On June 26, 2013, the United States Supreme Court invalidated the Defense of Marriage Act in United States v. Windsor. The decision struck down a key section of DOMA, which defined marriage as between a man and a woman for the purpose of federal law.

This article provides brief summaries of the implications of the historic decision and how it will impact business, family, criminal, immigration and juvenile law practitioners in Massachusetts.

Advising business law clients after Windsor and the demise of DOMA

BY JAMES DOWNEY AND SHANNON MCLAUGHLIN

The United States Supreme Court held Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, unconstitutional on equal protection grounds. Section 3 of DOMA defined marriage for federal purposes, as between a man and a woman only. Section 2 of DOMA, 28 U.S.C. § 1738C, which was not challenged in Windsor, allows states to refuse to recognize same-sex marriages performed under the laws of other states. Windsor does not affect state laws which currently prohibit same-sex marriage. The resulting revision of federal regulations and laws will have a major impact on the practicing business lawyer whether in-house or at the individual client level. As is often the case with U.S. Supreme Court decisions, more questions seem to have arisen than were answered. This article will provide a 50,000-foot overview of the Windsor decision, highlighting some of the challenges faced by business law practitioners, with a focus on in-house counsel and representing the individual client. It is by no means exhaustive in its

It takes a village

Robert Holloway’s very busy year

BY CHRISTINA P. O’NEILL

Robert L. Holloway Jr. wants to make one thing clear: the success of the initiatives and goals of the Massachusetts Bar Association are not to be credited to a particular president, or even a particular group of officers. They are the opportunity and responsibility of the entire membership and staff of the organization, many of whom work below the surface and out of public view, over a long span of time.

After years in the MBA officers’ circle, he spent his presidential term taking up, with the rest of the officer group, three initiatives that had been in the works for some time: membership, education and public relations.

Looking back on his presidency, which ends Aug. 31, Holloway and his successor, President Marylin A. Beck appointed me to the Ethics Committee, chaired then and now by the estimable and venerable Andrew L. Kaufman, long-time professor at Harvard Law School, first-rate intellect and genuinely good guy. Carol A. G. DiMento, who later became MBA president, had recommended me to Beck. DiMento and Beck thus got me started on my active MBA involvement, for which I thank them. Kaufman has been a great and important mentor to me, whether he realizes it or not. His combined equanimity, intellect, objectivity, wit and energy are a marvel. As chair of the Ethics Committee, he has served the MBA in relative obscurity, overseeing the provision of important advice to confidential inquirers seeking guidance on ethics matters. He is a model for all regarding the essence of professionalism and volunteerism.

Len Clarkin, former Providence College hockey great and outstanding trial and business lawyer, has been a good friend for more than 30 years. He and I have worked on many cases together, including trying a lengthy trust matter in the Probate Court and successfully prevailing on appeal thereafter. Clarkin is the consummate lawyer.
I owe a great debt of gratitude to my MBA officer colleagues, present and past, to many lawyers, family, law firm colleagues, friends, acquaintances, judges, clerks, legislators and loyal clients, without whose support I could not have done much of anything in my career.

Yorke how to get to Carnegie Hall. The New Yorker says, “practice. It’s a good joke, I think, and good advice.

My experience at the MBA — on the Ethics Committee, chair of the Civil Litigation Section Council, Executive Management Board, Budget and Finance, and the various officer positions — has connected me with many dedicated volunteers, committed to our great profession. Their hard work and enthusiasm have been an inspiration to me and have helped make me, I think, a better lawyer and a better person.

Someone — I do not recall who — when comparing Beethoven and Mozart, observed that Beethoven broke with conventions in music, being extraordinarily inventive. Mozart, by contrast, more often stayed within existing conventions: he simply did so better than anyone before or since.

During the many years I have been active in the MBA, I have heard many good ideas from many people. Like all successful organizations, the MBA is not short on good ideas. The challenge is to take those ideas, create a plan of implementation and execution, and carry out the plan. By making lists and following through, success is more likely. With Mozart as our example, we need to strive to do what we do better than others. That is our challenge on an ongoing basis — every day and every year.

I suggest that my Mozart conversation with Chernoff was about work, even though that word never was spoken. More important, like pretty much everything else I have experienced as a lawyer and as an MBA volunteer, that conversation was fun for me.

All of this for you, for letting me be part of the conversation with you over the years. It has been enjoyable and instructive. You have given me more than I ever could give in return. That pretty much sums it up.
New Child Support Guidelines effective Aug. 1

Former Chief Justice Robert A. Mulligan announced the promulgation of revised Child Support Guidelines effective on Aug. 1, 2013, based on a comprehensive review by the Child Support Guidelines Task Force. The task force that conducted the review, which is required every four years, was chaired by Chief Justice Paula M. Carey.

The Child Support Guidelines are used by trial court judges in setting temporary, permanent or final orders for current child support, in deciding cases that are before the court to modify existing child support, and in deciding cases that belong to the court to modify existing orders.

Key changes made to the guidelines include:

• Income from means tested benefits such as SSI, TAFDC and SNAP are excluded for both parties from the calculation of their support obligations.
• Availability of employment at the rates or overtime may be considered in attribution of income.
• The text makes clear that all, some or none of the income from secondary jobs or overtime may be considered by the court, regardless of whether this is new income or was historically earned prior to dissolution of the relationship.
• Reference is made to the 2011 Alimony Reform Act; the text does not, however, provide a specific formula or approach for calculating alimony and child support in cases where both may be appropriate.
• Clarification is given as to how child support should be allocated between the parents where their combined income exceeds $250,000.
• A new formula is provided for calculating support where parenting time and expenditures are less than equal (50/50) but more than the assumed standard split of two thirds/third.
• Guidance and clarification is given in the area of child support over the age of 18 where appropriate. While the guidelines apply, the court may consider a child’s living arrangements and post-secondary education.
• Contribution to post-secondary education may be ordered after consideration of several factors set forth in the guidelines and such contribution must be considered in setting the weekly support order, if any.
• The standard for modification is clarified to reflect the recent Supreme Judicial Court decision in Morales v. Morales, 464 Mass. 507 (2013).
• Circumstances justifying a deviation to include extraordinary health insurance expenses, child care costs that are disproportionate to income or when a parent is providing less than one-third parenting time.
• The review process included input from the public and the bar, and reviewed case files, economic analysis, as well as judicial and staff commentary.

