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TOWARDS A CONTEXT-BASED CIVIL RIGHT TO COUNSEL THROUGH “ACCESS TO JUSTICE” INITIATIVES

By Russell Engler

Introduction

The 40th anniversary in 2003 of U.S. Supreme Court’s landmark decision in Gideon v. Wainwright coincided with a revitalization of initiatives to achieve a “civil Gideon” right, that is, a right to counsel in civil cases. The renewed focus on establishing a right to counsel in civil cases arose against two important backdrops. First, recent studies document the increasing incidence of unmet legal needs, leading to enormous numbers of litigants appearing in court in civil cases without counsel. Second, during the past few years, the number of state “access to justice” commissions — formed to develop, coordinate and oversee initiatives to respond to the civil legal needs of low-income people — rapidly expanded.

I. The backdrop: unrepresented litigants, unmet legal needs and access to justice commissions

Despite the complexity of this country’s legal system, enormous numbers of litigants appear in court in civil cases without counsel. Reports from across the country consistently show that 70 to 90 percent of the legal needs of the poor go unaddressed.

II. Articulating the three-pronged strategy

The primary problem that flows from the flood of unrepresented litigants is that they are the exception, rather than the rule. The flood of unrepresented litigants is not that abnormal rather than the flood of unrepresented litigants.

A. Prong 1: roles of the judges, mediators and clerks

The underlying goal of the adversary system is to be fair and just. The ethical rules shaping the roles of the players in that system imply that unrepresented litigants create the smooth operation of the court.

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The judges and mediators play an active role to maintain the system’s impartiality.

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To achieve meaningful access to justice, we must revise our understanding of what it means to be impartial. We can no longer accept the idea that impartiality equals passivity. A system that favors those with lawyers over those without lawyers, without regard to the applicable law and the facts of a case, is an impartial system.

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To achieve meaningful access to justice, we should revise our notions of the proper role of judges and require the judges to assist unrepresented litigants as necessary to the system. Rather, it is that litigants routinely forfeit rights due to the absence of counsel. A system of justice in which large numbers of people forfeit rights because they are unrepresented rather than because the facts of the cases or the governing laws dictate their cases’ outcomes is unacceptable. Access to justice initiatives seeking to assist unrepresented litigants must target the forfeiture of rights due to the absence of counsel.
ensure that all relevant information is before the court and counsel. Counsel cannot forfeit rights due to the absence of counsel.6

We should similarly revise the rules of our court and mediation systems to ensure that all relevant information is before the court and counsel. Counsel cannot forfeit rights due to the absence of counsel.6

Concerns about expanding the roles of non-judicial personnel, including court-con-

etered mediators and clerks. In a world full of unrepresented litigants, the roles of medi-

ators and clerks should permit and even require them to assist unrepresented litig-

ants to avoid the unintentional waiver of rights that routinely occurs. Developing guidelines and conducting training sessions for mediators and clerks, as well as judges, will assist them in their active roles.

Another key role in the system is that of the lawyer pitted against the unrepresented litigants. Judges’ objections include a belief that mediating the dispute is a better way to work things out. The legal advice element of representation is the only place in the adversary system where lawyers are likely to be needed, urging the provision of:

- legal representation for all unrepresented litigants
- pro se clinics
- advice-only clinics and court-annexed limited legal service programs

These programs can help address the fairness concerns that lead to the provision of counsel for unrepresented litigants. In the report of the Maryland Law Access Task Force, one of the main aims was to establish a right to counsel in civil cases.

2. Reassessing recent cases

Reviewing and reassessing recent cases is instructive in light of this discussion on start-
ing points. Frase v. Barnhart, a custody case, reached the Maryland Court of Appeals on, among other issues, a civil right to counsel.18 Although three justices produced a powerful concurring opinion supporting such a claim, the majority declined to reach the issue.19

The lower court imposed impermissible conditions on Frase’s right to custody of her son in a contested proceeding in which she was not represented, while the Barnharts, care-
takers of her son, had counsel. Not only was Frase unable to represent herself effectively, but the Barnharts’ lawyer successfully portrayed Frase as a homeless alcohol and drug abuser.20

Factors beyond the legal claims suggest that certain custody proceedings may be a stronger place to start to advocate a civil right to counsel than eviction proceedings.21

In those instances, we believe that the provision of counsel for all unrepresented litigants is essential. In those cases involving domestic violence, the resulting power imbalance, increases the risk of an erroneous outcome. Factors beyond the legal claims suggest that certain custody proceedings may be a stronger place to start to advocate a civil right to counsel than eviction proceedings.21

21. Frase v. Barnhart

Advocates have targeted these areas due to the compelling nature of the underlying rights at stake. Prospects for successfully establishing a right to counsel in a variety of cases are better when the potential parties are in conflict, but targeting is subsets of cases within these broad categories. A first narrowing of the categories should involve cases that pit an unrepresented party against a represented one. Courts are more willing to help if they are doing so equally to both sides, and cases in which both sides are without counsel do not presum-

ably favor one side over the other, absent the data to the contrary. By contrast, cases pitting unrepresented litigants against each other are likely to be more sharply imbalanced. In such cases, one side has an unfair advantage and the other is at a disadvantage. The American Bar Association’s Commission on Immigration urged the bar association to support the “due process right to counsel for all persons in removal proceedings.”22

Careful evaluation of potential case out-
comes may suggest different starting points. Evaluation data may show that housing cases differ from family law cases in articulation of power imbalances that affect outcomes. In the housing context, providing counsel to the ten-

ant is a crucial factor affecting case outcomes and preventing eviction.23 Yet studies also show that landlords typically prevail against tenants who are unrepresented, often without a court hearing.24

The results of those studies suggest that unrepresented parties are more likely to be needed, urging the provision of:

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Reviews of those programs revealed that they were inadequate to protect the rights of pro se litigants in contested cases, particularly where the other side had repre-

sentation.25 Only when Frase obtained a representation at the appellate court level to pursue
A range of claims, including the right to appointed counsel, did the court overturn the custody decision—a dynamic wholly familiar to advocates for the poor. Ms. Frase has demonstrated that narrowing the requested relief in the initial test case may be necessary for the civil rights-to-counsel claim to command a majority. In framing the problem, the advocates for Faize hammered on the fundamental unfairness of casesining unrepresented litigants against represented parties.30 However, in seeking the solution, advocates sought a broader articulation of the right to counsel than that subset of civil cases. The appellant’s brief closed with:

Discussion and debate about the costs, and the details, of a suitably expanded Maryland program of legal services to the poor are subjects for another day in another place. They should be conducted, however, against a judicial finding that a right to counsel inheres in the Maryland constitution. As Ms. Frase has demonstrated, she is entitled to such a finding here.31

The amici ended by encouraging the court to “consider the inadequacy of services in a broader context.”32 They pointed out to the court that the state must require the state to afford pro se litigants like Faize full legal representation in order to provide the relief in relation to that evidence.

IV. Responses to objections, developing allies and neutralizing opponents and targeting self-interest

Framing the right to counsel in civil cases as part of a more comprehensive strategy of reducing the forfeiture of rights by those without counsel helps anticipate objections to the right to counsel by neutralizing allies, and mobilizing allies and neutralizing opponents and targeting self-interest.

A. Responding to objections

1. Drawing the line

One concern is where to draw the line. That no current civil Gideon proposal calls for appointed counsel for all parties in every civil case underscores the reality that the question is not whether, but where, the line will be drawn. Skeptics, let alone cautious supporters, will seek reassurances that the right is not a “free-for-all.” In Wisconsin; they asked the Wisconsin Supreme Court to “determine whether the Wisconsin Constitution accords the right to counsel in civil cases.”33

A civil right to counsel does not mean that a lawyer must be appointed to represent the poor in which poor persons believe themselves to be aggrieved. Where the rights of key court personnel stem the forfeiture of rights, that step alone is sufficient. Where that step falls short, if legal assistance programs either separately or in conjunction with the revised rules of court personnel and changes in the procedural rules—prevent the improper forfeiture of rights, there still may be no need for appointed counsel. But where those steps cannot prevent substantial injustice, a civil right to counsel must be recognized.

Drawing the line there might raise an objection from proponents of a broad-based civil right to counsel, proponents who fear that the line that we are drawing may underbot the broader claim rather than be the first step toward achieving the broader claim. Yet, in making such a choice, defining hard choices in the civil right-to-counsel context is not new. The earliest articles on this subject struggled with this problem.34 Even in the criminal context, defendants are not entitled to appointed counsel in all cases.

2. Philosophical objections to revising the roles of court personnel

Incorporating a civil right to counsel as part of a more comprehensive strategy neutralizes a second objection: that judges, mediators and clerks should not assist unrepresented litigants more than they currently do. I have described above the justifications for expanding their roles. The extent to which the rules expand directly affects the scope of a civil right to counsel.

With judges, for example, wherever we draw the line, judges will not be permitted to take certain actions. Where the prohibited actions are necessary to prevent the forfeiture of rights others must act. Context matters, and the rules that most certainly do not prevent the forfeiture of rights by unrepresented litigants are sufficient, the more active role of judges may be unnecessary. The key is not that judges must take certain actions to take a more active role, but that nonjudicial court personnel are permitted to play an expansive role, or if evaluation tools demonstrate that assistance properly might be provided, then unrepresented litigants are sufficient, the more active role of judges may be unnecessary. The key is not that judges must take certain actions to take a more active role, but that nonjudicial court personnel are permitted to play an expansive role, or if evaluation tools demonstrate that assistance properly might be provided, then unrepresented litigants are sufficient.

3. Developing civil right to counsel as part of a larger strategy

For those who are interested in cost concerns, as in past challenges, and, as the risk of error in the first place. The extent to which many judges, mediators, and clerks should not assist unrepre- sented litigants.

Identifying allies, and neutralizing opponents and targeting self-interest.

B. Identifying and mobilizing allies

The tailored relief should also mesh more closely with the evidence in the record. The brief that the amici curiae filed in Faize referred to the inadequacy of the limited assistance programs in protecting the rights of certain pro se litigants.35 Where existing data reveal who the pro se litigants are that are likely to suffer harm absent counsel, articulating the relief in relation to that evidence would strengthen the case. If the data do not demonstrate the magnitude of the number of categories of unrepresented litigants, the development of such data to strengthen the record should precede the next test case. Although narrowing the request or the relief will the court at the outset may be distressing to counsel, that step may be necessary to permit the courts that the claim of a right to counsel is no more expansive than necessary to prevent the forfeiture of rights.36

In Massachusetts, the court has recognized the right to counsel as an inherent right that inheres in the Maryland constitution. As Ms. Frase has demonstrated, she is entitled to such a finding here.

Kelly v. Warpinski

A coherent “access to justice” move- ment with so many unrepresented litigants will have to provide fair outcomes for those with- out counsel. This prong also should increase the likelihood that these players pressure the appointment of counsel. To prevent the unrepresented poor from forfeiting their right to a fair and meaningful hearing, the court will require court personnel to allocate more resources per case. Opposing lawyers cur- rently face no repercussions for unethical behavior such as not taking depositions with unrepresented litigants. Lawyers, who understand that overcharging has ramifications in terms of discipline repudiation and speed in the handling of their cases, will have an easier time sanctioning business if the other side has representation.

V. Nonnegotiable bottom line

I do not intend to suggest here that a strat- egy focused on a context-based right to counsel will yield immediate success. Rather, the strategy is designed to respond to the flood of unrepresented litigants in the courts and the advent of “access to justice” commis- sions. A coherent “access to justice” move- ment articulates an overarching goal of
obtaining justice for all, including those with- out lawyers in civil cases. An expanded civil right to counsel is one component of a coor-
dinated range of initiatives to achieve access to justice.

The nonnegotiable bottom line must be that those without counsel may not forfeit rights due to the absence of counsel. Narrow-
ing the scope of the right to counsel and col-
clecting data to demonstrate the risk of erro-
nous outcomes in these cases will hasten the gathering momentum for an expanded right to counsel. Cases pitting unrepresented liti-
gants against represented ones present the greatest challenge to those involved. They also are a potential source of embarrassment to the legal system because they expose the difficul-
ties in achieving fairness. A disciplined focus on these cases will shift the self interest of the players wended to the status quo and move them toward a consensus for change. Where the articulated right-to-counsel claim is the least intrusive way to solve a problem that will not go away, the call for a civil Gideon might finally be answered.

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End notes
5. See, e.g., Russell G. Pearce, Making Justice Inequal-
6. Engle, supra note 2, at 201-203.
9. See, e.g., also Nancy Kaufman, Can We Talk: Communicating with Unrepresented Litigants, www.msa.ulea.co.uk/debbo/talk.htm (last visited May 15, 2006) (guidance published by the Massachusetts Office of Bar Counsel, charged with prosecuting ethical misconduct by attor-
ney).
11. See Goldschmidt et al., supra note 6, at 47- 48.
12. Compare id at 52-63 (discussing judicial atti-
quidity and strategies for handling cases involv-
ing at least one pro se litigant) with Cynthia Gress, Reaching Out on Overreaching: Judicial Ethics and Self-Represented Liti-
gants 53-57 (2005) (listing “Proposed Best Prac-
tices for Cases Involving Self-Represented Litigants”).
13. See Engle, supra note 6 at 1998-2007 (discus-
sing programs that aim unrepresented litiga-

tants inside and outside the courthouse).
ited Legal Services Programs”).
15. See, e.g., Paula Hartmann-Aget and Nicole Mem, Research on Self-Represented Litigation Preliminary Results and Methodological Consider-
tations, 28 JUDICIAL SYSTEM JOURNAL 163 (2003); www.findarticles.com/p/articles/mi_q4044/is_2000101a/ai_91983777-footsnote: J ohn ROMAN ET AL, HURD'S INSTITUTE, ESTIMATING COSTS AND BENEFITS OF PRO SE LITIGANTS (2000). Carroll Seron et al., The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Rand-
17. Several counties have created a “pro se process” to allow access to specific categories of cases, see, e.g., Monroe County, N.Y., http://abanet.org for the guidance published by the American Bar Association).
DETERMINING SUPERVISORY STATUS

By Michael R. Brown and Andrew L. Eisenberg

In 2001, the Supreme Court in Kentucky River decision, 511 U.S. 571 (1994), in which the Court held that nurses at a private nursing home facility who “directed” nurses’ aides and other nonprofessionals in the provision of patient care were supervisors under the act. In that case, however, the board majority defined the term “directed” as follows: “If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both responsible and independent.” In particular, the board majority specified that the person directing the work must be held accountable if the directives are not properly carried out. As the board stated, “for direction to be ‘responsible,’” the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.”

Independent judgment

With respect to “independent judgment,” the board in Oakwood Healthcare found that “independent judgment” regarding supervisory authority is different from “professional” judgment. To establish that an employee exercises “independent judgment,” the judgment exercised must not be controlled by another authority. The determination whether a punitive supervisor exercises independent judgment depends on the “degree” of discretion exercised by the employer rather than the “kind of discretion exercised—whether professional, technical, or otherwise.” Thus, where an employee’s work is controlled or directed by the employee’s “rotating” charge nurse, the board ultimately held in Oakwood Healthcare that the employer’s permanent charge nurses (excluding emergency room charge nurses) were supervisors based on their “delegated authority to assign employees using independent judgment.” The employer demonstrated that charge nurses made staffing assignments “tailored to patient conditions and needs and particular nursing skills sets” and made patient assignments based upon their own assessment of the probable amount of nursing time each patient would require during the shift.

Part-time supervisors

The board also examined the supervisory status of the employer’s “rotating” charge nurses.

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Background regarding the supervisory status of professional employees

Section 2(11) of the act defines a “supervisor” as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in conjunction with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11). Thus, under Section 2(11), if an individual: (1) has any one of the 12 specified authorities; (2) uses “independent judgment” in the exercise of any of those authorities; and (3) exercises this authority in the “interest of the employer,” that individual is considered a “supervisor” for representation purposes under the act. At all times, the burden rests with the party asserting supervisory status to establish these three requirements.

When interpreting Section 2(11) of the act, the board previously relied in large part on the Supreme Court’s decision in NLRC v. Health Care and Retirement Corp., 348 N.L.R.B. No. 37 (Sept. 29, 2006), and Croft Metals, Inc. v. N.L.R.B. No. 38 (Sept. 29, 2006), the board re-evaluated its position with respect to the supervisory status of employees as a result of the funding by the United States Supreme Court in NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001) that the board had misapplied its supervisory test with respect to professional employees.

