperate. ■

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consistent with the facts. Your story needs to fit the facts not only because the jury won't buy a story that doesn't, but also because you lose credibility when you promise them facts that you cannot deliver. Delivering the story that you told in your opening enhances your credibility — but promising facts that ultimately don't come true will diminish it. And the jury will realize that long before your closing.

BE POLITE TO EVERYONE IN THE COURTROOM

Always be polite, even when you feel frustrated or mistreated. And you must be polite to everyone in the courtroom, including your opponent and adverse witnesses. Your reactions and behavior during trial send a message to the jury about your case. Adverse rulings and trivial mistakes don't usually affect the outcome, so smile and shake them off. If you look like you have been wounded, the jury will notice and may wrongly assume that your case is going badly and that the story you told them in your opening may have some flaws. Second, never, ever be rude. Nobody likes or trusts someone who is two-faced. Remember that the jury sees everything you do. A jury that sees a lawyer be routinely rude or inconsiderate to his or her opponent will not be fooled when that lawyer tries to charm the jury in the closing. Your credibility rating with the jury goes down every time you are rude in the courtroom. Build your credibility through your behavior at all points during the trial.

DRESS WELL AND SHOW UP ON TIME

If you can't be bothered to shine your shoes and wear a decent suit to court, or if you fumble around when it's your turn to question a witness because you are not ready, what message are you giving the jurors? You're telling them that you don't respect them, the judge or the process. If that's your message, you can be sure that is how they will also feel about you. Nor is this the time for showing your fashion prowess. Wearing a simple, conservative suit and being ready when it is your turn to speak projects confidence. The jury is ready for your story. ■

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