SJC approves trial court strategic plan to launch implementation effort

The Justices of the Supreme Judicial Court have announced approval of the strategic plan developed by the Massachusetts Trial Court and the launch of the implementation phase. The strategic plan will guide the trial court as it works to address current and future needs of the judiciary in serving the people of Massachusetts. It includes a series of tactics to be implemented in stages and sets forth transparent success measures to guide and assess the progress. A Strategic Leadership Team has been formed to oversee the implementation of the action plans. The overall plan was developed with the support of the state’s Division of Capital Asset Management and Maintenance (DCAMM).

The umbrella strategies, “One Mission: Justice with Dignity and Speed,” guide the tactical plans and decision making in the areas of governance and communications, facilities improvement, workforce development, technology enhancements, process improvement and innovative practices. Tactics for each of these areas are identified in the plan. Visit www.mass.gov/courts/strategicplanning to view the plan.

Changes to Rule 412 of the supplemental rules of the Probate and Family Court

The changes were recommended by the Probate and Family Court Bench/Bar Committee on Rules, circulated for comment, approved by then Chief Justice Paula M. Carey and approved and promulgated by the Supreme Judicial Court.

The changes to Rule 412 allow parties to jointly request modification of a judgment or order of the Probate and Family Court where the parties are in agreement, the agreement is in writing, and all other requirements of the rule are met. The changes to the rule will allow the Probate and Family Court to handle more cases administratively.

The changes to Rule 412 are effective Aug. 1, 2013. Visit www.mass.gov/courts/courtsandjudges to view the plan.
Recent updates to the Massachusetts Uniform Commercial Code

BY FRANCIS C. MORRISSEY AND EDWIN E. SMITH

On July 1, 2013, Gov. Deval L. Patrick signed into law Chapter 30 of the Acts of 2013. The new law updates Massachusetts' version of the Uniform Commercial Code, codified in Chapter 106 of the General Laws, and adopts the 2010 Amendments to UCC Article 9, Revised Articles 1 and 7, and a number of other amendments to the UCC.

The UCC was first enacted in Massachusetts in 1958 and it had been more than 10 years since any material changes have been made to the Massachusetts UCC.

Here is what the new UCC amendments will do.

REVISED ARTICLE 1

The amendments to Massachusetts UCC enact the 2001 revisions to Article 1 dealing with the general provisions of the code. There are some key substantive changes.

Scope. Section 1-102 makes explicit that the substantive rules in Article 1 apply only to transactions within the scope of the other Articles of the Uniform Commercial Code.

Good faith. Section 1-201(b)(20) replaces the current definition of "good faith" ("honesty in fact and the observance of reasonable commercial standards of fair dealing") with the definition adopted by all but one of the recently revised Articles of the Uniform Commercial Code — "honesty in fact and the observance of reasonable commercial standards of fair dealing." Course of performance. Section 1-303 adds the concept of "course of performance," taken from Articles 2 dealing with sales of goods and 2A dealing with leases of goods, to course of dealing and usage of trade as contractual interpretive tools.

REVISED ARTICLE 7

The bill would also enact the 2003 revisions to Article 7 dealing with documents of title. A few of the key changes effected by the revisions are set forth below.

Definitions. To permit electronic documents of title in contrast to paper-based ones (referred to as "tangible" documents of title), a document of title must be in a "record" as opposed to a "writing." The issuer of the document determines the format in which the document is initially issued. To convert a tangible document to an electronic document or vice-versa, the person entitled under the document must provide a process by which the person entitled can request the issuer to reissue the document in the alternative medium. The substitute document issued in the new medium will contain a notation that it was previously issued in the other medium. The person who procures issuance of the document in the alternative medium must surrender possession or control of the first document to the issuer and provide a warranty that the person is the person entitled under the surrendered document.

Control of electronic documents. A concept of "control" of an electronic document substitutes for the paper-based concepts of possession and indorsement. The essence of the control definition is that the system reliably establishes the person who has rights under the document.

Delivery of electronic documents. A tangible document is delivered by voluntary transfer of possession, and an electronic document is delivered by voluntary transfer of control.

Changes in industry practice. The Article 7 revisions also take into account changes in industry practice. While the revisions continue the standard of reasonable care that a warehouse must exercise for stored goods, the warehouse can limit its liability without stating a limitation per article or per unit of weight. A warehouse may also, in the warehouse receipt or storage agreement, place reasonable requirements regarding the manner and time of presenting claims. A carrier's lien is expanded to proceeds in the carrier's possession.

TECHNICAL CORRECTIONS TO ARTICLE 9

The bill would make some technical corrections to conform certain aspects of the Massachusetts Article 9 to the official text of Article 9.

Bank obligations with respect of a control agreement. The bill would clarify that a bank is not required to enter into or disclose the existence of a control agreement with a secured party claiming a security interest in a deposit account maintained with the bank.

Secured party liability arising from the security interest alone. The bill would also clarify that the existence of a security interest or the debtor's authority to deal with collateral, without more, does not subject the secured party to liability in contract or tort for the debtor's actions.

Re-designating sections of Part 4. The bill would re-designate sections of Part 4 of Article 9 to coincide with...
2010 AMENDMENTS TO ARTICLE 9

In addition to providing for the Articles 1 and 7 revisions and the technical corrections to Article 9 referred to above, the bill includes the amendments to Article 9 promulgated in 2010. Here is a brief summary:

Name to be provided on a financing statement when the debtor is an individual. If the debtor is an individual whose principal residence is in Massachusetts and the debtor holds an unexpired Massachusetts driver’s license or identification card, the debtor’s name as shown on the debtor’s license or card must be provided on a financing statement.

Definition of “registered organization.” A registered organization includes an organization whose “birth certificate” emanates from the act of making a public filing (e.g., a corporation, limited liability company, limited partnership or statutory business trust) as well as a Massachusetts business trust.

Name of registered organization. The name of a registered organization debtor to be provided on the financing statement must be the name reflected on the “public organic record” of the registered organization. In most cases, a registered organization’s “public organic record” is the articles or certificate of organization or other publicly available record filed with the state to form or organize the registered organization.

Debtor’s change of location; new debtor. If a debtor changes its location to a new jurisdiction or a new debtor located in a new jurisdiction becomes bound by the original debtor’s security interest, a financing statement filed in the original jurisdiction is effective to perfect a security interest in collateral acquired within the four months after that event. The secured party can continue the perfection beyond the four-month period by filing a financing statement or otherwise perfecting under the law of the new jurisdiction within the four-month period.

Other changes. The amendments provide for other changes: (a) an initial financing statement may indicate that the debtor is a transmitting utility; (b) a filing office will no longer be permitted to reject a financing statement that fails to provide the type of organization of the debtor, the jurisdiction of organization of the debtor, or the organizational identification number of the debtor; (c) an information statement may, but need not, be filed by a secured party of record who believes that an amendment or other record relating to the financing statement of the secured party of record was filed by a person not entitled to do so; and (d) the uniform forms of initial financing statement and amendment have been updated to reflect the amendments.