In 2006, the National Labor Relations Board issued new guidelines for determining the supervisory status of employees under the National Labor Relations Act. In Oakwood Healthcare, Inc., 348 N.L.R.B. No. 37 (Sept. 29, 2006), Golden State Healthcare Center, 348 N.L.R.B. No. 39 (Sept. 29, 2006), and Croft Metals, Inc., 348 N.L.R.B. No. 38 (Sept. 29, 2006), the board clarified its position with respect to the supervisory status of such employees. As a result of the findings by the United States Supreme Court, the board clarified that the term “supervisor” as defined by the National Labor Relations Board as used in Section 2(11) of the act, the board previously relied in large part on the Supreme Court’s decision in NLRC v. Health Care and Retirement Corp., 348 N.L.R.B. No. 37 (Sept. 29, 2006), and Croft Metals, Inc. v. N.L.R.B. No. 38 (Sept. 29, 2006), the board re-evaluated its position with respect to the supervisory status of employees as a result of the funding by the United States Supreme Court in NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001) that the board had misapplied its supervisory test with respect to professional employees.

Over the years, the board has struggled with adequately defining the terms “assign,” “responsibly to direct,” and “independent judgment.” As those terms are used in Section 2(11) and applying them in a consistent fashion. As a result of its repeated failures to articulate a sustainable position, as noted in the Health Care and Retirement Corp. and Kentucky River cases, the board, in an attempt to secure some finality, has utilized “independent judgment” in determining whether an individual is a supervisor under the act, requested an amicus brief from interested parties in July 2003. The parties were asked to address 10 particular supervisory questions raised by the board. Three years later, three new decisions were issued by the board’s attempt to establish, with some finality, an approach to resolving issues regarding supervisory status that will withstand judicial scrutiny.

The board provides further guidance regarding the supervisory status of employees

In Oakwood Healthcare, the board (Battista, Schaumber and Kirsanow with Liebman and Walsh dissenting) defined the term “assign” as: “the act of designating an employee to a place (such as a location, department or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” Moreover, “assign” refers to the “designation of significant overall duties to an employee, not... the ad hoc instruction that the employer performs in a discrete task.” For example, the board distinguished between “assigning,” a nurse the responsibility for caring for a particular patient or group of patients, as opposed to merely instructing, such as giving a sedative to a particular patient. The board defined the term “responsibly direct” as: “If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both responsible and independent.” In particular, the board majority specified that the person directing the work must be held accountable if the directives are not properly carried out. As the board stated, “for direction to be ‘responsible,’” the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.”

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With respect to “independent judgment,” the board in Oakwood Healthcare found that “independent judgment” regarding supervisory authority is different from “professional” judgment. To establish that an employee exercises “independent judgment,” the judgment exercised must not be controlled by another authority. The determination whether a punitive supervisor exercises independent judgment depends on the “degree” of discretion exercised by the employer rather than the “kind of discretion exercised—whether professional, technical, or otherwise.” Thus, where an employee’s work is controlled or directed by the employee’s “rotating” charge nurse, the board ultimately held in Oakwood Healthcare that the employer’s permanent charge nurses (excluding emergency room charge nurses) were supervisors based on their “delegated authority to assign employees using independent judgment.” The employer demonstrated that charge nurses made staffing assignments “tailored to patient conditions and needs and particular nursing skills sets” and made patient assignments based upon their own assessment of the probable amount of nursing time each patient would require during the shift. Part-time supervisors

The board also examined the supervisory status of the employer’s “rotating” charge nurse.
nurses in Oakwood Healthcare. These were registered nurses who were not assigned permanently as charge nurses but rather took turns filling in or “rotating” into that position. Their rotation schedule, worked out among themselves and on an ad-hoc basis, depended upon the needs of the unit and their particular work shift. The board held that putative supervisors must spend a “regular and substantial” part of their workday performing supervisory functions. The board noted that “regular” means “according to a pattern or schedule, as opposed to sporadic substitution.” Although not setting a specific standard for determining what constitutes “substantial,” the board noted that it has found supervisory status where putative supervisors spend only 10 to 15 percent of their work time performing supervisory functions. The board determined that the employer’s rotating charge nurses were not supervisors. In Croft Metals Inc., 348 N.L.R.B. No. 38 (Sept. 29, 2006), the same board panel found that lead persons at a manufacturing plant were not supervisors because the employer failed to establish that the lead persons “assigned” work or exercised “independent judgment” when performing their purported supervisory functions. Here, the lead persons worked alongside their regular line or crew members and performed the same task or job on the line or in their department every day. The board found that the lead persons “responsibly directed” their line or crew members, and that lead persons had been disciplined by the employer if their crew failed “to meet production goals or because of other shortcomings of their crews.” The record, however, reflected that the lead persons’ actions were largely governed by the employer’s policies, that the lead persons exercised little or no discretion and that any judgment they exercised was merely routine in nature.

Implications of the board’s decisions Unions’ reactions to the decisions Unions have been quick to decry the board’s decisions. Mary Kay Henry, executive vice president of the Service Employees’ International Union, perhaps today’s fastest-growing union in the country, stated that “the Bush administration’s rulings are bad for nurses and their families, bad for patients, and coming at a time when we are already struggling to attract nurses back to the bedside to provide the quality of care our patients deserve.” Unions have several options to try to mitigate the impact of the board’s decisions. For instance, they can attempt to negotiate collective bargaining agreements that will prevent an employer from assigning duties to an employee that would support a finding of supervisory status. They can seek to broaden contractual arbitration provisions if necessary in order to have issues regarding supervisory status resolved by arbitration rather than board proceedings. They can attempt to make greater use of voluntary recognition agreements in order to avoid NLRB review of supervisory status issues. Finally, should these options fail, they can seek legislative relief.

Next steps for employers The board’s decisions provide helpful guidance to employers in determining whether employees such as charge nurses or lead persons qualify as statutory supervisors under the act since the board majority has in many cases determined that charge nurses did not “responsibly direct” their regular line or crew members and thereby failed “to meet production goals or because of other shortcomings of their crews.” The record, however, reflected that the lead persons’ actions were largely governed by the employer’s policies, that the lead persons exercised little or no discretion and that any judgment they exercised was merely routine in nature.

Civil litigation and surveillance: Practical considerations for civil litigators

By Joseph M. Desmond and David View

Introduction

Video surveillance of allegedly injured plaintiffs is often the most persuasive evidence in a personal injury trial, and in some cases may determine the outcome of a case. While every picture is worth 1,000 words, good video surveillance often says the four words that defense lawyers are trained not to say to a jury: “The plaintiff is lying.” The importance of the role of video surveillance in impeaching the plaintiff was best described by the Eastern District of Pennsylvania in Snead v. American Export-Isbrandtsen Lines, Inc.,1 in the following passage:

The main purpose for secret motion pictures of a plaintiff is to impeach his credibility. Films taken without the knowledge of the subject often have a dramatic impact in court. One who has described in elaborate detail his disabilities, their extent and duration, and the limitations they impose may be shown by the camera to be a fraud. The possibility that such pictures exist will often cause the most blatant liar to consider carefully the testimony he plans to give under oath.2 Video surveillance is not only an effective tool in cross-examining a plaintiff, but in many cases it is also substantive evidence that demonstrates the plaintiff’s physical abilities. Such evidence may be used, at a minimum, to demonstrate that the plaintiff has a residual earning capacity that must be considered in light of a plaintiff’s common law duty to mitigate his damages. When surveillance can be used as substantive evidence, and not merely for impeachment purposes, counsel should be cognizant of the duty to disclose the evidence to avoid its exclusion at trial. Notwithstanding the importance of surveillance to civil litigants, there is little guidance in the rules of civil procedure or in Massachusetts case law that is instructive on the permissible scope of surveillance or the obligations of counsel in the disclosure and use of video surveillance at trial. This article examines the substantive limits on the use of surveillance and the additional procedural considerations that must be weighed during the course of the litigation when surveillance is involved.

Permissible scope of surveillance investigations

Investigations and surveillance efforts are constrained primarily by state and federal laws that provide private causes of action for invasion of privacy. There appears to be little or no authority in Massachusetts that would permit the exclusion in a civil case of surveillance evidence obtained in contravention of a person’s right to privacy. In a criminal context, law enforcement surveillance is constricted by the Fourth Amendment, which protects citizens from unlawful searches and seizures by the government and operates to exclude from trial any illegally obtained evidence. The Fourth Amendment only applies to govern-
ment actors, however, and does not apply in subsequent suits alleging invasion of privacy based on questionable surveillance tactics used in a prior personal injury suit.

State privacy law

The state privacy law, G. L. c. 214, § 1B, provides:

A person shall have a right against unreasonable, substantial or serious interference with his privacy. The Superior Court shall have jurisdiction to hear and to decide such actions and to enjoin such interference and to award damages.

The Superior Court decision in DiGirono- mas v. D.P. Anderson & Associates, Inc., illustrates the distinction between unenhanced vision and enhanced vision in determining whether surveillance infringes upon a subject’s right to privacy.

1. Where the investigator looks through the subject’s window into her apartment with the naked eye when she walks out onto a balcony;
2. Where the investigator looks at the subject with the naked eye when she walks out onto a balcony;
3. Where the investigator photographs, videotapes or looks at the subject with some degree of enhanced vision, such as a telescopic lens, when she walks out onto a balcony; and
4. Where the investigator photographs, videotapes or looks at the subject with some degree of enhanced vision while she remains inside her home.

After borrowing the logic from the crimi- nal law, the court concluded that the plaintiff had a reasonable expectation of privacy in her home, located at 124, § 1B when she was secretly videotaped. In reaching this conclusion, the court first noted that generally speaking, business premises invite lesser privacy expectations than do residences.

In Nelson, applying the same reasonable expectation of privacy test that was applied in DiGirono, the court determined that the plaintiff had no reasonable expectation of privacy in the area of her home where she was secretly videotaped. In the particular case, the court noted that the plaintiff had no reasonable expectation of privacy in an “open” workplace. For example, a restaurant or department store where a subject was employed would clearly be deemed “open” and “public,” as members of the public are free to enter such businesses at their will.

Audio recording

An additional statute that counsel must be cognizant of prior to commencing surveillance of a subject in civil litigation is G. L. c. 227, § 99, entitled “Eavesdropping, Wire Tapping, and other Interception of Communications.” This statute unambiguously prohibits the recording of another’s conversation without the consent of the person being recorded and imposes criminal punishments for violations.

In addition to potential crim- inal liability, the statute also provides a civil cause of action for any person whose oral communications were intercepted, used or disclosed against any person that intercepts, discloses or uses an intercepted oral communica- tion. The statute specifically allows punitive damages, as well as an award of attorneys’ fees, for violations. Under the statute, there is no requirement that the recording be made willfully to support a damages claim, but not in the proscription limited to areas where the subject has a reasonable expectation of pri- vacy.

Effect of prohibition on ex parte communications on surveillance

If the subject is in the workplace, the first question is whether surveillance is the need to remain compliant with the ethical rules relative to ex parte communications. In most cases, the need for surveillance does not arise until after a claim has been asserted or a suit has commenced. In either situation, the client will likely be represented by counsel, thus inhibiting opposing counsel’s ability, under the ethical rules, to communicate with the represented party. Counsel’s failure to comply with the ethical prohibitions in this regard may result in evidentiary sanctions,
such as the exclusion of any evidence obtained from the surveillance. In certain circumstances in the insurance context, the use of surveillance involves an ethical violation committed in the context of evidentiary sanctions resulting from Massachusetts precedent involving the imposition of potential professional discipline.32 Counsel utilizing surveillance must also be aware that the materials withheld are “impeachment” evidence. Courts have imposed this requirement in response to discovery motions seeking to flesh out the basis for the claim of privilege.

Discovery and pretrial disclosure of surveillance

There is no definitive authority in Massa- chusetts as to whether surveillance should be disclosed prior to trial, and if so, when the disclosure must be made. Several consider- ations must be taken into account in determin- ing whether and when disclosure must be made. It is clear that surveillance of personal injury plaintiffs falls within the privilege of the work product identified under Mass. R. Civ. P. 26(b)(3). Both the federal rules and the Massachusetts rules of proce- dure protect against the disclosure of “documents and tangible things” that are prepared in anticipation of litigation or for trial by the opposing party. The work product protection is limited to “documents and tangible things” and does not prohibit the discovery of underlying facts. Thus, as the District Court for the District of Massachusetts has recognized, observations of a defendant’s investiga- tors, as well as relevant information with respect to the investigation, are proper subjects of discovery.34

The work product privilege can be over- come by showing that the party seeking the discovery has a substantial need of the materials in the preparation of that party’s case, and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.35 The federal rules require that a party seeking to withhold materials pursuant to the work product doctrine file fully identify the materials withheld.36 The purpose of the disclosure requirement under the federal rules is to assure that the opposing party is afforded the substantial equivalent of the work product privilege under the Massachusetts rules and the photographs.50 Plaintiffs also argue that the surveillance tapes “may be used to impeach the effectiveness of his testimony by bringing forth evidence which explains why the jury should not put faith in his testimony,” while substantive evidence is “that which is offered to establish the truth of a matter to be deter- mined by the trier of fact.” The Chiasson court noted that films that tend to show a plaintiff’s physical condition are highly rele- vant and may in fact establish the most important underlying facts.49 Accord- ingly, the substantive evidence could not be withheld as “impeachment” evidence. Courts in Massachusetts have also held that disclosure of surveillance tapes in some cases in which the videotape is proffered solely for impeachment purposes.

Timing of disclosure

Defense lawyers may understandably seek to limit the disclosure of surveillance to the time of trial in an attempt to maximize the effect on cross-examination by impeaching a plaintiff with the evidence disclosed.49 However, the amendments to Rule 26(a) require “a full set of the case without waiting for a discovery request.” While the Massachusetts rules do not require the disclosure of the “substantial equiv- alent” of certain categories of answers and responses of the federal rules, the Massachusetts rules require parties to supplement responses with respect to any question directly addressed to the “identity and location of per- sons having knowledge of discoverable mat- ter” in a “seasonal” fashion.45 These disclo- sure requirements are subject to the claims of privilege noted above.

Both the state and federal rules have addi- tional requirements that should be consid- ered at the point of time the case is set for trial. The federal rules require parties to file a disclosure solely for 30 days in advance of trial, identifying each witness whom the party “may call” other than those witnesses used “solely for impeachment.”46 The Massachu- setts Superior Court Standing Order requires parties to list the names and addresses of each trial witness, other than rebuttal witnesses, in the pre-trial memorandum that is submitted to the court at the final pre-trial conference. “Rebuttal witnesses” are narrowly defined as those witnesses who have not been used as original trial witnesses until the plaintiff’s testimony was memorial- ized in deposition. Further, the court ordered the disclosure that “the plaintiff should take place as close to the time of trial as possible, but before the final pre-trial conference.”

Conclusion

Practitioners should be familiar with the myriad potential pitfalls in connection with the use of surveillance. While surveillance can certainly be a powerful tool in the defense of personal injury actions, caution must be taken in order to ensure compliance with the applicable rules and statutes. Such caution is necessary in order to avoid the risk of exclusion of favorable evidence, as well as the very real and other potentially adverse consequences dis- cussed in this article.

End notes
2. id. at 150.
5. id. at 1-2 n.2.
6. The statute provides that “[a] person shall have a reasonable and praiseworthy, substantial or serious interest in his privacy” G. L. c. 21A, § 1B. Although the language appears to promote the interference that is “unreasonable or substantial or serious, the Supreme Judicial Court has made it clear that the plaintiff must show that the intrusion is “serious, important, and either substantial or serious.” DiGiono v. 10 Mass. L. Rep. at *9; Soissons v. Morris...
See, e.g., Nelson v. GMC, 13 F. Supp. 2d 131 (2d Cir. 1994) (involving visual surveillance conducted into activities of one apartment through telescope located in another apartment).

14. Id. at 343.

15. See Commonwealth v. Hyde, 434 Mass. 594, 598-599 (2001). In Hyde, the Supreme Judicial Court discussed the strict nature of the statute and the broad limitations on its application.