Transition rules. The amendments contain their own set of transition rules with an effective date of July 1, 2013.

Francis C. Morrissey is a partner in Morrissey, Wilson & Zaffiroppoulos LLP and teaches secured transactions at New England School of Law. Edwin E. Smith is a partner in Bingham McCutchen LLP and is a Uniform Law Commissioner for the Commonwealth of Massachusetts.

MBA congratulates state’s newest attorneys

Massachusetts Bar Association leaders attended the recent series of swearing-in ceremonies held in Faneuil Hall in early June. Close to 500 attorneys were sworn into the Massachusetts bar this summer.

MBA officers spoke at each ceremony. MBA Vice President Robert W. Harris (pictured) spoke to new attorneys about the valuable resources and services the MBA provides attorneys just starting out in their legal careers.

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THE MBA IS PROUD TO OFFER THE MARATHON BOMBING VICTIMS LEGAL ASSISTANCE PROGRAM

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MBA urges Attorney General Coakley to oversee future One Fund distributions

The Massachusetts Bar Association has urged Attorney General Martha Coakley to actively intervene in the administration of the One Fund and its ongoing awarding of compensatory funds to injured victims of the Boston Marathon bombings.

Numerous counsel to victims have raised serious concerns that the protocol used by the One Fund to make awards has resulted in victims, who suffered very serious injuries, receiving either very low sums or no award at all. The MBA has called on Coakley to oversee the future distributions from the One Fund after the departure of fund administrator Kenneth Feinberg.

Attorney Feinberg has now disclosed that although victims submitted descriptions of actual injuries with their claims, he considered none of this critical information and instead based the vast majority of his recent awards solely on the length of hospitalizations or on whether victims sought emergency outpatient treatment following the bombing. By using this measure as a supposed proxy for injury severity, Feinberg overlooked the fact that many victims, particularly those who are suffering sensory or cognitive impairments, had injuries that were not immediately apparent, or not diagnosed, until days later and therefore did not result in extensive hospitalizations. For victims like the Alabama doctor whose hearing loss has caused him to shut his practice, or the international aid worker who suffered a traumatic brain injury and can no longer work (neither were hospitalized), Feinberg’s protocol means they received the lowest possible award, just $8,000 each, from the $61 million distributed.

It is the MBA’s hope that under the Attorney General’s oversight, future One Fund donations can be used to remedy some of the inequities of Feinberg’s shortsighted protocol. If that occurs, the One Fund will be the resounding success its donors expect and all of the victims of the Marathon bombing surely deserve.
BAR NEWS

MBA Diversity Task Force Happy Hour draws crowd

The Massachusetts Bar Association hosted its first Diversity Task Force Happy Hour on June 25 at the MBA’s offices in Boston. More than 40 members of the legal community attended the happy hour, which provided an opportunity for attendees to meet and network with MBA Diversity Task Force leaders.

MBA’s Diversity Task Force members include:
• Robert W. Harnais, chair, Harnais Law Office, Quincy
• Ruth L. Deras, Law Office of Ralph Carabetta, Revere
• Adam John Foss, Suffolk County District Attorney’s Office, Boston
• Timothy G. Lynch, Swartz & Lynch LLP, Boston
• Radha Natarajan, CPCS-The Roxbury Defender’s Unit
• Clarence D. Richardson Jr., Law Offices of Timothy Loff, Newton
• Eneida M. Roman, Roman Law Offices, Boston

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C-Class (all) | $2,000
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CLS-Class (all) | $3,000
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SL-Class (all) | $2,000
GLK-Class (all) | $2,000
GL-Class (all) | $3,000
G-Class (all) | $3,000
M-Class (all) | $2,000

New 2014 Models | Incentive
---|---
E-Class (all) | $1,500
CLS-Class (all) | $3,000

Contact Jeff Davis
Executive Manager
800.495.3031 ext. 101
jdavis@herbchambers.com

Members of the legal community mingle at the MBA’s Diversity Task Force Happy Hour on June 25.

Members of the MBA’s Young Lawyers Division participated in a special networking reception at King’s in Boston on June 27.
Continued from page 1

Robert L. Holloway Jr., MBA Chief Legal Counsel and Chief Operating Officer Martin W. Healy, House Speaker Robert A. DeLeo and Trial Court Administrator Harry Spence.

The MBA held an informational meeting with Essex County legislators at the Salem District Court on Monday, Jan. 7, 2013, which included MBA Director of Policy and Operations Lee Ann Constantine; MBA President Robert L. Holloway Jr.; Sen. Joan Lovely (D-Peabody); and Trial Court Administrator Harry Spence.

It’s not fair to do that and in the long term, it’s not realistic.”

ADVOCACY

The MBA, along with others, successfully lobbied lawmakers to get a judicial pay raise for judges (see p. 10 for more information). Led by Chief Legal Counsel and Chief Operating Officer Martin W. Healy, the MBA advocated for a sound court budget and additional funding for the Massachusetts Legal Assistance Corporation. Many members worked on these endeavors.

Advocacy above and beyond the usual occurred after the Boston Marathon bombings. The Boston Marathon Volunteer Lawyer Initiative attracted dozens of lawyers who have assisted bombing victims by working on claims on a pro bono basis. Holloway commends Paul E. White, a partner at Sugarman, Rogers, Barshak & Cohen PC, who is chair of the MBA’s Civil Litigation Section Council, with leading the volunteer program for the marathon victims. “He’s an example of the kind of terrific leadership we have,” Holloway says, and notes that despite the media attention garnered by the effort, much of the work is done in relative obscurity.

White credits Holloway as the driving force behind the MBA’s challenge to the way the One Fund dispensed funds for victims. The MBA has asked Attorney General Martha Coakley to intervene in the administration of funds of the One Fund, asserting that some seriously injured victims received very low payouts or none, due to the way eligibility criteria were applied. The One Fund’s goal is to compensate victims as far as possible, but the MBA wants to see criteria that consider the downstream costs of medical treatment and other factors that can vary from individual to individual.

Challenging a charitable effort on such a scale, particularly an effort spearheaded by Gov. Deval Patrick and Boston Mayor Thomas Menino — not to mention Martha Coakley, who administered funds for victims of the World Trade Center attacks on 9/11 — was not an easy thing to do, White says. But Holloway persists, “He totally supported the fact that we had to do something further,” White said.

Holloway set up a process for addressing the challenges, and then supported White in ways that didn’t interfere with the process, White says.

GETTING INVOLVED

The MBA has never been short on good ideas, Holloway says — the challenge is how to implement and execute those ideas. The organization has a core component of volunteer leadership without which it could not exist in many respects. That core includes not just the officers but members of the executive management board, members of the budget and finance committee, section council chairs and members, standing committee chairs, and members of the House of Delegates. Cumulatively, they constitute a minimum of 250 leaders who are people committing significant time for the benefit of the MBA and the profession.

Section councils meet monthly; each member is responsible for a task or project. The time commitment may be several hours a week on average throughout the year. For officers, however, the time commitment is considerably more; as president or president-elect, it could be a full-time job. “Everybody in this officer group is in private practice. Not only are they volunteering a substantial amount of time, it costs them money to do that because it’s taking time away from their private practices,” Holloway says.

He made a commitment to traveling the state to spread the word about what the MBA can offer. The result: “I tell people that my long-term bar associations involvement made it much easier for me to do business. I can pick up the phone and I can call people. … That’s just one of the things you….”

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MBA hosts second summer networking event

The MBA hosted part two of its free Summer Networking Series on Thursday, July 11, at the Rooftop Deck, blu Restaurant, Bar and Café in Boston. More than 100 members of the legal community attended the event.

Bring a friend and join us for our final summer networking session on Thursday, Aug. 8, at Tia’s on the Waterfront, 200 Atlantic Ave., Boston. R.S.V.P at www.massbar.org.
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ADR

Legislature and Governor agree on judicial pay raise, disagree on implementation

By Lee Ann Constantine

When Gov. Deval L. Patrick signed the fiscal year 2014 budget into law on July 12, included was an amendment to the judicial pay raise passed by the Legislature earlier in the month. The Legislature proposed an incremental increase with effective dates of Jan. 1, 2014; Jan. 1, 2015; and July 1, 2015. Patrick, who supports the increase, believes that two years is too long to wait. He amended the budget so the entire $30,000 increase will be effective on Jan. 1, 2014. He also provided the funding for the pay increase in a supplemental budget also filed on July 12. Massachusetts judges last received compensation increases in 2006.

At press time, the Legislature rejected the governor’s amendment instead voting on an amendment containing an incremental raise with effective dates of Jan 1, 2014 and July 1, 2014. The supplemental budget, which included the necessary funding for the pay raise, was pending before the House Ways and Means Committee.
Polanowicz focuses keynote on Affordable Care Act at June 25 Health Law Conference

BY MARC A. D’ANTONIO

The MBA’s Health Law Section hosted its annual conference June 25. The program provided attendees with an opportunity to hear from expert panels on trends in health care fraud enforcement, insurance coverage of mental health care and advocacy initiatives to improve access to essential mental health services.

“We were so honored and excited to have Secretary John Polanowicz, a recognized leader in health care quality and costs,” said Conference Co-chair Lorraine Sainsbury-Wong.

Polanowicz offered insight on the Affordable Care Act (ACA) both on the state and federal level. With 97 percent of its residents covered with health insurance, Polanowicz indicated that other states will be looking to Massachusetts for guidance, particularly as the country moves toward the ACA’s implementation of the ACA.

The day concluded with a presentation from Rep. Jeffrey Sanchez (D-Boston), chair of the Joint Committee on Public Health. Sanchez discussed HB1051, “An Act Preventing Unnecessary Medical Debt.” The committee’s proposed bill expands existing state and federal protections for low and moderate income patients who incurred medical debt. He indicated that more than 50 percent of Massachusetts residents who filed for bankruptcy did so because of medical debt. One of the bills overarching goals is to address not only acute health care costs but also the costs associated with medical bills.

Connect and collaborate with fellow section members

How to share a file

The Massachusetts Bar Association’s My Bar Access, a valuable member benefit, provides MBA members with an opportunity to share practice information in one convenient, online location. Each MBA section/division has a “recent shared files” or “latest shared files” option on My Bar Access, which offers members an opportunity to exchange documents and links, including multimedia, in a socially-enriched environment. Files uploaded to My Bar Access are housed in each section/division’s library and can only be viewed within the environment. Files uploaded to My Bar Access are housed in each section/division’s library and can only be viewed within the environment.

To share a file:
2. Login to My Bar Access using your MBA user name and password.
3. Click on “contribute” in the My Bar Access gold navigation bar.
4. On the “contribute” landing page, click on “share a file.”
5. Add a new file by following the My Bar Access library entry template. If you want to associate the file with a particular My Bar Access group, choose your section/division from the drop-down menu under “library.” Make sure you pick the best “entry type” in order to upload your hyperlink, standard file, YouTube video or copyrighted material.
6. “Choose” the file you want to share from your desktop and then click the “Upload File(s)” button. Click the green “Next” button on the bottom right-hand corner of your screen.
7. Follow the Tag Your Entry template to associate your file with a specific section/division or content type. This allows for easier identification and recall in the future, when an MBA member may search for a particular topic on My Bar Access.
8. Click the blue “Finish” button on the bottom right-hand corner of your screen and your file will upload.
review. Careful analysis of state versus federal laws and regulations will be required by those practicing in the business area. As always, consult with qualified counsel for specific advice.

ADVISING BUSINESS CLIENTS
WHAT STANDARD TO USE?

One of the threshold issues since the Windsor decision involves how states and federal agencies currently recognize marriage. Some federal agencies adhere to what is known as a "place of celebration" standard, which means that no matter where a couple is legally married anywhere in the world, the union is recognized for the purpose of federal benefits. However, some federal agencies use the "place of residence" standard to determine whether a same-sex marriage is recognized. Both the Internal Revenue Service and the Social Security Administration use the "place of residence" standard, meaning the marriage has to be recognized in the place the couple is living for them to be eligible for those federal spousal benefits. There is no methodology to where and under what circumstances each may be used, requiring a careful hand when advising clients and examining each agency’s rules and guidance. For example, the Department of Defense has a "place of celebration" marriage standard for military members, while the Department of Veterans Affairs has a "place of residence" standard for veterans. This translates into potentially very different consequences for two sets of benefits that are closely-related.

FAMILY MEDICAL LEAVE ACT

In-house counsel should consider a likely increase in leave requests under the Family Medical Leave Act, (29 U.S.C. § 2601, 29 CFR 825). Currently, up to 12 weeks of unpaid job-protected leave is given to eligible employees to care for spouses. FMLA regulations currently look to an employee’s state of primary residence to determine whether a person is considered a "spouse." Since Section 2 of DOMA allows states to refuse recognition of same-sex marriages from other states, an employee moving from a state that recognizes same-sex marriage to one that does not, could create a legal dilemma for an in-house counsel when determining marital status. Not so for those married in one state and living in a non-same-sex marriage state. The income tax situation becomes further complicated when a same-sex couple works in multiple states. In such a situation, absent further guidance, a joint federal return will need to be filed, with single status being claimed on some state returns.