16. Id. at the Massachusetts Casebook of Statutes is much stricter than its counterpart in other states or the federal equivalent which focus upon the speaker's expectation of privacy. Criminal law cases decided under the statute have stressed that an individual may only make an audio recording of someone's speech with their explicit or implicit consent. See e.g., 602-604, Commonwealth v. Sakore, 370 Mass. 502, 505-507 (1976). The Hyde Court explicitly concluded that secret communications are prohibited by the statute and are not limited to situations where an individual has a reasonable expectation of privacy. Hyde, Mass. at 601, citing Jackson, 370 Mass. at 506. It is evident from the court's strict reading of the statute that an audio surveillance of someone would require the other party's consent before such recording may take place without regard to whether the recording took place in public. Hyde, 434 Mass. at 155.


18. Rule 6.2 of the Massachusetts Rules of Professional Conduct states that: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." See also Maldonado v. GMC, 13 F. Supp. 2d 1192, 1194-1195 (D. Ky. 1998) (findling violation of the Kansas version of Rule 42).

19. Id. the court noted that although there is no allegation or evidence that plaintiff's counsel directly contacted any GM employee, Rule 8.4(a) of the Model Rules of Professional Conduct prohibited a lawyer from attempting to violate the rules of professional conduct through the acts of another. Id. Thus, since plaintiff's counsel was barred under Rule 4-2 by communicating with mixing the content of these articles and therefore is not discussed.

20. Id. at 344.

21. Id. at 344, quoting Hyde v. Attorney, 110 F.3d 187 (1st Cir. 1997).

22. Id. at 344, quoting Hyde v. Attorney, 110 F.3d at 187.

23. Id. at 344, quoting Hyde v. Advertising, 110 F.3d at 183.

24. Rule 8.4(c) of the Massachusetts Rules of Professional Conduct states:

It is professional misconduct for a lawyer to:

(a) attempt or violate to attempt the Rules of Professional Conduct, knowingly assist or induce another to do so, or do as through the acts of another.

25. 347 F.3d 655 (5th Cir. 2003).

26. Id. at 698-699. The court also found a violation of South Dakota's ethical Rule 8.4(c), which prohibited "conduct involving dishonesty, fraud, deceit or misrepresentation."

27. Id. at 698.


29. G. L. c. 175A, § 2. The definition of insurance includes any: Any person who regularly engages, in whole or in part, in the practice of assembling or collecting information about natural persons for the primary purpose of providing the information to an insurance institution or insurance representative for insurance transactions.

30. G. L. c. 175A, § 3.

31. Id. The statute provides in full:

No insurance institution, insurance representative, or insurance-support organization shall use or authorize the use of any device to obtain information in connection with an insurance transaction, provided, however, that a person may use a computer or the like to obtain information directly or indirectly from any person, provided that the information obtained is not for the purpose of investigating a claim that has been made in connection with a claim.

32. Rule 8.4(a) of the Model Rules of Professional Conduct states:

It is professional misconduct for a lawyer to:

(a) attempt or violate to attempt the Rules of Professional Conduct, knowingly assist or induce another to do so, or do as through the acts of another.

33. 49-50 (R.I. 1989); Diodrand v. Perrelli, 390 So.2d 704, 707-708 (Fla. 1980); Sonder v. Midower Corp., Civil Action No. 96-9005-5AP (Mem. and Order Mar. 12, 1997). It is sometimes argued that the content of a surveillance video is privileged as trial preparation materials and therefore excluded from discovery under Fed. R. Civ. P. 26(b)(3). This privilege, however, has its exceptions. Rule 26(b)(3) allows discovery where a party can show that there is a “substantial need” for the material and the party is unable, without undue hardship, to obtain the “substantial equivalent of the materials” by other means. Most courts in deciding this issue have determined that surveillance videos are discoverable because of their nature and the fact that a party would not be able to obtain equivalent materials, since the surveillance video itself was taken at a particular time and place that can never be replicated.
**The Ahlborn Case and Its Implications for Medicaid Recoveries in Massachusetts**


By Charlotte E. Glinka, Esq. and David W. White-Lief, Esq.

In what may cautiously be considered a landmark victory for injured plaintiffs, a unanimous United States Supreme Court ruled on May 1, 2006, that any Medicaid claim for reimbursement from a personal injury settlement is limited to that portion of the settlement allocated for past medical expenses. *Arkansas Department of Health and Human Services, et al. v. Ahlborn, 126 S. Ct. 1752 (2006).* Before this decision, the state courts had been split on whether Medicaid could assert a lien against the entirety of any third party recovery, regardless of the type of claim or the damages alleged. With *Ahlborn,* the Supreme Court has definitively ruled on this issue, lending clarification to a previously murky issue. While we should be heartened by the Court's decision in favor of injury victims, it would be prudent to proceed carefully when applying the *Ahlborn* ruling to future settlements here in Massachusetts.

### The Case

Heidi Ahlborn was a 19-year-old college student in Arkansas who suffered severe brain damage and other serious injuries in a car accident in 1996. Because she did not have assets sufficient to cover her medical costs, she applied for and received medical assistance benefits from the state’s Medicaid program through the Arkansas Department of Human Services (ADHS). The cost of her medical expenses under the Medicaid program totaled about $215,000.00. Ahlborn subsequently filed a personal injury action in state court to recover for her injuries and other damages arising from the motor vehicle accident, including her permanent physical injuries and impairments, pain and suffering, mental anguish, past and future medical costs, and past and future lost earnings.

Medicaid asserted a right to recover the amounts it had expended for her medical expenses from any subsequent recovery. Heidi Ahlborn might receive in the tort action, and periodically notified Ahlborn’s attorney of its claim. Arkansas state law required that before reaching any settlement, Medicaid was to be given “notice and a reasonable opportunity to establish its interest” in the expected proceeds. State law also mandated that as a condition to receiving Medicaid benefits, the individual was required to assign his or her right to recover the full amount of those expenses from any responsible third party. Although not named as a party in the original suit, Arkansas’ Medicaid department subsequently intervened in the lawsuit with respect to its lien.

In 2002, Ahlborn settled her lawsuit against the tortfeasors for the sum of $35,581. Ahlborn subsequently argued, however, that Ahlborn’s settlement was, in effect, the property of the state to the extent of its lien. The Supreme Court then unanimously affirmed the judgment of the 8th Circuit Court of Appeals, which held that Medicaid was entitled only to the pro rata share of the settlement proceeds.

### The Decision

The issue before the Court was whether Arkansas law, which ADHS argued allowed a lien for the entirety of the Medicaid benefits paid, was enforceable under federal law. The Court looked to the federal anti-lien statute, which prohibits the placement of a lien on “the property of any individual in honor of his death on account of medical assistance paid . . . on his behalf under the state plan.” 42 U.S.C. § 1396p(a)(1). The Arkansas Medicaid department attempted to argue, however, that the anti-lien statute precludes a state from asserting a lien for the entirety of the Medicaid benefits. The Court rejected this argument and ruled that the anti-lien statute precludes a state from attempting to recover from any third party the risk of underestimating the value of the medical damages was counter-balanced by the risk that allowing “absolute priority” to the state may inhibit the settlement of cases or unfairly compensate injured victims.

### The Massachusetts Medicaid lien statute

While *Ahlborn* is a significant decision affecting the rights of injured plaintiffs, the implications of the decision in Massachusetts are still being tested. On the one hand, it would seem that the decision may encourage earlier settlements of cases involving Medicaid liens, because the settlement amounts can be allocated among various items of damages such that the claimant is required by law to spend any increase in financial assistance that occurred as a result of the accident, illness, injury or other incident.

### Guidance for the plaintiffs’ personal injury attorney

In any case in which Medicaid has made or will be making payments for medical expenses, consider the following strategies:

- Promptly notify the commonwealth, in writing, as required by G.L. c. 18, § 5G, “upon commencement of a civil action or other proceeding to establish the liability of the defendant insurer or any other third party, the claimant shall assign to the department and the division of medical assistance the total of all public assistance benefits, both financial and medical, provided by said agencies or on or after the date of the loss to or on behalf of the claimant, the claimant’s spouse or children, and any other individual the claimant is required by law to support, provided, however, that on the date of the loss the claimant was already eligible for medical assistance benefits, the claimant shall repay only medical assistance required and any increase in financial assistance that occurred as a result of the accident, illness, injury or other incident.

### Further Reading

- Charlotte E. Glinka is a partner with the law firm of Kinney, Wilt & PC. Glinka concentrates her practice in the areas of medical negligence and personal injury litigation.
- David W. White-Lief is a principal in the law firm of Breakstone, White-Lief & Glad. PC in Boston, practicing in all aspects of plaintiff’s personal injury law. White-Lief is president-elect of the MBA.
of any third party ..."

• Request a complete itemization of the commonwealth’s lien at the outset of the case, and if treatment is continuing, update your lien information periodically.

• If liability is contested, or there is limited insurance, and the ultimate settlement will likely be less than the full value of the case for the claimant, inform the state that any reimbursement from the settlement proceeds for medical expenses will need to be apportioned based on the holding in Ahlborn.

• Begin a dialog with the commonwealth as soon as practical before entering into any settlement discussions, and continue to confer with the commonwealth throughout the negotiation process. To the extent you can reach an agreement over the division or apportionment of any settlement proceeds early in the process, the more likely it is that you will reach a compromise that is satisfactory to all parties. In addition, this allows the commonwealth the opportunity to stand and appreciate the factors that go into any settlement – i.e., the strengths and/or weaknesses of liability, comparative negligence, if any, the extent of the plaintiff’s non-medical damages and other factors.

• To the extent an agreement as to the equitable allocation of any settlement proceeds cannot be reached, consider seeking the intervention of the court to approve a division of the settlement proceeds, much in the same way third-party settlement petitions are routinely handled in cases of workers’ compensation liens. Although this is still an untested option, certainly notice should be given to the commonwealth’s [Civil Litigation] Recovery Unit, and it should have an opportunity to be heard.

The Casualty Recovery Unit is in the process of developing guidelines and forms for consideration of Ahlborn requests. Keep in mind that successful negotiations under the Ahlborn decision will require reasonableness and candor. One should expect to provide detailed information on special damages, detailed descriptions of injuries, fair analysis of liability, and full disclosure of available insurance coverages and other assets. One cannot expect to arbitrarily allocate a disproportionately small portion of the settlement to medical expenses in an attempt to avoid the reimbursement of the Medicaid lien. A fair allocation should mirror the pro rata share of what one might reasonably expect in a full-value settlement or jury verdict. Also, unlike the state in Ahlborn, it is unlikely the commonwealth will readily stipulate to the value of your case, which is why you should be prepared to justify what you feel is a fair full value of the case.

Under that commonwealth that will owe the federal government reimbursement for the federal portion of Medicaid pay-out if there is a recovery, and any reduction in that reimbursement has to be justified. Offering a solid basis for a reduction of the lien will be the key to prompt and reasonable compromise.

Further application of Ahlborn The Medicare program affords the government similar liens pursuant to 42 U.S.C. § 1395y, the Secondary Medicare Payer Program. Although it does not appear that any case has yet tested the application of Ahlborn to Medicare, Medicare liens may also be limited when the claimant is not made whole by the settlement of the case. Ahlborn will not have any effect on liens by insurers or hospitals on personal injury claims under the Massachusetts lien statute, G.L. c. 111, § 70 ex seq. It is clear, after the decision in Forest v. Christmas Tree Shops, Inc., 429 Mass. 21 (1999), that the ability to force an insurer or hospital to contribute to attorney’s fees or to accept an equitable reduction in the lien will have to await legislative action.

Conclusion In Massachusetts, resolution of liens under Ahlborn is still largely untested. Every circumstance will vary, and questionable liability and inadequate insurance will complicate resolution of Medicaid liens. The decision in Ahlborn, however, clearly provides relief for litigants when full recovery cannot be achieved, and it is the duty of every practitioner resolving such a case to seek an appropriate reduction in the Medicaid lien.

Additional resources

Center for Medicare and Medicaid Services, www.cms.hhs.gov/home/medicaid.asp
National Association of State Medicaid Directors, www.nasmd.org

End notes
2. The case was settled for a compromised amount because of Ahlborn’s own contributory negligence.
3. Ahlborn v. Arkansas Department of Human Services, 397 S.E.2d 620 (6th Cir. 2005).

Civil Litigation

DISCLOSURE OF MEDICAL ADVERSE EVENTS: A STUDY OF THE UNIVERSITY OF MICHIGAN HEALTH SYSTEM MODEL

By M. Kate Welti, Esq.

Disclosure of medical adverse events by health care institutions is a relatively new development in the effort to improve patient safety and contain escalating medical liability costs. A notable example of this approach was implemented by the University of Michigan Health System (“UMHS”) starting in 2001, with significant positive results.1 Given the demonstrated benefits of the UMHS approach, it is likely that similar efforts will increasingly be made by Massachusetts health care institutions, with significant implications for the local health care, insurance and legal communities.

In 2001, UMHS was experiencing the challenges that health care systems nationwide continue to face today with respect to medical liability and safety issues. In general, malpractice litigation was costly and too often displayed only a tenuous relationship to actual incidences of negligence.2 At the same time, there was a gathering movement to improve patient safety. A 1999 Institute of Medicine study reported that up to 98,000 deaths result annually from medical errors, with 90 percent of those deaths arising from failed systems and procedures.3 Health policy analysts recognized that reporting and analyzing adverse events permitted more effective ways to reduce error, yet disclosure was often avoided by providers due to fears of malpractice lawsuits.4 Ironically, several studies show that a significant reason why patients sue physicians or hospitals is anger over a sense of stonewalling, with a lawsuit seen as a means to obtain more information about their care.5 Thus, the non-disclosure mentality had the opposite of its intended effect: injured patients seeking accountability and compensation often had no alternative but to hire a lawyer.

UMHS did have the benefit of tort reform measures, which were enacted by the state of Michigan in 1994. Among other provisions, the statutes instituted a pre-suit notice requirement. The requirement created a six-month “cooling off period” in which the patient provided notice that they intended to file a lawsuit. Tort reform, however, had little effect on the UMHS claims numbers and even less impact on the way in which it responded to claims. The six-month notice period was not utilized to respond to claims in an attempt to head off litigation, or even to prepare for litigation. The reforms also failed to prompt any initiation of systems that would allow UMHS to learn how to improve patient safety from the adverse events. As of August 2001, UMHS had 262 open claims, which included pre-suit notices and active litigation. The portfolios for reserves was valued at more than $70 million. Annual litigation costs were approximately $3 million. The average time to resolution of claims and lawsuits was 20.3 months. At that time, UMHS created and implemented a disclosure policy of medical adverse events. The results were startling. As of August 2005, the number of claims had decreased to 114. Total reserves on medical malpractice claims dropped by more than two-thirds. Annual litigation costs were down to $1 million. The average time to resolution of claims was 9.5 months.

The UMHS disclosure policy is based on three principles, which were published at the outset to UMHS staff, plaintiff and defense counsel in southeastern Michigan, and the courts. The first is that UMHS will compensate quickly and fairly when inappropriate medical care causes injury. Second, UMHS will defend medically appropriate care vigorously. Finally, UMHS will reduce patient injuries (and therefore claims) by learning
from mistakes.

According to Boothman, the key to implementing the disclosure policy principles is first understanding the difference between reasonable and unreasonable care, and then determining whether, and to what extent, the patient's outcome was adversely affected. The pre-suit notice window is crucial to that process. In 2001, UMHS began to utilize that period by creating a claims analysis infrastructure and system that uses that time to make a determination as to whether the care was reasonable or not, and accordingly, to decide whether to proceed to litigation or settlement.

After UMHS learns of a claim or a potential claim, the following process takes place, with some variation. First, if risk management learns of an adverse event near or at the time of the occurrence, they will contact the patient or family in response to the UMHS model, and accordingly, to decide whether to proceed to litigation or settlement.

The UMHS model goes against the grain of conventional wisdom in several respects. One of the most obvious is disclosing its findings and expert opinions on the reasonableness of care prior to the commencement of suit. The UMHS view is that if it is concluded that the care was unreasonable, it would be moving to resolve the claim. It is not clear, based on available information, what effect disclosure of these negative views has in litigation if the patient refuses to settle, or whether it would increase the settlement figure. On the other hand, if UMHS finds that the care was reasonable, disclosure of these findings would not prejudice them if the patient pursued litigation after the disclosure.

The apparent successes of the UMHS approach are many. As set forth above, claims and transaction costs have significantly declined. There may also be other advantages that may be harder to quantify, such as reduction in medical errors due to clinical quality improvement measures.

The model has also received positive reviews from two usually disparate camps: medical faculty and plaintiff attorneys. According to a 2006 survey of UMHS faculty, 98 percent fully agreed with the UMHS approach to malpractice claims. A survey of the Southeastern Michigan plaintiffs' bar at the same time showed that 86 percent said they had changed their approach in response to the new UMHS model, and the same percentage said that their costs were lower. Eighty-six percent of attorneys agreed that UMHS transparency allowed them to make better decisions about the claims they chose to pursue, and 57 percent admitted that they declined to pursue cases after 2001, that they believed they would have pursued before the changes were employed. Finally, 71 percent admitted that when they settled cases with UMHS, the settlement amount was less than anticipated.

In spite of the benefits UMHS has reaped from its model, it remains an open question as to whether it can be successfully applied in other settings. Although a disclosure policy may be applied locally without difficulty if the patient is engaged before they file a claim, if the institution first learns of the adverse event through the filing of a lawsuit, it becomes more problematic. Settlements of civil claims on behalf of a physician are reported and publicly available on the board of Registration in Medicine Web site. Massachusetts physicians would thus be understandably nervous about disclosure and would likely be exert pressure on their affiliated hospitals to avoid adopting policies that involve disclosure after a suit has been filed. These differences are not insurmountable, however, at least one Massachusetts facility, Fallon Clinic, has instituted a disclosure policy. It appears likely that more health care systems will follow suit with some form of a disclosure policy, even if not as extensive as the UMHS model.

End notes

1. The information in this article regarding the UMHS disclosure policy is taken from the following materials: Medical Justice: Making the System Work Better for Patients and Doctors, Testimony of Richard C. Boothman, Chief Risk Officer, University of Michigan Health System before the United States Senate, Committee on Health, Education, Labor and Pensions, Thursday, June 22, 2006. Materials from a presentation at Fallon Clinic on September 27, 2006, featuring Richard Boothman, entitled Disclosure of Medical Adverse Events; and correspondence from Richard Boothman, dated October 30, 2006, responding to questions of the author. The information is used and reproduced with permission of Richard Boothman.

2. National Medical Error Disclosure and Compensation (MEDiC) Bill (S. 1784). The bill is currently in committee.


6. Id. at 13.

7. Based upon conversation with Risk Management Department of Fallon Clinic on October 30, 2006. The policy went into effect on October 1, 2006.
LIMITED ASSISTANCE REPRESENTATION IN THE PROBATE AND FAMILY COURT

By John G. Dugan

Litigants in the Suffolk and Hampden Probate & Family Courts will be able to retain attorneys for “limited-scope representation” under a plan being launched in Boston and Springfield on Nov.

The volume of pro se appearances in domestic relations matters has exploded in recent years, often resulting in ineffective pleadings and delays in providing financial, protective and parental scheduling orders for the parties. Many states have implemented new programs to address the reality of self-represented litigants, case backlogs and overcrowded courtrooms. In Massachusetts, a committee led by Justice Elaine Moriarty and, more recently, the Supreme Judicial Court’s Steering Committee on Self-Represented Litigants, studied and reported on a number of possible solutions. One of those solutions is limited assistance representation (“LAR”), which allows clients to engage an attorney for only a portion of a legal matter, making representation more affordable and allowing the party to appear pro se in the less complex aspects of the case.

Pilot programs The SJC has issued a Standing Order that creates LAR pilot programs in the Suffolk and Hampden Divisions of the Probate and Family Court. For full text of the Standing Order, see 35MLW 473, Oct. 23, 2006. Judges, registrants and other court personnel have received education, forms and training on limited representation. Many private and public sector attorneys have attended training sessions, which are required for participation in the programs. Additional training sessions will be scheduled. An advisory committee will monitor and evaluate the pilots, measure client use of LAR and address participants’ concerns and suggestions.

The Standing Order permits a participating attorney to file a Notice of Limited Appearance in any probate or domestic relations matter in the Hampden or Suffolk Divisions. The notice must identify precisely the event or issues for which the attorney will appear. Upon completion of the limited representation, the attorney must file a Notice of Withdrawal. The important distinction is that the operative instrument is a notice, not a motion to withdraw. The Notice of Withdrawal terminates the attorney’s appearance, and is binding on the court and opposing party/counsel. Copies of the Notices of Appearance and Withdrawal must be properly served upon the client and opposing party/counsel. When a party is represented in only limited portions of a case, service of pleadings by the opponent must be made upon the party and upon counsel for those matters included in the limited appearance. For matters not included in the limited appearance, service is made only on the pro se party.

The Standing Order specifically allows “ghostwriting,” which is the practice of assisting a client in preparing a pleading, motion or other document to be filed in court. In that case, the attorney must insert the notation “prepared with assistance of counsel” on the ghostwritten instrument. The attorney is not identified, and the required notation does not constitute an appearance by the attorney.

Practice, ethical standards and professional liability insurance The standards of competence required in limited and full representation are identical. The lawyer will be held to the prevailing standard of practice of an attorney reasonably qualified in the particular field of practice. Similarly, Rules of Professional Conduct

PROBATE AND FAMILY COURT

By John G. Dugan

John G. Dugan is a principal at Doherty, Ciochenowski, Dugan & Cannon in Franklin. Dugan’s practice is concentrated in probate and family law. He has served as chair of the MBA’s Probate Section Council, and co-chair of the Expanded Justice Working Group, an adjunct to the SJC’s Steering Committee on Unrepresented Litigants.

ne of the keys to a successful committee is providing opportunities for members to be engaged in meaningful professional projects that are substantial and rewarding. In that regard, our section council has wasted no time in getting off the ground this year. Our main projects in the works include: writing several articles for this Section Review; composing a major amicus brief on behalf of the MBA; planning volunteer opportunities such as assisting the legal needs of the homeless; arranging several CLE events, including an upcoming brown bag lunch and the Health Law Conference; assisting in the creation of an updated publication on judicial preferences; and forming a subcommittee to address debt/court creditor rights.

The only reason we are able to accomplish these projects (and more) with ease. If you are interested, please contact me at jcatalano@toddweld.com or (617) 720-2626, or Section Administrator Marc D’Antonio at dantonio@massbar.org or (617) 338-0650.

By Jeffrey Catalano

Jeffrey Catalano is a partner at Todd and Weld in Boston. His practice consists of representing victims of catastrophic injuries in the areas of medical negligence, product liability, class actions, and other personal injury cases.

Jeffrey Catalano

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The attorney must define the overall representation, explains the new LAR procedures and now pending case. After completion of representation, the attorney should send a closing letter to the client to emphasize that representation has terminated. Good documentation will eliminate or minimize misunderstandings between attorney and client.

Practice tips

-**Attorneys who ghostwrite pleadings should open a file for each client and keep copies of all pleadings as drafted by the attorney. Ideally, the client should sign the file copies, or the attorney should file the original pleadings in court, to ensure that no changes are inserted by the client that would later be attributed to the drafting attorney.**

- If a client wishes to extend or revise the scope of limited representation while the case is in progress, the attorney should file a Notice of Withdrawal as contemplated by the original limited appearance, execute an amended legal services agreement and file a new Notice of Limited Representation that reflects the amended agreement. There is no restriction on the number of limited appearances that an attorney may file.

- Do not ask the court for approval or input regarding withdrawal. When the time has come for termination of representation as defined by the limited appearance, file a Notice of Withdrawal and exit the case. The court will not intervene in attorney-client disputes about limited representation.

- The advisory committee is assembling a list of mentor attorneys who will be available by voice or e-mail to discuss and advise on questions about limited representation. If there is some doubt about any aspect of limited representation, contact a mentor.

- Both pilot courts have designated a liaison to coordinate LAR proceedings in the respective courts. The Suffolk liaison is Anthony Carnevale, administrative deputy assistant register, at (617) 788-8353. The Hampden liaison is Lori A. Landers, family law facilitator, at (413) 735-6045. The liaisons may be contacted for information on training sessions, pilot participation and LAR forms.

Limited representation is working well in many states. It makes legal representation available to more people, allows legal services providers to represent more clients, and results in more professionally prepared pleadings in the courts. LAR can be a highly efficient part of any attorney’s practice. We hope and expect that the pilots will succeed and serve as models for LAR throughout Massachusetts.

Potential pitfalls and best practices

The Standing Order provides: “A qualified attorney may limit the scope of his or her representation and practice in cases in which the attorney, under the circumstances and the client given informed consent.” The “reasonable” standard means that the attorney must assess the client’s situation and determine whether limited representation is appropriate in the particular circumstances. The “informed consent” standard means that the attorney must ensure that the client and attorney have a mutual and consistent understanding about division of responsibilities.

3. The attorney should document the nature and scope of limited representation. The checklists, legal services agreement, Notice of Limited Appearance and Notice of Withdrawal should provide a clear definition of what the attorney will and will not do in the matter. After completion of representation, the attorney should send a closing letter to the client to emphasize that representation has terminated. Good documentation will eliminate or minimize misunderstandings between attorney and client.

**Practice tips**

- Attorneys who ghostwrite pleadings should open a file for each client and keep copies of all pleadings as drafted by the attorney. Ideally, the client should sign the file copies, or the attorney should file the original pleadings in court, to ensure that no changes are inserted by the client that would later be attributed to the drafting attorney.

- If a client wishes to extend or revise the

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amily Law in Massachusetts continues its rapid evolution. Same-sex marriage and de facto parent rights opened doors for some spouses and, in Massachusetts, but we are still learning — and debating — how far the law should go and under what circumstances. In Charron v. Ammal, et al., now pending at the Supreme Judicial Court, the plaintiff seeks the right to sue for loss of consortium where the cause of action accrued before the plaintiff and her spouse were permitted to marry. The couple exchanged rings in a commitment ceremony, executed reciprocal estate plans and other documents, and adopted a child together before the cause of action accrued. They married immediately after the Goodridge decision permitted them to do so. One spouse died, allegedly as a result of medical neglect that occurred after the couple’s commitment ceremony and co-adoption of their daughter but before the marriage. Under principles of loss of consortium, the survivor’s claim for loss of consortium would be barred. The issue to be decided here is whether equitable principles may trump tort law in this plaintiff’s favor.

The Supreme Judicial Court also recently decided in A.H. v. M.P., a de facto parent case in which the Court sought amicus filings on the issue of expanding de facto parent rights to include custody. The trial court denied de facto parent status to the former partner of the biological mother, citing (among other factors) an American Law Institute Principle of Family Law that would require the non-biological or non-adoptive parent to have lived with the child for at least two years. The parents in this case were in an unmarried same-sex relationship. So, one issue in the case was the usefulness of the de facto parent doctrine to would-be parents who have neither adopted the child nor married the legal parental. The SJC did not reach the two-year ALI rule. Instead, the Court held that the partner who had failed to adopt would not later be treated as a de facto parent, where no caretaking bond had developed between the plaintiff and the child while they lived in the same household.

The principles and practice of family law. We are fortunate to work in a developing field in a cutting-edge jurisdiction. I hope that some section members find much to think and talk about in our publications and meetings and urge each member to join the conversation.
Although patients injured by health care providers’ errors have pursued lawsuits in Massachusetts since the 19th century, medical negligence law has not been stagnant. Advancements in medical science prompt the assertion of novel theories of liability and damages, which can both set boundaries in medical negligence law and help to prove that she did not want any further testing, then the child would not have been born, and there would be a fundamental problem of logic if the child were allowed to recover damages when otherwise he never would have lived. Thus, like Payton, Viccaro not only charted new territory in medical negligence law, but it also erected new boundaries in it.

The SJC, however, did leave open the question of whether a child born with a defect could recover the extraordinary expenses expected to be incurred to care for himself if his parents were unable to bear those costs and he would otherwise become a public charge. Bower v. Katz, 1994 WL 879466. (Mass. Super. Ct. 1994) presented this very issue. There, a child born with multiple impairments and whose parents had overseen him to the Department of Social Services successfully pushed a pathway through to another new frontier as the Superior Court permitted him to maintain a claim seeking the extraordinary expenses associated with his care although he would not have been born had the defendant not been negligent. Cases such as Kekos, Zivinjian, Burke and Viccaro provided Gorovitz and Boten the strong foundation upon which to maintain their client’s claim. But had those attorneys been unable to establish that their client would have chosen to have an abortion, they would have had to argue for a change in the expansion of the law, which would have been a daunting task. This is what Hector Pineiro, another Massachusetts attorney, is arguing doing in a currently pending case at the opposite end of the life cycle.

Medical negligence at the end of the human life cycle

Pineiro represents the widow and four children of Nelson Gonzalez, a man who died of terminal cancer at the age of 29—year-old who had died from a rare brain cancer. In the wrongful death lawsuit styled Gon- zalez v. Katz, et al, currently pending in the Worcester Superior Court, the Gonzalez fam- ily alleges that the defendants, including the organ procurement organization that har- vested the organs and the health care providers who assisted with the transplant, knew or should have known that the donor’s liver was potentially diseased with cancerous cells and that transplantation would pose a significant risk to Gonzalez that he would contract cancer. The family further claims that the defendants are liable under the common law for negligence and failure to obtain the consent of the patient. Pineiro believes that the issue of whether an organ obtained from a brain dead subject can establish common law negligence against an organ proc- urement organization and health care providers assisting in the transplant process is one of “national first impression.” Gilman disagrees, frames the issue somewhat differ- ently, and argues that the SJC already decided the issue in favor of the defendants in a very recent SJC decision discussed below. Before discussing this potentially novel legal issue, a summary of the scat Massachusetts organ donation law will provide helpful context. In 1968, Congress promulgated the Fed- eral Uniform Anatomical Gift Act ("UAGA")

THE FRONTIERS OF MEDICAL NEGLIGENCE LAW AT THE OPPOSITE END OF THE HUMAN LIFE CYCLE

By Anthony V. Agudelo

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in order to promote organ donation for trans-
plantation, thereby increasing research and education. Congress sought to achieve this goal by pro-
viding uniformity across the country in organ donor laws and eliminating uncertainty as to the legal liability of those authorizing and receiving anatomical gifts. Legislators in all 50 states and the District of Columbia have since enacted some form of the UAGA.

In Massachusetts, the UAGA was codified at M.G.L. Ch. 113, §§ 7-13 as part of the Promotion of Anatomical Science Act (“PASA”). PASA sets forth the methods for making an organ donation, the procedure for obtaining consent from next of kin, and allows individuals who may become donors, and the circum-
cumstances under which a donation is to be considered null and void. Most significant to this article, PASA also contains a provision barring civil damages against persons who act in good faith in accordance with the terms of the statute. This has been called the “good faith immunity provision.”

Parties in suits arising out of allegedly improper organ harvests, donations or trans-
plants face a cloud of uncertainty because there is only one Massachusetts appellate deci-
sion interpreting the statute. Carey v. New England Organ Bank, 446 Mass. 270 (2006), and a dearth of Massachusetts legislative his-
tory explaining the intent behind its enact-
ment.

In Carey, the family of an organ donor sued the New England Organ Bank (“NEOB”), a chartered organ procurement organization, and others alleging that the defendants negligently and with bad faith removed the donor’s organs knowing that they were unsuitable for transplantation. The defendants moved for and were granted summary judgment on the grounds that they were entitled to the statutory good faith immunity. As explained by Superior Court Judge David Lowy in his written decision, without the pro-
tection from liability provided by the good faith defense, procurement organizations could likely hesitate to seek needed organ donations that could later prove invaluable, and if courts were to construe the good faith immunity provision narrowly, they would only inhibit the successful recovery of anatomical gifts. Carey v. New England Organ Bank, 2004 WL 875623 (Mass. Super. Ct. 2004). The SJC affirmed Lowy’s ruling and held that it was the plaintiff’s burden to prove the defendants’ lack of good faith, rather than the converse. The SJC also noted that the good faith immunity provision was designed for situations where an organ is removed without genuine consent simply because of confusion.

Although the NEOB is also a defendant in the Gonzalez case, because Gonzalez does not involve an alleged failure to obtain the proper consent from the donor’s family, it is ques-
tionable whether the NEOB is entitled to rely upon the good faith statutory defense in Gon-
zales.

According to Pinoeiro, the NEOB acquired the donor’s liver, kidneys, lungs, and other organs and tissues. Those organs and tissues were transplanted into five people, including Gonzalez. Gonzalez did not know prior to the transplant that the donor had died from brain cancer and that there was a chance that the cancer had spread to his liver. In fact, the cancer had infected the donor’s liver, and Gonzalez died a year after receiving the diseased liver. Sadly, three of the four recipients of the donor’s organs have also since died of cancer.