BANKRUPTCY

Prior to Windsor, two separate petitions were required when same-sex couples filed for bankruptcy, creating additional expenses and time. Further, same-sex spouses did not have the benefit of the greatly increased exemptions claimed in bankruptcy with the addition of a spouse. In addition, an automatic stay is granted to both spouses once the bankruptcy is filed which protects them from both foreclosure and creditors. Windsor provided more clarity in this area to same-sex couples, but questions remain, which will likely be resolved through litigation and further federal action.

ESTATE PLANNING

Pre-Windsor, same-sex couples generally chose to file federal tax returns as “single,” with some filing as “head of household” if they had children. Now, same-sex couples will need to file joint tax returns or married filing separately. Clients should be made aware that this could result in their paying more or less tax on income. Additionally, initial guidance indicates that couples that were married up to three years ago will have the option to amend federal returns for the preceding three years. Whether or not they must amend all the returns for the three returns or can selectively choose to amend where it benefits them remains to be seen.

WHAT’S NEXT

Shortly after the Windsor decision was rendered, President Barack Obama directed the U.S. Department of Justice to review relevant federal statutes to determine the need for additional guidance on statutes impacted by the decision and the IRS stated that it plans to provide revised guidance.

DOMA

Continued from page 1

review. Careful analysis of state versus federal laws and regulations will be required by those practicing in the business area. As always, consult with qualified counsel for specific advice.

ADVISING BUSINESS CLIENTS
WHAT STANDARD TO USE?

One of the threshold issues since the Windsor decision involves how states and federal agencies currently recognize marriage. Some federal agencies adhere to what is known as a "place of celebration" standard, which means that no matter where a couple is legally married anywhere in the world, the union is recognized for the purpose of federal benefits. However, some federal agencies use the "place of residence" standard to determine whether a same-sex marriage is recognized. Both the Internal Revenue Service and the Social Security Administration use the "place of residence" standard, meaning the marriage has to be recognized in the place the couple is living for them to be eligible for those federal spousal benefits. There is no methodology to where and under what circumstances each may be used, requiring a careful hand when advising clients and examining each agency’s rules and guidance. For example, the Department of Defense has a "place of celebration" marriage standard for military members, while the Department of Veterans Affairs has a "place of residence" standard for veterans. This translates into potentially very different consequences for two sets of benefits that are closely-related.

FAMILY MEDICAL LEAVE ACT

In-house counsel should consider a likely increase in leave requests under the Family Medical Leave Act, (29 U.S.C. § 2601, 29 CFR 825). Currently, up to 12 weeks of unpaid job-protected leave is given to eligible employees to care for spouses. FMLA regulations currently look to an employee’s state of primary residence to determine whether a person is considered a "spouse." Since Section 2 of DOMA allows states to refuse recognition of same-sex marriages from other states, an employee moving from a state that recognizes same-sex marriage to one that does not, could create a legal dilemma for an in-house counsel when determining marital status. Not so for those married in one state and living in a non-same-sex marriage state. The income tax situation becomes further complicated when a same-sex couple works in multiple states. In such a situation, absent further guidance, a joint federal return will need to be filed, with single status being claimed on some state returns.

BANKRUPTCY

Prior to Windsor, two separate petitions were required when same-sex couples filed for bankruptcy, creating additional expenses and time. Further, same-sex spouses did not have the benefit of the greatly increased exemptions claimed in bankruptcy with the addition of a spouse. In addition, an automatic stay is granted to both spouses once the bankruptcy is filed which protects them from both foreclosure and creditors. Windsor provided more clarity in this area to same-sex couples, but questions remain, which will likely be resolved through litigation and further federal action.

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WHAT’S NEXT

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Impact on family law

BY PATIENCE CROZIER

The United States Supreme Court’s holding in United States v. Windsor, 570 U.S. __________ (2013) — declaring Section 3 of the so-called Defense of Marriage Act unconstitutional — touched many in Massachusetts, the birthplace of marriage equality in the United States. The case is cause for relief in many respects, but challenges for lawyers and inequities for LGBT clients remain. Family lawyers must be careful and thoughtful in reviewing Windsor and its implications.

In Windsor, the U.S. Supreme Court determined that Section 3 of DOMA was unconstitutional on equal protection and due process grounds. Section 3 prohibited federal recognition of same-sex marriages as it related to military members and their families.

Major James Downey has served in various legal positions throughout his career, most recently with Citigroup. He is a graduate of Suffolk University Law School and is currently the chief of legal assistance for the Massachusetts National Guard.

Major Shannon McLaughlin is an attorney with the Massachusetts National Guard and a graduate of Boston College Law School. She is also a member of Standing Committee on Armed Forces Law with the American Bar Association.

For McLaughlin v. United States, challenging the constitutionality of DOMA as it relates to same-sex marriage should pay heed to the Massachusetts, the birthplace of marriage equality in the United States. Since the passage of the Massachusetts Civil Rights Law with the American Bar Association.

Graduate of Boston College Law School. She is also a member of Standing Committee on Armed Forces Law with the American Bar Association.

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Challenges Remain

Section 2 of DOMA remains intact, meaning that sister states do not have to recognize same-sex marriage. More than 30 states have either legislative bans or constitutional bans against same-sex marriage (or both). For family lawyers, that means we need to educate ourselves about the law of all the states to ensure our clients will be protected wherever they travel or reside. Married couples who have moved to a non-recognition state may be unable to divorce. In drafting separation and premarital agreements, language should be incorporated to ensure that the agreement is recognized as a contract in all jurisdictions even if the marriage is not recognized. It is critical for couples to complete co-parent adoptions of their children. A married couple who has been married in Massachusetts will both appear on their child’s birth certificate, but if they do not adopt and subsequently move

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to a non-recognition state, only the birth mother will be recognized as the legal parent. A judicial decree of adoption will be recognized nationwide, but parenthood flowing from marriage will not. Couples should also be advised to revisit their estate planning documents and consider revisions to ensure federal protections available to married persons.