This tragic event recalls Jesica Santillan whose story garnered significant media atten-
tion in 2003. Santillan was a teenager who received a heart-lung transplant at Duke Uni-
versity Hospital, but died shortly thereafter because the donor had an incompatible blood type. Duke and the Santillan family reached a settlement before any lawsuit was filed, and Duke also established a $4 million perpetual fund for Latino pediatric patients to honor Jesica. Because no lawsuit had been pursued, however, no court was presented with the good-faith-immunity issue now presented in the Gonzalez case.

In Gonzalez, the NEOB and two trans-
plant coordinators filed a motion to dismiss, arguing that PASA immunized them from liabil-
ity specifically because the plaintiff failed to aver any facts supporting a claim that the defendants were not acting in good faith when they procured the organ donor’s liver. Pinoeiro argued in opposition to the motion that the plaintiff has no obligation to allege or prove that the defendants acted in bad faith, claiming that the immunity provision is inap-
licable when determining the rights of donees vis-à-vis an organ procurement organiza-
tion which distributes organs knowing that the donor and the recipient are not in good faith. He further contended that the statute explicitly recognizes that testing of donor organs before transplantation is not only imperative, but also the hallmark of good medical practice. As stated earlier, Pinoeiro’s opposing counsel, Gilman, framed the issue somewhat differ-
ently. She described the legal issue as whether organ procurement organizations have a statu-
tory immunity that trumps the common law if they act in good faith when conducting donation activities. And this issue, she argued, was already decided by the SJC in Carey. Judge Peter Agnes Jr. of the Appeals Court agreed with Pinoeiro and the plaintiffs, finding that PASA did not extend into the realm of donors who receive disease-riddled organs, and therefore, the good faith immu-
nity provision was inapplicable and could not be asserted as a defense. Agnes described PASA and the UAGA “as ‘donor driven laws which provide little insight as to the donor’” and reasoned that there was “nothing in the language of the statute” or its historical back-
ground that suggests that its purpose was to supersede com-
mon-law theories of tort liability with respect to the consequences of medical decision making about whether particular organs which have been donated are suitable for transplan-
tation.”

Gonzalez also noted that “the SJC did not intend to create an immunity to protect organ professionals when they reck-
lessly or negligently procure or distribute dead-
ly organs.” In doing so, he recovered the defen-
dant’s liver, has also filed a lawsuit in the Worcester Superior Court. Attorneys Andrew C. Meyer Jr. and William J. Thompson represent Collins’ family, which claims that prior to the procedure, the trans-
plant surgeon told Collins that the donor was “healthy” and that the kidney “looked good and healthy.” Meyer has commented that Collins was expecting a life-saving procedure, but instead was handed a death sentence by her doctors. For reasons not made public, Meyer and Thompson chose not to name the NEOB as a defendant in their case, and none of the defendants have filed a motion to dis-
miss contending that the good faith statutory defense bars the claim.

While we do not know how the Gonzalez case will change Massachusetts medical neg-
ligence law, if at all, or how the law will develop in the future, we do know that the law will be significantly impacted by the ways in which the field of medicine evolves. And one point remains true regardless of what the future of medicine holds, which is that human life at both ends of the life cycle necessitates great levels of protection, both medically and legally.
A recent decision of the National Labor Relations Board regarding who is a supervisor under federal labor law, Oakwood Healthcare, Inc.,1 has labor unions in an uproar. Both the AFL-CIO and Change to Win, the two major labor federations, have blasted the decision as depriving millions of American workers of their rights under the National Labor Relations Act.2 Labor unions are so upset that the AFL-CIO has filed a complaint with the International Labor Organization of the United Nations claiming that the board’s decision in Oakwood violates international labor law principles. The fear, as articulated by the dissent in Oakwood, is that employees will lose their statutory rights of employees.”

Labor unions are deriding the board’s decision in Oakwood as the statute itself. The National Labor Relations Act defines a “supervisor” as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discipline, or otherwise effectively recommend discharge, assign, reward or discipline other employees, or to direct them, or to adjust their grievances, or other effectively to recommend such action, in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.”3

While labor unions are deriding the board for its interpretation of this definition in Oakwood, the real battle was decided by the U.S. Supreme Court five years ago. In NLRB v. Kentucky River, the Supreme Court was asked to review the board’s determination that six registered nurses were not supervisors.4 In doing so, the Court articulated a three-part test for determining who is a supervisor based upon the statutory definition: (1) the individual holds authority to exercise any one of the 12 supervisory functions listed in the statutory definition; (2) the exercise of that authority requires the use of independent judgment; and (3) the individual’s authority is held in the interest of the employer. Applying this test to the registered nurses at issue, the Court chastised the board for its conclusion that they were not supervisors. Although the nurses directed other employees, the board had determined that they did not exercise independent judgment in doing so but instead utilized what the board characterized as “ordinary technical or professional judgment.” The Court rejected this formulation as creating a distinction not borne out by the statutory language.5

Oakwood represents the board’s first attempt at revisiting these issues after Kentucky River. At issue in the case was a union’s effort to organize the employer’s 181 registered nurses. Twelve of those nurses permanently served as “charge nurses.” Charge nurses were responsible for overseeing their patient care units and assigned other nurses and employees to particular patients. In addition to the permanent charge nurses, other nurses took turns serving in this capacity. The frequency and regularity that one of these nurses acted as a “rotating” charge nurse depended upon the particular patient care unit and the number of nurses in that unit.6 The regional director determined that neither the permanent charge nurses nor the rotating charge nurses were supervisors and the employer petitioned the board to review that determination. In its decision, the board attempted to explain two of the supervisory functions listed in the statute — “assign” and “responsibly to direct” — in light of the Supreme Court’s decision in Kentucky River. Relying on the dictionary definition of the word, the board explained that “to assign” refers to “the act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or over-time period), or giving significant overall duties, i.e., tasks, to an employee. As to the function “responsibly to direct,” the board relied on appellate court precedent to hold that “for direction to be ‘responsible,’ the person directing and performing the oversight must be accountable for the performance of the task by the other, such that adverse consequences may befall the one providing the oversight if the tasks performed by the employee are not performed properly.”7 The board also explained what constitutes the exercise of independent judgment. Relying again on the dictionary definitions of the words, the board stated that “an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.”8 However, the board emphasized that this is a matter of degree, which will vary based upon the particular circumstances.9 Finally, the board held that an individual is not a supervisor if he or she does not spend a substantial and regular portion of his or her time performing supervisory functions.10

None of these definitions reflects an unnatural reading of the statutory language, and the board’s application of these terms demonstrates that the tests are results-neutral. In Oakwood, the board concluded that the 12 permanent charge nurses were supervisors because they assigned employees using independent judgment. However, the board held that the remaining nurses who acted as rotating charge nurses were not supervisors because they did not spend a substantial and regular part of their time performing supervisory functions. And in two companion cases, Croft Metals, Inc.11 and Golden Crest Health Care Center,12 the board held that none of the individuals at issue were supervisors. In Croft Metals, the board concluded that certain lead persons had the authority “responsibly to direct” other employees but did so only in a routine or clerical fashion.13 Likewise, in Golden Crest, the board found that the employee’s nurses, including charge nurses, did not “assign” employees because they could only request but not require other employees to work past the end of their shifts or come in from home.14 Nor did they have the authority to direct other employees, because the employer failed to prove that the nurses were accountable for the work performance of subordinates.15 Taken together, only 12 of the employees at issue in these three cases were found to be actual supervisors. Thus, while critics have implied that the board has single-handedly reclassified millions of employees as supervisors, Oakwood and its companion cases do not bear out that conclusion. Instead, the decisions make clear that whether an individual is a statutory supervisor will be decided on a case-by-case basis. Although the “permanent” charge nurses in Oakwood were found to be supervisors, the board reached the opposite conclusion regarding the charge nurses at issue in Golden Crest, demonstrating that specific facts regarding an individual’s actual duties, not job titles, will be controlling. The worst that can be said about the decisions is that they provide a roadmap regarding what facts will establish supervisory status. However, clarity in the law in this regard should be viewed as a positive development for both employers and employees alike.

End notes
1. 348 NLRB No. 37 (Sept. 29, 2006).
4. See Oakwood, 348 NLRB No. 37 at 15 (dissenting opinion) (“Today’s decision threatens to create a new class of workers under Federal labor law: workers who have neither the genuine prerogatives of management, nor the statutory rights of employees.”).
7. 523 U.S. at 123–124.
8. Id. at 175.
9. 348 NLRB No. 37 at p. 2.
10. Id. at 4.
11. Id. at 6.
12. Id. at 8.
13. Id.
14. Id. at p. 9.
15. 348 NLRB No. 38 (Sept. 29, 2006).
16. 348 NLRB No. 39 (Sept. 29, 2006).
17. 348 NLRB No. 38 at p. 4.
18. 348 NLRB No. 39, p. 3.
19. Id. at 5.

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TAXING EMOTIONAL DISTRESS DAMAGES IS DECLARED UNCONSTITUTIONAL

By Nina Joan Kimball

Perhaps it is not true that the only things you can count on are death and taxes. The U.S. Court of Appeals for the District of Columbia Circuit has just declared that taxing emotional distress damages is unconstitutional. In Murphy v. IRS, 2006 U.S. App. LEXIS 21401 (D.C. Cir. Aug. 22, 2006), the D.C. Circuit held that damages received in compensation for mental distress and harm to reputation are akin to compensation for personal injuries, which have long been understood not to be "income" within the meaning of the 16th Amendment to the Constitution, and therefore not taxable.

This decision could have far-reaching consequences. Although Murphy involved a claim brought by a federal employee suing her employer for retaliation under various whistle-blower statutes, the reasoning of the decision would apply to awards of emotional distress damages under any statute or common law claim. Coming out of the D.C. Circuit, one of the most respected appellate courts in the country, the opinion authored by a Reagan appointee, Chief Judge Douglas Ginsberg, this decision will likely be followed in other jurisdictions.

The case arose when Marrita Murphy claimed that her employer, the Air National Guard, had blacklisted her and provided unfavorable references after she complained about unfavorable references on her Department of Labor. An administrative law judge awarded her $45,000 for "emotional distress or mental anguish" and $25,000 for "injury to professional reputation" on her discrimination and retaliation claims. After paying taxes of $20,665 on the $70,000 award, Murphy sought a refund of the $20,665 tax, claiming the money was not taxable "income" as defined by the Internal Revenue Code (IRC) Section 104(a)(2) because it was damages received for a "personal injury or sickness" which are not included within the statutory definition of income; and (2) it was not "income" within the meaning of the 16th Amendment to the Constitution.

The D.C. Circuit rejected her first theory, finding that she was not compensated for a physical injury. Even though she had evidence that she suffered physical symptoms, such as teeth grinding, anxiety attacks, shortness of breath and dizziness — the court concluded that the damages she was awarded were not to compensate her for the physical symptoms, but rather compensated her for the underlying emotional harm. Consequently, the money on which she paid a tax was compensation for an emotional injury, not a physical injury. Hence, it did not fall within the statutory exception. Murphy v. IRS, at **9-13.

However, the court agreed with Murphy's second argument, that taxing the emotional distress damages was unconstitutional because the award did not constitute taxable "income" within the meaning of the 16th Amendment. The issue before the court was whether the compensation Murphy received for her injuries was income. Congress derived its power to tax income from the 16th Amendment, ratified in 1913, which provides: "The Congress shall have the power to lay and collect taxes on income from whatever source derived." However, as the court recognized, Congress's power to tax is limited "to the power to tax 'income,' and not all money persons receive is income. To determine whether Murphy's emotional distress award was "income" as defined in the 16th Amendment, the court looked to Congressional accounts and early Supreme Court decisions interpreting the Internal Revenue Code's income tax provisions, enacted within a few years of the 16th Amendment. The court pointed out that the Supreme Court interpreted "gross income" in the statute to extend only to "gains" or "accessions to wealth," but not to a "restora-
Now you see it, now you don't: Evidence and the spoliation thereof in employment law cases

By Paul H. Merry, Esq.

Introduction

Employment lawyers, defense as well as plaintiff-side, acknowledge one distinguishing feature of employment law disputes: All or part of the evidence (that is, the evidence) are usually in the hands of employers. This is generally true of witnesses, few of whom, if still employed, are willing to risk jeopardizing their employment by testifying voluntarily on behalf of a fired co-worker. The rule applies to an even greater degree with respect to records and other documents, the great majority of which are usually under the firm’s control of the employer. Indeed, this employer-control of the bulk of evidence challenges employees and their advocates as to how to develop sufficient evidence to get the matter before a jury. This problem for plaintiffs has been compounded by the increasing reliance on electronic media by employers. Communications and documents bearing on the employment relationship are often maintained solely in electronic form, whether as electronic mail, electronic drafts of memorandum, letters, rules, policies, employee handbooks and personnel manuals (many of which are available to employees today only on a proprietary, secure Web site).

Company-wide employment lawyers must be prepared to litigate to compel production of this “soft-copy” evidence, and also be in a position to assure that such material continues to be available. Precious evidence in the form of electronic mail messages, draft memoranda, sales and other performance data are routinely destroyed by employers who believe they are doing nothing wrong by merely following an established record retention policy. Indeed, most businesses have policies of routinely destroying electronic materials as their usefulness declines, usually after a year or less. In vigorously contested employment cases, preservation of records relating to plaintiff-employee performance, employee leave, as well as to defendant-employer grounds for its adverse action, become crucial. Paving discrimination requires a showing that non-protected-class employees were treated better than protected-class employees. This can be a heavy evidentiary burden that plaintiffs often cannot bear in the absence of documents controlled exclusively by the employer, because it requires access not only to the plaintiff-employee’s own records but to comparator co-worker records as well.

Sales personnel offer a particularly clear example. Organizations that engage in sales usually evaluate staff on the basis of volume of sales and gross margin, or proportion of sales revenue over company cost. This information, particularly as it relates to comparator personnel, is available only from the organization itself.

Given the crucial importance of such evidence, the temptation can be strong to place it beyond the reach of an adversary. This can occur indirectly, by means of data re-organization or changes in data handling, or by adopting practices that assure swift destruction of potentially damaging records or to proceed more openly by destroying (or the electronic equivalent, deleting) the materials.

Because employers possess the power of exclusive possession of evidence combined with the power of easy destruction of electronic data, employee advocates must be prepared to respond appropriately when records they anticipate will be available from the employer suddenly disappear. The doctrine of spoliation offers a tool for advocates to address such a disappearance.

Spoliation

Spoliation is the destruction of records or other evidence that is or may be relevant to a dispute that may result in litigation, or to a government investigation or an audit. Spoliation occurs whenever documents or objects which may assist the court in resolving an issue are rendered unusable or beyond the ability of the court to use them. See, e.g., The Sedona Guidelines: Best Practice Conference & Consensus Document: Information & Records in the Electronic Age, GuideLine 3.

Early cases of spoliation arose in adversity law and involved the destruction of cargo and shipping manifests necessary to resolve disputes over shipping of cargoes and the loss of goods. See The Amiable Isabella, 19 U.S. 1; 5 L. Ed. 191, 1821 U.S. LEXIS 380; 6 Wheat. 1, February 22, 1821. In Massachusetts, some cases involving impairment of furniture alleged to have caused serious injury, or the destruction of an ambulance involved in a traffic accident. See Kippenhan v. Chauf­ tive Service, 428 Mass. 142 (1998); Townend v. American Insulated Panel Company, Inc., 174 F.R.D. 1 (D. Mass. 1997). Courts have differed as to the level of intent required before sanctions will be warranted. The doctrine of spoliation has found the basis for substantial sanctions even where a spoliator appeared to have acted with good intentions. In that case, an investment brokerage firm was accused of mishandling documents based on representations made in a promotional brochure. The defendant destroyed all copies of the offending brochure and destroyed the incorrectly distributed sales literature alleged to have caused serious injury, or the destruction of an ambulance involved in a traffic accident. See Kippenhan v. Chauffeur Service, 428 Mass. 142 (1998); Townend v. American Insulated Panel Company, Inc., 174 F.R.D. 1 (D. Mass. 1997). Courts have differed as to the level of intent required before sanctions will be warranted. The doctrine of spoliation has found the basis for substantial sanctions even where a spoliator appeared to have acted with good intentions. In that case, an investment brokerage firm was accused of mishandling documents based on representations made in a promotional brochure. The defendant destroyed all copies of the offending brochure and destroyed the incorrectly distributed sales literature alleged to have caused serious injury, or the destruction of an ambulance involved in a traffic accident. See Kippenhan v. Chauffeur Service, 428 Mass. 142 (1998); Townend v. American Insulated Panel Company, Inc., 174 F.R.D. 1 (D. Mass. 1997).

One prudent first step for those representing employees is to place the employer on notice, in the initial contact or demand letter, that litigation is likely and that all evidence relating to an employee's employment must accordingly be preserved. Expressly identifying electronic materials may make the job of the court easier should its intervention become necessary. The Zubulake court’s instructions regarding systems to defend or employ counsel buttresses their traditional ethical duty in this regard.

Another way of putting protection in place is for employers (plaintiff-side) or advise (defense-side) the imposition of litigation holds on all materials bearing on the dispute. A litigation hold policy enables employers to preserve relevant internal materials. Beyond requesting a litigation hold in the initial demand letter, this policy should be requested as part of initial discovery, to further increase the likelihood that defendants take their obligations seriously and preserve all relevant communications and other documents.

In addition to a formal written demand for preservation of evidence, the complaining party may file a motion for a protective order, ex parte, at the same time the complaint is filed. Acting ex parte may avoid the danger of alerting the defendant regarding materials it may wish to destroy; and while the court may be reluctant to grant such orders without...
hearing from the other party, the filing of such a motion will create the potential that a jury instruction on spoliation represents one means of effectuating such a sanction. In this step, the court instructs the jury that it may infer from the destruction of the evidence at issue that it would have supported the contention for which the plaintiff sought to use it, or was in some other way damaging to the defense. The jury may thus rely on it in making a decision concerning liability, damage or any other issue on which it bears. Appropriate relief may also consist of exclusion of testimony putatively arising from, or based on, the missing records.

In a Massachusetts case, Linnem v. A.H. Robinson Co., Inc., 11 Mass. Law Rptr. 189, 1999 WL 46,4215 (Mass. Super Ct. June 16, 1999), the court issued a spoliation charge against a company for failing to preserve evidence in an injury case relating to pharmaceuticals. There, in the extensive litigation over the diet drugs fenfluramine and phentermine, plaintiffs had sought and won an initial ex parte order requiring the defendant drug manufacturers to retain extensive electronic communications, including electronic mail. The manufacturers thereafter succeeded in having the order lifted, in part on the basis of their representations that electronic materials would be preserved and provided. However, it later developed that materials had been nevertheless destroyed and the court, Brassard, J., ordered that the jury be given the spoliation instruction that it may infer that the evidence was disadvantageous to the defendants as part of the charge.

Alternatively, where missing evidence might raise a credibility question or be a basis for contradicting defense testimony, such defense, or the testimony on which it relies, may be barred from admissibility. In a case in which the plaintiff claimed to have been injured by a driveway which was later destroyed by the defendant, the injured party sought to bar from evidence photographs of the offending furniture. The plaintiff argued that unless it could examine for itself the actual driveway that caused injury, it would be prejudiced by the conclusions a jury could draw from the (potentially misleading) photographs. This theory represents an attempt to compensate for the damage done to the truth-finding process that the spoliation represented.

Finally, the court may apply the ultimate sanction of entry of default judgment against the plaintiff; or dismissal of the spoliation party’s case. As with other failures to make discovery, these sanctions are available to the court pursuant to Mass. R. Civ. P. 37(b)(2). But application of this sanction has been criticized, particularly where no finding of intent has been made.

In Mena v. New Holland North America Inc., et al., the Court of Appeals considered a district court decision sanctioning spoliation by dismissal of the case where the court omitted to inquire into motivation. Relying on Missouri law and federal decisions, the Mena court held that evidence of intent was necessary, writing:

[we] need not decide whether federal or state law governs in this diversity action because the result is the same under both - to warrant dismissal as a sanction for spoliation of evidence there must be a finding of intentional destruction indicating a desire to suppress the truth. . . . [A] finding of bad faith is necessary before giving an adverse inference instruction at trial against a plaintiff for the destruction of evidence. It would therefore be unreasonable to excuse a finding of bad faith when imposing a more severe sanction, the outright dismissal of a plaintiff’s case.

Sanctions can also be imposed in an exemplary manner, as a deterrent to future spoliation, as the court did in the Prudential case noted above. Perhaps the simplest sanction is the entry of orders aimed at preventing the spoliating party from receiving an advantage as a result of its misconduct. For example, in employment cases, an order eliminating from the trial any testimony that's veracity cannot be tested against destroyed records may be one possibility. Such a position may have a hobbling effect on defenses sufficient to deter future spoliation. It may at the same time offer the approach most likely to place the court and the parties in the position closest to the one they would have occupied had the spoliation not occurred.

Conclusion

The adverb of electronic documents has vastly increased the array of materials that should be discoverable from defendants in employment cases. At the same time, the fragility of electronic data means it may be more easily spoliated than hard copy materials. Steps taken in a timely manner, however, should add in minimizing the risk of such spoliation occurring and the costs of a litigial process and the discovery party's case should it occur.

End notes

1. Researchers at the University of California, Berkeley, recently found that 93 percent of all information generated in 1999 was in digital, or electronic, form. With- es, The Discovery of Electronic Evidence: What You Need to Know, Association of the Bar of the City of New York, May 29, 2003, at 2.

2. One source of confusion is whether spoliating a party has led the court and the parties in the position closest to the one they would have occupied had the spoliation not occurred.

3. Questions of methods of production for electronic data and, more importantly, how costs are to be allocated are large topics beyond the scope of this paper. It is, however, worth noting that costs are frequently divided and that courts encourage negotiation over such matters as media for production, search software and search terms between the parties.


5. Id at 1006. See also Stevenson v. Union Pac. R. Co., 354 F.3d 739, 746 (8th Cir. 2004); Morris v. Union Pac. R. Co., 373 F.3d 896, 901 (8th Cir. 2004) (noting under Stevenson that “a finding of intent is required to impose the sanction of an adverse inference instruction”); and Brown v. Hamil, 856 S.W.2d 51, 56-57 (Mo. 1993) (“The evidentiary spoliation doctrine applies when there is intentional destruction of evidence, indicating fraud and a desire to suppress the truth”).
Labor and Employment

COMMENTS FROM THE LABOR AND EMPLOYMENT LAW SECTION CHAIR

By Rosemary Pye

The 1,200 members of the Labor and Employment Law Section enjoy careers in a field that provides intellectual challenge, the satisfaction of having an impact on working lives, and colorful stories. The L&E Section Council wants to reach out to its members throughout the state to bring you services through the Section Review, our CLE programs, our review of pertinent legislation, and community outreach. We welcome your ideas and participation.

In this issue, Nina Kimball, Paul Merry and Robert Fisher lead the section’s enhanced commitment to the Section Review as an ideal way to reach all of our members. Kimball introduces us to a recent case from the D.C. Circuit on the constitutionality of taxing damages for emotional distress. Although the decision was vacated by the D.C. Circuit after Kimball had submitted her article, the case will be heard en banc and is likely to have far-reaching consequences. While Merry notes the particular challenge of obtaining evidence in employment cases, the problem of the spoliation of evidence cuts across all legal specialties. Fisher has written on the National Labor Relations Board’s new lead cases on the fundamental question of whether an individual is a supervisor or an employee, entitled to the protections of the act.

Editors Marilyn Zuckerman, Alanna Matus and Christiana Montgomery would be happy to hear your suggestions and receive your articles. Do not miss the opportunity to educate and inspire other members of the bar.

Our luncheon roundtable program continues in Boston and has recently expanded to Springfield and Worcester. In Boston, we have had presentations on retaliation in the wake of the U.S. Supreme Court decision in Burlington Northern, the survival of MCAD claims, new litigation theories of workplace bullying, and religion in the workplace under the leadership of Ellen Messing, James Glickman and David Wilson. In January, Tani Sapirstein and Daniel Blake held a luncheon roundtable in Springfield on retaliation claims, while Nicholas Anastasopoulos and Mark Hickernell began the Worcester roundtables with a program on the NLRB’s lead cases on supervisory status. We want to bring the MBA to you.

The L&E Section features two practice groups, which meet at the MBA at 20 West St. in Boston. The Employment Law Practice Group for employment lawyers is chaired by Bryan Decker, Catherine Reuben and Jay Segel and meets the second Tuesday of the month at 4:30 p.m. The Labor Relations and Collective Bargaining Practice Group for labor lawyers is chaired by Bryan Decker, Catherine Reuben and Jay Segel and meets the second Wednesday of the month at noon.

Because both are open to members and nonmembers for free, this is an ideal time to come and bring guests. Each meeting covers a specific topic or presents a particular speaker, and you are always welcome. In this small group setting, you can have an intensive discussion of cutting-edge issues with a cross-section of practitioners in your specialty. These groups have often included opportunities to speak informally with state and federal labor and employment law officials, such as MBA section council members and MCAD Commissioner Martin Ebel. Contact Section Administrator Marc D’Antonio at dantonio@massbar.org or (617) 338-0650 to sign up for the mailing list.

Section council leaders also promote our interests in community outreach, legislation,amicus curiae participation and outreach to the membership by the MBA. Pro Bono Coordinator Bryan Decker is starting a program to develop materials and train volunteer lawyers to educate employees on their rights and obligations in the workforce. While achieving a consensus on legislation among neutrals, management, plaintiff and union attorneys is difficult, Legislative Liaison Yvette Politis is tracking legislation of interest to the section’s members. Monica Halas represents the section on the MBA’s important Amicus Curiae Committee. Daniel Blake, the section’s MBA Web site liaison, is responsible for making sure the newly designed Web site meets your needs. All four welcome your suggestions and participation.

The section sponsors two major conferences and at least one seminar each year. The Annual NLRB-U.S. DOL Robert Fuchs Labor Law Conference, co-sponsored with the other New England state bar associations and the Boston Bar Association, is held in October and focuses on Washington federal officials. Our 28th Annual Spring Conference is already set for May 9 at the Sheraton Boston. Judge Nancy Gertner will give the keynote address. The panels will address the First Circuit’s review of arbitration awards, the rights of undocumented workers, electronic discovery, and the comprehensive survey of employment law cases.

With respect to seminars, Jay Shepherd started our year with a seminar on non-compete agreements, headed by Judge Allan Van Gestel, and other seminars are being planned. While much work has already been done on the CLE programs for the year, we invite your suggestions to allow us to respond to developing interests.

The section values its co-sponsorship with other MBA sections. Labor and employment law impacts many specialties, including business law, civil litigation, immigration law, tax law and individual rights and responsibilities. By joining with our colleagues in L&E and other MBA sections, we all sharpen our knowledge and skills, meet new people in our specialty and gain recognition for our expertise, and contribute to our community. Please contact any section council member or section leaders to participate.

Massachusetts Bar Association

Labor and Employment Law Section Council 2006-07

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By Alan E. Brown

HELL’S GATES—ADOPT EFFECTIVE CLIENT COMMUNICATION METHODS TO AVOID BAR DISCIPLINE

Section Review
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Law Practice Management

A t the mouth of the Kennebec River in Arrowsic, Maine, there is a section of water known as Hell’s Gates. Here, strong currents draw the unsuspecting boater into a whirlpool that even an old salt would struggle to escape. Avoiding trouble means steering clear of that section of the river altogether. Here in Massachusetts, wise lawyers heed similar advice when dealing with the BBO. They do not risk crossing its path. However, many lawyers unnecessarily invite scrutiny of their work and risk discipline by failing to adopt and follow effective client communication methods.

Bar counsel’s Attorney Consumer Assistance Program (ACAP) screens all complaints made to the BBO. Since its inception, ACAP has reported that more than 25 percent of its callers raise concerns about lawyer neglect, lack of diligence and communication problems.1 As a former bar counsel investigator responsible for mediating these attorney-client disputes, I can personally attest to the large number of BBO inquiries generated by lawyers’ lax communication. The BBO routinely hears clients say:

“I don’t get to see my lawyer often enough.”

“What can you do to minimize your exposure to client discipline?”

“When and how communication will take place, in order to predict and properly respond to client expectations.”

Many offices rely heavily on support staff to communicate with clients. This can result from the lawyer’s busy schedule or because the lawyer services a non-English speaking population and needs an assistant to translate information. While it is fine to have a secretary or paralegal communicate basic information to clients, it is not appropriate to delegate all client communications to support staff. The client hired and wants to hear from you, the lawyer. Bar discipline problems can emerge when the non-lawyer assistant evolves into a pseudo-attorney, giving legal advice. Additionally, many clients doubt information received from support staff when the lawyer seems evasive to speaking with the client. Many clients think the support staff is simply pacifying them. Take time to speak with clients before they call the BBO.

1. Return all phone calls within 24 hours

Clients want to know that their lawyers are working diligently on their behalf. Nothing comforts clients more than to hear their lawyer’s voices on the other end of the telephone as they attempt to return a call the same day, leaving detailed information with your secretary or your voice-mail greeting indicating when you will be back in the office and available to take and return calls. Request that your clients leave their voicemail messages the times when they will be available. Ask at the inception of the representation, as part of a standard intake form, the best time to reach the client, and the clients’ preferred method of communication.

2. Send frequent written updates

Clients ask their lawyers to handle disputes that are very often emotionally charged. As a result, many clients benefit from written updates that provide assurance that their assuages have been received by the lawyer.1 Having something in written solving also means that the client has a source besides the lawyer to consult when a questions arises. While certainly this is not the address all clients’ concerns, it does offer the client a second source, besides the lawyer, from which to obtain information about the case. At my firm, we strive to send something in writing to each client, even if it’s just a quick e-mail, every 60 days. Also provide the client with written notice of important information and developments in the case. Unlike a carpenter who can show his progress in building a home to his customer, lawyers have to exercise greater creativity in presenting case progress to clients. Clients will appreciate the services provided if they receive regular notice of important events. Better appreciation means fewer calls to the BBO.

Note that a recent written communication from a lawyer to a client goes a long way in convincing bar counsel that the lawyer has reasonably responded to information, and often shifts the burden to the client to explain why this written update is insufficient.

3. Put office systems in place that foster communication

Client communication should not consist solely of firefighting. By taking control of client communication, you regain control of your practice and your time. Having systems in place, even if it is just a tickler that reminds you to reach out to your client at regular intervals, cuts down on client inquiries and allows you to respond on your own schedule.

Make use of technology to facilitate this process. Many lawyers who answer BBO complaints stemming from communication problems lack a client communication system in their offices.

5. Create a standard letter for the “nuisance client”

We have all experienced situations where a client calls much more often than case developments occur. While it may not fully satisfy the client, it will go a long way towards satisfying the BBO if the lawyer sends a form letter to the client that very briefly (i.e., one sentence) describes the status of the case and informs the client that you will provide an update in 60 days or as appropriate. Keep this letter handy and set support staff to prepare it for your signature. Documenting your prompt compliance and attempts to keep the client reasonably informed strongly evidences compliance with Mass. R. Prof. C. 1.4.

6. Bill regularly

Just like frequent written updates are critical to effective client communication, regular billing shows your clients the work you have invested on their behalf and the bill itself is a great communication tool. Regular billing...
Law Practice Management

also lets clients know how much money you have spent on the case fees and expenses. Surprise bills at the end of the case often result in calls to the BBO. Combining monthly billing with a short narrative status update is a great way to efficiently manage client communication. Some firms that take cases on a contingency keep internal time records to track their own efficiency. Consider sharing these “bills” with clients so they can appreciate your efforts.

Log the date and time of every call to a client, even if you just leave a voicemail message. If no substantive conversation takes place, bill these calls as “no charge.” Aside from creating a record of your attempts to reach your clients, a useful record when facing disciplinary allegations of poor communication, clients love to see “no charge” entries on their invoices.

7. Provide a roadmap to the case

At the inception of the representation, provide the client with a roadmap outlining major events in a typical case (e.g., answering the complaint, written discovery, deposition), along with guidelines setting out how often the client should expect to hear from you. Tell clients in this roadmap that you will provide status updates whenever a major development occurs or every 60 days. Inform clients about the time a typical case takes to reach trial. Deal with any client’s unreasonable expectations at this stage, and decline the case if you cannot come to an agreement.

Better to turn down the case than take on a client who will become a communication nightmare. If you take the case, stick to the plan set out in the roadmap. But counsel will look favorably on any lawyer who shows such careful planning in communicating with his clients.