**QUESTIONS ABOUND**

Will retroactive relief be available? Should couples seek to amend federal tax returns? Will widows/widowers now qualify for certain Social Security benefits previously unavailable? Married same-sex couples who live in non-recognition states should be aware that while certain federal benefits are based on the marriage being valid where celebrated, others are based on the marriage being valid where the individual resides. Because civil unions and registered domestic partnerships confer a legal spousal status not recognized as a "marriage" for federal purposes — federal benefits will likely be unavailable to these couples. Fortunately, in Massachusetts (and in most recognition states), a civil union or registered domestic partnership will be treated as a marriage for all state purposes. There is no doubt that — as a result of these marriage-friendly and unanswered questions — we can expect numerous legal challenges across the country, not only to the possible denial of federal benefits to legally married same-sex couples but also to the many state bans on same-sex marriage itself.

Lawyers must continue to educate the public about the rights and responsibilities of marriage, the implications of Windsor and the patchwork of protections and pockets of discrimination that still exist. Practitioners and clients must consult with legal, tax and financial professionals with specific expertise in LGBT issues. The Windsor case is an exciting and substantial step forward, but it cannot be an invitation to complacency. It is wise to remain vigilant in following the many legal developments that could affect same-sex couples and their families.

**Impact on criminal law**

**BY PETER ELIKANN**

Practically speaking, the landmark United States Supreme Court’s ruling in United States v. Windsor that the federal Defense of Marriage Act is unconstitutional will have little discernible effect on the practice and enforcement of criminal law in Massachusetts.

This, despite the fact that Justice Anthony M. Kennedy, writing for the 5-4 majority, specifically included this field of law when he stated that DOMA contravened “laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright and veterans’ benefits.”

First, the decision upheld the history and tradition of marriage being within the authority of the states. It reasoned that to have the federal government treat a couple as unmarried while, at the same time, a state may or may not recognize that same couple as married might create “contradictory marriage regimes for the same state” and violate basic due process and equal protection principles. Since Massachusetts does, in fact, already recognize same-sex marriages, Windsor has no impact here on victims or citizens accused of crimes within its borders.

Nor will it affect same-sex couples married in Massachusetts when they travel, move or return to other states. Since Windsor left in place the law that says no state is required to recognize same-sex marriages performed in another state, there will be no change there.

Most of the criminal laws pertaining to married couples concern rights relating to domestic assaults, abuse and restraining orders. This is why even if, hypothetically, Massachusetts did not recognize same-sex marriages, it would still have little effect here. That is because Massachusetts’ domestic abuse law has already long been enlightened enough to broaden its jurisdiction outside a legal marriage. For example, in a relatively wide net, the Massachusetts 209A restraining orders against those who attempt to cause physical harm or place another in fear of imminent serious physical harm encompass those who: (1) are currently, or even formerly, married; (2) are or were residing in the same household; (3) are or were related by blood or marriage; (4) have a child in common regardless of whether they were ever married or even living together; or (5) either are, or have been in the past, in a dating relationship. In other words, there has not been a requirement of legal marriage for an offender to be criminally charged with a 209A restraining order.

The exception where an actual legal marriage is a requirement in Massachusetts is the assertion of the marital privilege. The spousal privilege law in Massachusetts states that a spouse cannot be forced by the prosecution to give testimony in a trial or other criminal hearing brought against the other spouse with the exception of prosecution for non-payment of support, child incest, child abuse or neglect of parental responsibilities. Although Windsor requires that, from now on, same-sex married couples be recognized as spouses for the purposes of all federal laws, there are very few federal criminal laws concerning married couples. For example, Windsor’s general penal code makes it a crime to assault, kidnap or murder a member of the immediate family of a United States official, judge or law enforcement officer with the intent to influence or retaliate against that official. The Windsor decision makes this federal offense applicable to same-sex spouses for the first time.

The bottom line is that the landmark Windsor decision will have almost no practical effect on criminal offenses in the commonwealth.
Impact on immigration law

BY MICHAEL D. GREENBERG

In a 5-4 decision authored by Justice Anthony Kennedy, the United States Supreme Court determined that Section 3 of the Defense of Marriage Act violated equal protection guaranteed under the Fifth Amendment of the Constitution. Section 3 prohibited any federal benefits for same-sex spouses and defined marriage, for federal purposes, as between a man and a woman. Section 2 allows defined marriage, for federal purposes, as between a man and a woman. Section 3 prohibits any benefits guaranteed under the Fifth Amendment of the Constitution.

In addition, a spouse would not be accorded derivative asylum benefits or derivative benefits as the spouse of one who is the beneficiary of some other family-based petition.

On July 1, 2013, Janet Napolitano, secretary of the Department of Homeland Security, announced that the department would immediately take steps to implement the decision and John F. Kerry, secretary of the Department of State, also announced that state would implement the decision as it pertained to consular processing. The departments have always recognized the place of performance of the marriage as the law determining validity. What this means is that individuals who were married in a state where same-sex marriages are permitted, e.g., Massachusetts, may immediately file for immediate relative visas for their spouses, even if they live in a state that specifically does not recognize gay marriages performed in other states, e.g. Pennsylvania. However, other federal benefits may not be so clear. Some federal statutes or regulation look the state of residence. Step-parents will also be able to petition for their spouses children under the same rules as heterosexuals.

In addition, persons should be able to file for fiancé visas provided they establish they will marry in a state and or country permitting same-sex marriages. An individual granted admission as a fiancé must marry within 90 days to the person named as fiancé. Since the status of civil unions remains unclear, it would be the safest course at this time to marry in a state permitting same. The burden of proving the bone fides of the relationship still remain in addition issues of support and medical examinations will be the same as for heterosexual marriages.

All other immigration restrictions remain. Unless grandfathered under 245I of the Immigration and Nationalization Act (INA) persons who entered without inspection will not be able to adjust. Any unlawful presence, or criminal activity bar, remains unchanged. Persons presently in proceedings or who have been ordered removed and not left the country, will have to proceed in immigration court.

In addition to the family petitions, persons who were abused in a same-sex marriage will now be eligible to self-petition. People who were denied the right to have an adjudication of a visa petition during immigration proceedings should be able to reopen the case and or remand it if before the Board of Immigration Proceedings for consideration of the marriage.

This is an exciting new era in immigration law, where many of our citizens and their spouses will no longer be treated as a second class. It is exciting to see how fast the affected departments reacted positively to the new circumstances.

Michael D. Greenberg is a Boston attorney focusing his practice on immigration law, and is the author of many articles on the subject. He is the present chair of the MBA’s Immigration Law Section Council.

Impact on juvenile and child welfare law

BY MICHAEL KILKELLY

The invalidation of DOMA will have a primary beneficial effect on the children born to or adopted by a same-sex couple. All of the federal laws that apply to the family will now treat the children of...
same-sex married couples the same as all other children. The U.S. Supreme Court reaffirmed the principle that the equal protection clause does not permit discrimination based on the marital status of the parents of children. Of course, the application of particular state laws and rules in child welfare will have to be litigated in each state.

The other main area where the DOMA decision will have an effect is on adoption. Adoptive parents have all the same rights and obligations as any other legal parent, including biological legal parents. Not only are adopted children eligible for many federal benefits, the federal government also actively supports adoption and assisted reproduction through a variety of laws, policies and spending measures. See, e.g., 42 U.S.C. § 670 (foster care and adoption assistance); Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, H.R. 867 (codified in scattered sections of 42 U.S.C.) (imposing timelines on states for moving children from foster care to adoption); Multistate Placement Act of 1994, Pub. L. No. 103-382, H.R. 6 (codified in scattered sections of 42 U.S.C.) (prohibiting states from delaying or denying adoptive placements on the basis of race, color or national origin.)

Federal benefits extend to children of married and unmarried couples who adopt. The federal tax code promotes adoption and assisted reproduction, including by creating subsidies for adoptive parents of children with special needs, tax credits for adoption-related expenses and exclusions for employer-paid adoption expenses; by allowing the costs of in vitro fertilization to be deducted from income; and by defining an adopted child or a child conceived using assisted reproduction as dependents for purposes of the dependency exemptions. See 26 U.S.C. § 23 (formerly 26 U.S.C. § 36C); 26 U.S.C. §§ 137, 151–152; INTERNAL REV. SERV., PUBLIN. N0. 502: MEDICAL AND DENTAL EXPENSES 8 (2012). The DOMA decision ensures that these adoption benefits will be extended to the children of same-sex couples and their parents.

Michael F. Kilkelly is the chair of the MBA’s Juvenile and Child Welfare section. He is an attorney in private practice in Holden, concentrating in the areas of domestic relations and juvenile delinquency law.

Sources:


The MBA honored members of the profession who have served for 50 years on July 18.

The MBA highlighted the efforts of four volunteers with Volunteer Recognition Awards on July 18. From left to right: Volunteer Recognition Committee Chair Grace Garcia and Volunteer Recognition Award Honorees Thomas J. Barbier, David A. Parke, Jayne B. Tyrrell and Timothy J. Dacey III.

The MBA honors volunteers, 50-year members

The Massachusetts Bar Association celebrated the efforts of its volunteers at its July 18 Volunteer Recognition Dinner, held at Lomardo’s in Randolph. Also recognized at the event were the MBA’s 50-year members.

"Tonight is an opportunity for the MBA to recognize all of you for your volunteer efforts, which allow the MBA to fulfill our vision of "our mission," MBA President Robert L. Holloway Jr. said. “Because of your contributions to our vibrant organization, the Massachusetts society as a whole is enhanced; the public are better served; and access to justice is better preserved for everyone."

The dinner honored the contributions of more than 100 volunteers who donated time to the MBA over the past year by serving on one of the association’s section councils, committees or task forces.

The presentation of four MBA Volunteer Recognition Awards highlighted the work of individuals chosen from a pool of nominations. Grace Garcia, chair of the Volunteer Recognition Committee, presented the honors to the four awardees, which included:

- Timothy J. Dacey III, Goulston & Storrs, Boston: Dacey has served on the MBA’s Committee on Professional Ethics for 29 years and as vice-chair of the committee for 22.
- Dacey was recognized for his efforts in providing careful, informed ethical advice to attorneys who need a quick response.
- David A. Parke, Bulkley, Richardson & Gelasin LLP, Springfield: Parke has served on and enthusiastically served the MBA’s Business Law Section Council for more than a decade, in a number of important roles, most notably as a co-chair of the MBA’s annual In-House Counsel Conference.
- Thomas J. Barbier, Deutsch, Williams, Brooks, DeRensis & Holland PC, Boston: Barbier is an active MBA volunteer. In addition to serving as the MBA’s Law Practice Management Section Council chair, Barbier has planned and spoken at many continuing legal education programs, has volunteered for the Dial-A-Lawyer program and was a mentor for the Tiered Mentoring Program for two years.
- Jayne B. Tyrrell, Massachusetts IOLTA Committee, Boston: A long-standing MBA volunteer, Tyrrell has been involved with the association for more than 23 years and has served on the Housing Committee, Amicus Brief Committee, Lawyers in Transition Committee, Elder Law Committee and more. Tyrrell is dedicated to showcasing lawyers as they do work that supports our system of justice.

In addition to the Volunteer Recognition Awards, the following 50-year honorees received their service plaques from Holloway and MBA President-elect Douglas K. Shell:

- Donald M. Blich; John E. Bradley; William J. Dailey Jr.; Jerome H. Fletcher; Hon. Thayer Freeman-Smith; Francis H. Fox; Hon. Andrea Gelasin; Hon. John M. Greeley; Daniel J. Johndis; Roger R. Lipson; James J. McCusker; David I. Schachtman; Myer R. Singer; David Skeels; and Richard J. Snyder.

The MBA honored members of the profession who have served for 50 years on July 18.

TOPHS BY JEFF TEGBIATH

DOMA Continued from page 15

same-sex married couples the same as all other children. The U.S. Supreme Court reaffirmed the principle that the equal protection clause does not permit dispa- rate treatment of children based on the circumstances of their birth. As the court explained in Weimer v. Aetna Casualty & Surety Co.:

"Imposing disabilities on the illegitimate infant is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. . . . [N]o child is responsible for his birth and penalizing the illegitimate child is an ineffective — as well as an unjust — way of deterring the parent." 406 U.S. 164, 175 (1972).

The recent DOMA decision protects the well-being of children. DOMA de- prives the children of married same-sex couples of “governmental services and benefits desirable, if not necessary, to their physical and emotional well-being and development.” Pederson v. Office of Pers. Musgr., 881 F. Supp. 2d 294, 338 (D. Conn. 2012). All children, whether conceived intentionally or accidentally, through uninhibited assisted biological procreation or through other means, benefit from federal recognition of their parents’ mar- riages and the supports that come with it.

In the child welfare context, all federal laws and rules will now apply equally to all children and all marriages. All parents — whether legal parents, or a child conceived using assisted reproduction through a variety of means, through reproductive technology or a child conceived through unassisted biological procreation — are entitled to right treatment of children based on the marital status of the parents of children. Of course, the application of particular state laws and rules in child welfare will have to be litigated in each state.