8. Recognize signs of a communication problem

If you regularly receive calls from clients asking for the status of their cases, you may have a client communication problem. If you regularly speak with clients only after they have left multiple messages, you likely have a client communication problem. If you have received calls from ACAP or have had written complaints filed against you, you definitely have a communication problem. In all cases, take a serious look at the communication methods now in existence in your office and make improvements. Failure to recognize and address communication issues means you will ultimately hear from the BBO. Do not unnecessarily invite the BBO to scrutinize your work and possible discipline.

End notes

3. Of course, these communications are intended to be brief status updates, not detailed analyses or opinion letters.
4. Under no circumstances should you fail to reply to a call from ACAP within 24 hours or ask a support staff member to handle an ACAP inquiry. This only adds weight to an allegation of poor communication.

Property Law

The end of “prohibition by condition”:
CASTLE HILL APARTMENTS LIMITED PARTNERSHIP v. PLANNING BOARD OF HOLYoke

By Mark W. Corner

It is a well settled proposition of land use law that site plan review is a valuable tool in the regulatory process, providing municipal planning boards and zoning boards with oversight over uses permitted as a matter of right under local zoning by-laws or ordinances. It is equally well settled that in the regulatory process, municipal land use authorities are authorized to impose reasonable conditions on projects subject to permit-ting, including under the site plan review process. There may, of course, be a substantial difference of opinion between a landowner and a municipality as to what constitutes a “reasonable” condition imposed on a use permitted as a matter of right undergoing site plan review.

The right of property owners to rely upon uses permitted as right in their developmen-tal planning, and the limits on the authority of a municipality to impose conditions on such development in the context of site plan review, met on a collision course in Castle Hill Apartments Limited Partnership v. Planning Board of Holyoke.¹ The Appeals Court acknowledged the limits of the authority of a municipality to impose such condi-tions, recognizing that such authority, without limits, is tantamount to the authority to deny such permitted use.

Factual background

Castle Hill Apartments Limited Partnership (“Castle Hill”) is the owner of real prop-erty located at 83 Mountain Park Road in Holyoke, Hampden County, Massachusetts, consisting of 17.4 acres (the “property”). On or about Nov. 16, 2001, Castle Hill, as owner of the property, and II Construction Inc., as general contractor, submitted plans to the City of Holyoke Planning Board for five mul-tifamily structures, containing a total of 125 residential units, on the property (the “pro-ject”). The project, comprising “multifamily dwellings,” is a use permitted as a matter of right in the RM-20 zoning district in which the property is located, since it comprises multifamily dwellings with a density of less than 20 units per acre.² The project and asso-ciated structures, as proposed in Castle Hill’s application, complied in all respects with the dimensional zoning requirements applicable to the RM-20 zoning district, including set-backs, height and lot coverage. Castle Hill is also the owner of 56 existing townhouse-style rental units located on the property, each hav-ing two means of access and egress to grade, which were designed and built circa the 1960s and 1970s. The proposed units in the new structure were designed as “garden-style” apartments, with access and egress from each unit to common areas within the building, and without direct access to grade.

Under the ordinance in effect at the time when Castle Hill applied for a building per-mit, as well as under the ordinance as amended as of Feb. 19, 2002, an applicant for a building permit for new construction of a multifamily structure or development required a special permit from the Planning Board, as well as site plan approval by the Planning Board for a multifamily development consisting of more than one building lot.³ The Planning Board conducted public hearings in connection with Castle Hill’s application for the project over eight sessions, running from Jan. 10, 2002 until July 9, 2002, at which point the Planning Board closed the public hearing and the record on Castle Hill’s application.

Castle Hill’s application was subject to vehement opposition from abutters and other community members. Opponents of the project referred to the design of the proposed

Endnotes

¹ See the Appeals Court’s decision in Castle Hill v. Planning Board of Holyoke, 455 N.E.2d 1307, 1308 (Mass. 1983). It is noted that, in the time since the publication of that case, the Massachusetts Supreme Judicial Court has vacated the Appeals Court’s decision in Castle Hill v. Planning Board of Holyoke, 455 N.E.2d 1307, 1308 (Mass. 1983) and remanded the matter to the Appeals Court. See Ayers v. Planning Board of Holyoke, 465 N.E.2d 447 (Mass. 1984).

² The RM-20 zoning district allows multifamily dwellings, as defined by the ordinance, as a permitted use therein, decreasing only in the amount of lot coverage with certain setbacks. See City of Holyoke, Zoning Ordinance, Art. 4.II.

³ The Planning Board’s decision in Castle Hill v. Planning Board of Holyoke, 441 N.E.2d 515, 519 (Mass. 1982).
buildings as “barracks” style. Additionally, the mayor of Holyoke wrote the following to the city’s planning director about the project:

Anyone willing to support such a project does not have the best interests of the city at heart and cannot have my support and confidence. Therefore, I respectfully have to ask for letters of recusation from any board member and the planning director who are inclined to favor this flawled project and not bring the full power of local zoning as well as Massachusetts General Law.

During the course of the public hearing process, its response to concerns raised by the community and the Planning Board, Castle Hill reduced the number of units proposed for the project from 125 to 123. On Oct. 3, 2002, the Planning Board voted unanimously, at a public meeting, to “approve” the plan submitted by Castle Hill. The Planning Board issued a Statement of Findings, dated Oct. 4, 2002, as well as a Notice of Decision — Site Plan Review, Approval with Conditions, which was filed with the Holyoke city clerk on Oct. 4, 2002. In its Statement of Findings, the Planning Board expressly found as follows:

• The completed site plan application package submitted by [plaintiffs] meets the requirements of the Site Plan Review Ordinance, Section 10.0.0, and is sufficient for board review.

• Castle Hill complied with the requirement that it submit to the Planning Board a "narrative giving details of the project. In addition to this narrative, we have asked for and received additional information."

• Castle Hill is "in compliance with the use and dimensional requirements of the Holyoke Zoning Ordinance, the General Laws of Massachusetts and applicable rules and regulations of state and federal agencies.

• Castle Hill is in compliance with the criteria "in regard to landscape and open space."

• The Planning Board identified no prob-
lems with the project with regard to utilities, drainage, circulation, services, infra-
structure demands or outdoor storage.

• Such approval was hardly an endorsement of the project by the Planning Board. Despite having determined that the project had satis-
fied the objective requirements set forth in the site plan review provisions of the ordinance, and despite its unanimous vote to "approve" the project, the Planning Board went on to observe that the project:

building design is not compatible with the existing development with regard to architecture, building materials and entrancesways. The proposed units are of "barracks" style design (two entrancesways per building) using vinyl siding and facade brick, yet the existing buildings use clapboard and brick with separate front and rear entrances for each unit. For these reasons, the proposal is not compatible with the existing development, and does not comply with Section 10.1.7.3 of the Holyoke zoning ordinance.

The Planning Board purportedly conditioned its "approval" subject to, inter alia, the following condition subsequent ("Condition 8"): 8. Prior to the issuance of the building permit, the applicant shall submit to the board for its approval, an amended design that shall address the following: (a) The building design shall be in harmony with the existing structures. (b) The design shall incorporate the use of brick and clapboard construction materials consistent with the existing structures. (c) The proposed structures shall vary in size, style and detail consistent with the existing structures on the parcel. (d) Each unit must include a front and rear means of access/egress, specific to the existing dwelling structures, for sub-
sequent approval. (e) The color of each unit shall be consistent with the color scheme of the existing develop-
ment.

In effect, the Planning Board’s “approval” of the project was expressly conditioned upon Castle Hill submitting, for the subsequent approval of the Planning Board, an entirely new plan, which would provide for the wholesale redesign of the “approved” plan. Indeed, the design changes associated with such a revised plan would require the Planning Board to determine that each unit “include a front and rear means of access/egress” would result in the project being converted from a “garden-style” (or, more pejoratively, “barracks” style) design to “townhouse-style.” As a conse-
quence of converting the project from garden-
to-townhouse-style within the footprint approved by the Planning Board, the number of units on the property would be reduced from the 123 units appearing on the “approved” site plan to 40 to 60 units — sub-
stantially fewer than the 348 units (including the 56 existing units on the property) permitted by the Planning Board’s decision, dated July 2, 2004, pursuant to Condition No. 17 of the Planning Board’s decision.

Procedural history

In a classic case of being unable to “please all of the people all of the time,” two appeals were generated from the Planning Board’s decision. Castle Hill appealed to the Land Court from the Planning Board’s decision, pursuant to G.L. c. 40A, §17, contending that the imposition of Condition 8 was beyond the authority of the Planning Board. Castle Hill protested that the Planning Board exceeded its authority by requiring each unit to have two means of access and egress per unit, pursuant to Condition No. 8(d), noting that such a major design change would have resulted in the significant reduction of the number of units that could be constructed on the property within the approved footprint from the 123 units ostensibly “approved.” Further, despite “approving” the plan, the board specifically required that Castle Hill submit a new plan in accordance with Condition 8, including the condition that each unit have two means of access and egress, for sub-
sequent approval. Additionally, a number of abutters appealed from the decision in a sepa-
rate action filed in Hampden Superior Court.

The Land Court held a hearing on Castle Hill’s Motion for Summary Judgment on Nov. 24, 2003, at which the court consoli-
dated Castle Hill’s appeal with the abutters’ appeal from the Planning Board’s “approval” of the plan. On April 9, 2004, the Land Court (Sandis, J.) issued a Memorandum of Decision and Order. The Land Court allowed Castle Hill’s Motion for Summary Judgment, ruled that the Planning Board had exceeded its authority with respect to the imposition of Condition 8(d) to its decision, which required Castle Hill to submit a new plan with separate access and egress for each unit, finding that such condition was an effec-
tive denial of the plan. The court remarked the matter to the Planning Board to make findings consistent with the summary judg-
ment decision, and to issue a new decision within 90 days of the date of the Land Court’s decision. Specifically, the Land Court ruled that:

The Planning Board should be aware that the decision shall not be revised so as to limit the number of units in the project below the number proposed by the plain-
tiffs, particularly where the maximum number of units allowed on loco-
wer is nearly five times the number of the maximum number allowed. (Emphasis added)

The Land Court retained jurisdiction on the matter for review of the Planning Board’s revised decision. The Land Court also dis-
missed the abutters’ appeal, finding that they lacked standing as “persons aggrieved” by the Planning Board’s decision necessary to sustain an appeal under G.L. c. 93A, §17.


The Appeals Court decision

By decision dated March 31, 2006, the Appeals Court affirmed the decision of the Land Court. The Appeals Court upheld “the use of site plan approval as a permissible regu-
atory tool for controlling the aesthetics and environmental impacts of lands,” but held that “[w]here the proposed use is one permit-
ted by right, by site plan approval, it may apply substantive criteria […] and may only impose reasonable terms and conditions on the use of the proposed site.” The Appeals Court concluded that “the discri-
tionary power to deny use is denied.”

The Appeals Court acknowledged, how-
ever, that “our plan review “is not without some teeth.” A board … possesses discretion to impose reasonable conditions under a bylaw’s requirements in connection with approval of the site plan, even if the conditions are objected to by the owner or are the cause of added expense to the owner. In some cases, the site plan, although proper in form, may be so intrusive on the interests of the public in one particular aspect or another that rejection by the board would be tenable. This would typically be the case in which, despite best

The Land Court (Sandis, J.) issued a sub-
sequent order on Oct. 13, 2004, rectifying that “[t]heir status report filed with this court on Sept. 3, 2004, [Castle Hill] proposed new language in the findings and conditions in which they agreed to add additional plantings not to exceed 5 percent of the cost of land-
The Appeals Court then went on to dis-
cuss what would constitute a “reasonable” condition imposed under site plan review to a use permitted as a matter of right.11 While multi-family dwellings, such as those pro-
posed by Castle Hill, constitute a use permit-
ted as of right in the zoning district in which the property is located, additional zoning relief was required under the City of Holyoke Zoning Ordinance. Section 7.6 of the ordi-
nance requires a special permit and site plan approval for multi-family developments con-
sisting of more than one building for dwelling purposes per lot. Pursuant to Section 10.1.1 of the ordinance applicable to all new multi-
family housing, the purpose of site plan review is to “protect the health, safety, conve-
nience and general welfare of the city by pro-
viding a mechanism to review plans for pro-
posed structures and to ensure that development is designed or expanded in a
manner that reasonably protects visual and environmental qualities of the site and its immediate surroundings. The number of entrances is not an enumerated condition of site plan review, and the Appeals Court rejected the board’s assertion that the number of entrances is an inherent part of the build-
ning’s architecture or design in the context of site plan review. The Appeals Court expressly held that use of the catchall phrase of “architectural techniques” as permitting the board to require a redesign of each building to provide multiple entrances was unrelated to the considerations of safety, health, environ-
ment, or aesthetic benefits to the neighborhood. The court further noted that:
Reasonable conditions aimed at con-
trolling noise or other environmental or visual impacts associated with the use of the entrances by multipurpose uses, or the architectural design of the entrances themselves, may have been permissible under Holyoke’s site plan review criteria. Nonetheless, imposing a condition that requires Castle Hill to completely redesign the interior and exterior of each building to add multi-
ple entrances to accommodate vague exterior aesthetic concerns is not rea-
sonable, and exceeds the board’s authority. In addition, we share the judge’s concern about the impact of the
conditions on the density of the pro-
ject, which is an enumerated con-
sideration of the site plan review cri-
teria.

The Appeals Court further noted that it “did not consider reasonable a condition imposed pursuant to site plan review that provides questionable aesthetic value and yet pro-
foundly impacts the density of the project.” The court noted that “the condition’s dra-
matic impact on the density of the project under the guise of harmonizing visual impacts is troubling,” and that “issues of density are not included in the site plan review’s criteria because issues as to density, like issues related to the use itself, were previously resolved in a legislative sense when the city enacted the ordinance requiring up to 20 units of multi-
family residence per acre of a site in the RM zoning district.” Accordingly, issues of density, as well as uses permitted as of right, cannot be restricted through the site plan review process. Conditions restricting permitted uses and
allowed density are not properly restricted by conditions unrelated to the enumerated goals of site plan review applicable under the zoning ordi-
nance. In that regard, the Appeals Court noted that:
The proposition that two entryways per unit would contribute positively to the visual impacts of the buildings is difficult to accept. Although the adoption of the label ‘barrack’ style to describe the proposed buildings con-
notes an unattractive, uninteresting, and, perhaps, distasteful design, the actual site plan depicts colonial-like architectures with vaulted rooftops, shuttered windows, multiple decks, and attractive lighting and landscaping. The visual advantages achieved from adding multiple entrances to the proposed structures are not readily apparent from the record.

The court further noted that
against this backdrop, the issue before the Appeals Court was whether imposing a condi-
tion of two entrances per individual unit is a “reasonable” condition “to protect the health, safety, convenience and general welfare of the city … and to ensure that [design] reasonably protects visual and environmental qualities of the site and its immediate surroundings, consistent with Section 10.1.1 of the ordi-
nance. The Planning Board conceded that
Castle Hill would have to completely recon-
grace the board’s authority. In addition, we share the judge’s concern about the impact of the
do not allow development carte blanche. Reasonable conditions may be imposed through the site plan review process, to imple-
ment the explicit goals of such process set forth in the community’s extant site plan review regu-
lations. The imposition of such reasonable conditions, however, must be tied to the authority of the board administering site plan review, and must be geared to achieve the goals identified in the by-law, such as the legitimate planning goals of safety, traffic control and the like. However, the imposition of such conditions cannot inter-
ference with more specific rights and restrictions that have been legislatively imposed, such as density, dimensional and use restrictions in a zoning district that are authorized by the applicable zoning regulation. As noted by the Appeals Court, “where the site plan involves a permitted use, the judge’s proper role . . .
[is] to inquire whether the public [may] be protected to a degree consistent with the rea-
sonable use of the locus for the permitted use, consistent with the allowed density.” A planning board, administering site plan review, only has authority to impose conditions if the design flaw regulated by the condition was “so intrusive to the interests of the public in one regulated aspect or another that rejection by the board would be tenable” — a high stan-
ard indeed when dealing with uses permitted as of right.

Here, the Planning Board did not seek to regulate “health, safety, convenience or gen-
eral welfare” through site plan review of the project — which was well within the density restrictions imposed by the Holyoke Zoning Ordinance. Instead, it sought to regulate the
“visual and environmental qualities of the site and its immediate surroundings” — i.e., it sought solely to regulate aesthetics. In doing so, it impermissibly affected the density of the project, reducing it to below the level permit-
ted as of right under the ordinance, and thus overstepped its bounds.