The other main area where the DOMA decision will have an effect is on adoption. Adoptive parents have all the same rights and obligations as any other legal parent, including biological legal parents. Not only are adopted children eligible for many federal benefits, the federal government also actively supports adoption and assisted reproduction through a variety of laws, policies and spending measures. See, e.g., 42 U.S.C. § 670 (foster care and adoption assistance); Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, H.R. 867 (codified in scattered sections of 42 U.S.C.) (imposing timelines on states for moving children from foster care to adoption); Multistate Placement Act of 1994, Pub. L. No. 103-382, H.R. 6 (codified in scattered sections of 42 U.S.C.) (prohibiting states from delaying or denying adoptive placements on the basis of race, color or national origin.)

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can get out of it. It’s a very practical and measurable benefit that you can get by join-
ing and being active. Go to the events. And membership is not that expensive. The moral of the story is that the membership concept has been to underscore the benefits of being involved. Not just being a member, but being an active member.”

BEYOND THE BELTWAY MINDSET

During his presidency, Holloway has made an effort to spend time with members from Central and Western Massachusetts, as well as the eastern part of the state, to make sure that issues in the profession, including problems in the court system and advocating for an adequate court budget, are understood by all lawyers across the commonwealth.

“The reality is, most lawyers are focused on how to practice law in a manner that’s going to allow them to make a reasonable living,” he said. “It’s especially true today, because of the downward pressure on fees and changes in a number of areas of traditional practice for solo and smaller firms.”

About 70 percent of the approximately 55,000 actively licensed lawyers in the state practice in firms of five or fewer, making Holloway’s 15-member firm large by comp-
parison. The pressures and issues that small practitioners deal with, he says, are regular people who are buying and selling houses, or need some estate planning done, or have a child who got picked up for operating under the influence — things that affect most typi-
cal middle class families. There are market limits to what lawyers can charge. Twenty-
five to 30 years of economic pressure on lawyers goes counter to the public percep-
tion, which until recently was distorted by the highly publicized entry level starting sal-
aries for new law school graduates going to work for the largest law firms. That’s not so true any more, with big firms cutting back.

“Lawyers are middle-class folks, by and large. And so economic realities create an ongoing challenge for bar associations, in-
cluding the MBA, and that’s why these ini-
tiatives in reference to education, media and public relations, are ongoing efforts, and they have to be ongoing efforts,” Holloway says.

IN IT FOR THE LONG TERM

Change has to be long-term to stick. “It’s not fair to staff and it’s not fair to volunteers to set up unrealistic, unattainable objectives in the early stages,” Holloway said. “Really what you’re doing is you’re trying to change the culture and change the tone. And that’s what we intended. As to whether or not it’s been successful, that’s for others to say.”

Issues of how to improve the operations of the court system are not all that different from issues of how to improve the opera-
tions of the MBA, he says. Is more money needed, or would reallocation of resources be more effective? “To the extent that there are things we’re not doing so well, do those things better. To the extent that we should be doing certain things that we’re not doing at all, we’ve got to get people to do them,” he said. Again, it’s not just the ideas themselves — it’s the implementation and execution.

“It’s especially difficult if things are done in just one-year cycles,” he said. “If there’s one takeaway from this, [it’s that this] was not a one-year deal. This is multi-
year. … The game plan was to put things in place that we hope will have a life be-
yond Bob Holloway’s presence. Because it wasn’t Bob Holloway’s presidency. He hap-
pened to occupy that position for one year, along with five other officers who worked with him and each other to put these initia-
tives together, with the game plan that this group of officers on an ongoing basis and the officers that follow ideally would work to continue to improve upon and refine these objectives, with these being the building blocks. So we’ll see. The ultimate results are down the road.”
Most cases involving non-compete and non-solicitation agreements are resolved at the preliminary injunction phase or settle at the president summarizing their conversation, left, he spoke to A.R.S.’s president about what he left A.R.S. The agreement stated that it remained in force regardless of any change in [Morse’s] duties, responsibilities, post, position or title. Morse and Leibensperger concluded that, although Morse became director of operations in 2011 after being general manager, any change in his responsibilities was not material because “both roles required Morse to be involved in A.R.S.’s disaster restoration projects and to promote A.R.S.’s brand by attending industry seminars and maintaining the company’s ‘industry relationships.’” What is more, although his base salary went down by 4 percent in 2011 and 2012 from what it was in 2010, he remained one of the five highest-compensated employees at A.R.S. Interestingly, Leibensperger discussed in a footnote a Superior Court case from October 2013 that Morse presented to support his argument. See Akibia Inc. v. Hood, C.A. No. 2012-02974F (Suffolk Super. J.). The judge in that case ruled that a non-competition agreement was void because of a material change in the defendant’s employment, even though the agreement stated that the material changes in his employment would not void the agreement. Leibensperger noted that a single justice of the Appeals Court had affirmed Akibia in part because no existing appellate case in Massachusetts had addressed such circumstances. See Akibia Inc. v. Hood, 2012-I-0900 (Mass. App.). (J Sullivan, J. single). The implication is that Leibensperger did not follow Akibia because there was no material change in his case and no controlling appellate authority to support Akibia’s rationale.

**Lessons for employers:** Include a provision in non-competition and non-solicitation agreements stating that the agreement remains in force regardless of any change in the employee’s job title, duties and compensation at the company.

**Non-solicitation clauses:** Leibensperger refused to enforce one non-solicitation clause and modified the second because both were too broad. In particular, both covered a larger geographic territory and lasted for a longer period of time than the non-competition clause, which the court held was reasonable and enforceable. The first clause prohibited Morse, for two years after he left A.R.S., from soliciting or providing products or services competitive with those of A.R.S. to any customer or prospective customer of A.R.S. at the time Morse worked there. Leibensperger refused to enforce this clause for two reasons. First, the non-competition clause of the agreement only applied for one year within 50 miles of any A.R.S. office, and A.R.S. post a surety bond of $500,000 for the payment of costs and damages to Morse if the preliminary injunction were later found to be wrongly issued. Leibensperger rejected out-of-hand Morse’s argument that issuing a preliminary injunction enforcing the agreement would cause Morse harm because he would be unemployed. For the same reason, Leibensperger rejected Morse’s request that A.R.S. post a surety bond of $500,000 for the payment of costs and damages to Morse if the preliminary injunction were later found to be wrongly issued.

**Lessons for employers:** If you are going to claim that a non-competition or non-solicitation clause prevents you from finding employment, do not find employment while the injunction is in place.

**Conclusion**

Leibensperger’s decision shows that employers (and their lawyers) must be careful when drafting non-competition and non-solicitation agreements, and an employee’s post-termination conduct can mean exercising their equitable powers to enforce them.
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