In sum, while the site plan review process has “teeth,” its regulatory appetite cannot exceed the limits and goals legislatively imposed through the site plan review regu-
lations, or those regulations governing permitted uses and density.

End notes
2. See City of Holyoke Zoning Ordinance (here-
forth “Ordinance”), § 3.1, 4.3 (Table of Principal Uses).
3. See Ordinance § 6(2)(f) (in effect through February 19, 2002) and Ordinance §7.4.6 (effective as of February 19, 2002).
4. The abusers’ appeal was transferred to the Land Court by interdepartmental transfer purs-
uanne to G.L. c. 218, § 9.
5. The Land Court decision contains an extensive discussion concerning its jurisdiction to con-
sider the Planning Board’s decision on site plan review at this state of the proceedings, noting that the Ordinance and the Decision itself sub-
mit the question to review pursuant to G.L. c. 40A, § 17. The Land Court held that “where the site plan for a use as a matter of right is denied, there is no need to first apply for a building permit, the denial of which would trigger an appeal under G.L. c. 40A, §§ 8 and 15, as a prerequisite to an appeal under G.L. c. 40A, § 17.” Compare with St. Botolph Citizens Committee, Inc. v. Board of Redevelopment Authority, 429 Mass. 1 (1999) and Quincy v. Planning Board of Towneley, 39 Mass. App. Ct. 17 (1995).
7. The abusers also filed a Notice of Appeal, but did not prosecute the appeal, which was dis-
missed by the Appeals Court.
8. The Planning Board sought further appellate review, which was denied by the Supreme Judi-
cial Court.
10. The Appeals Court did not reach, in sum, the question of whether site plan review is relevant un-
in cases where the site plan involves a permitted use, the judge’s proper role . . .
[is] to inquire whether the public [may] be protected to a degree consistent with the rea-
sonable use of the locus for the permitted use, consistent with the allowed density.
11. Because site plan review is created by local ordinance or by state statute, we recognize that the term does not have one meaning in the context of site plan review.
15. A caveat: the Appeals Court noted that “[p]revious site plan review is created by local ordinance or by state statute, we recognize that the term does not have one meaning in the context of site plan review.” See St. Botolph Citizens Committee, Inc. v. 429 Mass. at 8 n.9.
16. The Land Court acknowledged that “while the Planning Board may not postpone a determina-
tion of a matter of substance in part of its deci-
sion, it may grant a permit and reserve to itself the right to review compliance with any condi-
tions imposed.” See, e.g., Tino v. Board of Appeals of Shruberry, 22 Mass. App. Ct. 618 (1986); Ranney v. Board of Appeals of Nantucket, 11 Mass. App. Ct. 112 (1981). By setting the matter back to the Planning Board, with instructions, did not adddress directly whether the Board’s original decision was defective for that reason. The Appeals Court did not reach, and did not address, that issue.
SOURCE OF CONFUSION: THE NEW MASSACHUSETTS AND FEDERAL REGULATIONS ON THE SOURCING OF INCOME FROM THE EXERCISE OF NONQUALIFIED STOCK OPTIONS

By Adam K. Desjean

In July, Massachusetts issued new regulations addressing the taxation of nonresidents of Massachusetts. Included in the regulations were new rules on the sourcing of nonresidents’ income from the exercise of stock options that are not qualified stock options (“NSOs”) under the Internal Revenue Code. In 2005, the Treasury Department similarly issued regulations addressing the sourcing of stock option gains of nonresidents of the United States. The “grant to exercise” sourcing rule Massachusetts announced in its regulations differs from the “grant to vest” sourcing rule that the federal government adopted in its 2005 regulations. As a result of these differing sourcing rules, a foreign person who is a nonresident of both Massachusetts and the United States will often recognize different NSO income amounts for Massachusetts and federal tax purposes when he or she exercises NSOs that were received in connection with Massachusetts employment.

Residency and sourcing

The concept of residency differs for Massachusetts and federal tax purposes.1 In general, for federal tax purposes, an individual is a resident of the United States if the taxpayer is a United States citizen or a green card holder, or if the individual is “substantially present” in the United States.2 While the actual “substantial presence” test is more nuanced, many tax practitioners refer to the substantial presence test as the “183-day rule,” as most other nonresident individuals who are present in the U.S. for 183 days or more are residents under the substantial presence test.3 For Massachusetts tax purposes, a taxpayer who is domiciled in Massachusetts is a resident.4 In addition, Massachusetts has its own 183-day rule for determining residency.5 Under Massachusetts’ 183-day rule, a nonresidential individual who has a “permanent place of abode” in Massachusetts and who spends more than 183 days in the state during the taxable year is a resident of Massachusetts for state tax purposes.6

The consequences of residency/nonresidency are similar under both the federal and Massachusetts tax systems. For a taxpayer who is a resident of the United States, gross income includes income from all sources worldwide.7 In contrast, nonresidents of the U.S. are federally taxable only on their U.S. source income.8 As under the federal system, the gross income of a Massachusetts resident for Massachusetts tax purposes includes income from all sources worldwide.9 Gross income of a nonresident of Massachusetts is analogous to gross income for a nonresident under the federal tax system in that it takes into account only gross income from sources within Massachusetts.10

Stock options rules

A nonqualified stock option is a stock option that fails to be a qualified stock option under §422 or §423 of the tax code.11 Qualified stock options are treated favorably if certain holding period requirements are satisfied. The rules governing stock option qualification are quite detailed. Accordingly, only broad outlines of the rules for qualification under §§422 and 423 are presented here. Section 422 delineates the requirements for “incentive stock options” (“ISO”). In order for an option to be an ISO, the option must be granted pursuant to a plan that permits an employee to purchase shares of the employer, or shares of a parent or subsidiary of the employer.12 In addition, the plan itself must be approved by the granting company’s shareholders, the options must be granted within 10 years of the date of the plan’s adoption, and options granted under the plan must be exercisable within 10 years of the grant date of the option.13 Finally, an option will not be a qualified option under §422 if the option exercise price is less than the fair market value of the stock at the time that the option is granted.14

Section 422 contains the rules relating to options granted pursuant to employee stock purchase plans (“ESPPs”).15 ESPP options, like ISO options, must be granted pursuant to shareholder- approved plans and the option’s exercise price must be for the purchase of stock of the employer or a parent or subsidiary of the employer.16 Unlike ISOs, however, ESPP options can be granted with a built-in “spread” between the option exercise price and the fair market value of the stock at the time of the option grant. The spread amount is limited to the lesser of 15 percent of the fair market value of the stock at the date of the option grant or 15 percent of the fair market value of the stock at the time the option is exercised.17

Tax consequences of disqualifying options

As indicated above, options granted under both ISO and ESPP plans have holding period requirements for statutory treatment to obtain. In both instances, the employer must hold the stock for at least two years after the grant of the option, and the stock must also be held for at least one year after the option is exercised.18 Dispositions of stock prior to the attainment of the holding period requirements are disqualified income.19

If the holding period and other requirements are met in the case of an ISO, then the employee recognizes no income on the grant or exercise of the option, unless the taxpayer is a nonresident and his or her income is attributable, for the purposes of determining its source, is based upon the facts and circumstances of the particular case.20 However, the new regulations further add that “[i]n the case of stock options, the facts and circumstances generally will be such that the applicable period to which [the option spread] is attributable is the period between the grant of the option and the date on which all employer-related conditions for its exercise have been satisfied (the vesting of the option).”21

Example of sourcing under new federal regulation:

NSO TO PURCHASE 100 SHARES AT $15/SHARE

Grant date: Jan. 1, 2004
Vest date: Dec. 31, 2005
Option exercise date: July 1, 2006, stock FMV of $35/share
Non-U.S. resident: January 1, 2006 - exercise date (July 1, 2006) (assume 120 non-U.S. worldwide wages)
NSO income: $200 ($300 FMV at exercise less $100 exercise price)
Sourcing: All U.S. source income, as all workdays during grant period and vesting period are U.S. workdays.

Massachusetts sourcing of stock option income

Prior to this year, Massachusetts sourced all of the “spread” from an NSO to Massachusetts if the NSO was granted in connect-
The Massachusetts sourcing of income for NSOs is complex and depends on the facts and circumstances of each case. The new Massachusetts rule, which took effect on January 1, 2006, replaced the previous time-based method with a new method that takes into account the workdays spent in Massachusetts. The new rule is intended to provide a more equitable distribution of income between Massachusetts and the taxpayer's home state.

| Total NSO income: | $200 |
| Workdays during grant to exercise period: |  |
| Massachusetts: | 480 days |
| Non-Massachusetts: | 120 days |
| Total Days: | 600 days |
| Mass. apportionment %: | 80% (480/600) |
| Mass. source income: | $160 ($200 x 80%) |

The exercise of nonqualified options will often have differing gross incomes for Massachusetts and federal tax purposes. Given that many taxpayers will likely be unaware of this difference in the starting point for the computation of tax, there seems to be the potential for significant, albeit unwitting, noncompliance with the new Massachusetts sourcing rule.

Apart from this potential for confusion, the distinction embodied in the new Massachusetts NSO sourcing rule would appear to suffer from a lack of raison d'être. While the old Massachusetts NSO sourcing rule captured more income for Massachusetts than both the current and old federal sourcing rules, it is not at all clear that the new Massachusetts regulation will result in the sourcing of greater amounts of income to Massachusetts than would be sourced to the state if Massachusetts followed the federal rule contained in the 2005 federal regulations.

Indeed, inasmuch as under the Massachusetts rules the option-holder has significant control over the sourcing of income — he or she, after all, decides when to exercise the option — it seems possible that the new Massachusetts rule will actually result in less tax revenue for the Commonwealth than if the federal "grant to vest" rule had been adopted.

Conclusion

In conclusion, as a result of the new, differing state and federal sourcing rules, transnational taxpayers who have received NSOs in connection with Massachusetts employment will have to be particularly mindful of their respective gross income computations.

End notes
1. Given the divergence in the federal and Massachusetts residency rules, it is possible that the Massachusetts and federal tax treatments of NSO gains would differ purely as a consequence of the fact that a taxpayer is a resident of the United States for federal tax purposes and a nonresident of Massachusetts for Massachusetts tax purposes, or vice versa.
3. Under the Internal Revenue Code, an individual is substantially present in the United States during a tax year if the taxpayer is present in the United States for at least 31 days in the calendar year and, under a formula which treats a portion of prior year’s days of presence as days of presence in the current tax year, the taxpayer’s days of presence in the United States for the current tax year equals 183 or more days. See 26 U.S.C. § 7701(b)(3).
10. 26 U.S.C. § 421. Section 421 does not refer to "qualified stock options" but to qualifying transfers, which transfers can occur only with the options described in §§ 422 and 425.
23. See Treas. Reg. § 1.83-7 and 26 U.S.C. § 83. The primary reason that few NSOs are taxed as income upon grant is because NSOs must have a "readily ascertainable fair market value" in order to be taxed upon grant. Treas. Reg. § 1.83-7(a).
26. The regulations indicate that compensation should be sourced based on "the facts and circumstances of the particular case." Treas. Reg. § 1.861-4(b)(2)(i). However, the regulations also indicate that in many instances appointment on a time basis is acceptable. Treas. Reg. § 1.861-4(b)(2)(ii).
28. Rev. Rul. 69-17. Revenue Ruling 69-17 addressed sourcing for the purpose of Inter-
PROVISIONS IN THE PENSION PROTECTION ACT AFFECTING PRIVATE FOUNDATIONS AND DONOR ADVISED FUNDS

By Lisa M. Rico

T he Pension Protection Act of 2006, P.L. 109-280 (the “2006 Pension Act”), signed into law by the president on Aug. 17, 2006, has a number of provisions affecting private foundations and donor advised funds. This article provides an overview of several of the changes affecting private foundations and donor advised funds.

Increases to the penalties under the private foundation rules

Private foundations are defined under Section 509(a) of the Internal Revenue Code of 1986, as amended (the “code”), as Section 501(c)(3) organizations (organizations organized and operated for charitable, religious, educational, scientific or literary purposes, testing for public safety, to foster national or international amateur sports competition, or for the prevention of cruelty to children or animals) that are not public charities. Public charities are publicly supported organizations that receive a certain amount of their support from governmental units or contributions from the general public or organizations that provide support to a public charity (a “supporting organization”). Unlike public charities, private foundations usually receive their support from and are controlled by a limited number of contributors. Due to this nature of private foundations and the potential for abuse, Sections 4940-4945 of the code impose a number of anti-abuse rules and excise taxes on private foundations (the “private foundation rules”) that are not applicable to public charities. The 2006 Pension Act has added more sting to the private foundation rules by increasing the amount of certain excise taxes effective for tax years beginning after Aug. 17, 2006.

Section 4941 of the code imposes an excise tax on a private foundation’s excess business holdings of any functionally unrelated business enterprise during the taxable year. The initial tax on excess business holdings has been increased from 5 percent to 10 percent of the value of such holdings.

Section 4942 of the code imposes a tax on a private foundation if the foundation makes investments that jeopardize the organization’s charitable purposes. The initial tax imposed on foundations for jeopardizing investments has been increased from 5 percent to 10 percent of the amount involved.

A foundation manager who knowingly participates in the making of jeopardizing investments is also liable for a 10 percent (increased from 5 percent) tax on the amount of the investment. In addition, the dollar limitation on the initial tax on the foundation managers has increased from $5,000 to $10,000 per investor. While the amount involved. If a tax is imposed on the self-dealer, a tax may also be imposed upon a foundation manager who knowingly and willfully participates in the act of self-dealing. The tax on the foundation managers for acts of self-dealing is increased from 2.5 percent to 5 percent of the amount involved and such tax is limited to $20,000 per act (up from $10,000 per act prior to the 2006 Pension Act).

Section 4943 of the code imposes an initial tax on a private foundation’s undistributed income that has not been distributed before the first day of the second (or any succeeding) taxable year following the relevant taxable year. The tax on the amount of such undistributed income at the beginning of such second (or succeeding) taxable year has been increased from 15 percent to 30 percent.

Section 4944 of the code imposes an initial tax on a private foundation’s excess business holdings of any functionally unrelated business enterprise during the taxable year. The initial tax on excess business holdings has been increased from 5 percent to 10 percent of the value of such holdings.

Section 4945 of the code imposes a tax on a private foundation’s undistributed income that has not been distributed before the first day of the second (or any succeeding) taxable year following the relevant taxable year. The tax on the amount of such undistributed income at the beginning of such second (or succeeding) taxable year has been increased from 15 percent to 30 percent.

New taxes imposed on taxable distributions from donor advised funds

As an alternative to establishing a private foundation to reduce administrative costs, many individuals gift to donor advised funds. A donor advised fund is a fund or account into which a donor contributes funds into an account with a sponsoring organization and pursuant to an agreement (a “donor advised fund”) (1) which is separately identified by reason of a donor’s services to the organization, or (2) with respect to which the donor (or the donor’s designee) has (a) advisory privileges as result of the donor status as donor and not by reason of a donor’s services to the organization.

Section 4966(d)(1) of the code, a donor advised fund is a fund or account (hereinafter referred to collectively as an “account”) (1) which is separately identified by reason of a donor’s services to the organization; (2) which is owned and controlled by a sponsoring organization, and (3) as to which the donor (or the donor’s designee) has, or reasonably expects to have, advisory privileges as to the distribution or investment of assets held in the fund or account by reason of the donor’s status as donor. All three prongs of this test must be met for a fund to be treated as a donor advised fund. A sponsoring organization, as defined by Section 4966(d)(1) of the code, is an organization (1) to which charitable contributions may be made other than a code section 501(c)(3) governmental entity and without regard to the code Section 170(c)(2)(A) requirement that the organization be organized in the United States, (2) which is not a private foundation, and (3) which maintains one or more donor advised funds.

The Joint Committee on Taxation Techni- cal Explanation of the Provisions of the Pension Protection Act of 2006 (the “joint committee report”) provides insight into the require- ments necessary to be treated as a donor advised fund. The committee report indicates that the third prong of the test is not met unless the account refers to contributions of a specific donor, such as naming the account after the donor or by accounting separately for such account on the books of the sponsoring organizations as funds contributed by a specific donor. A fund or account that is treated as a donor advised fund if the contributions of multiple donors will gener- ally not meet this prong of the test. With respect to the second prong of the donor advised fund test, the committee report indi- cates that if a donor or person other than the sponsoring organization controls the funds deposited into an account, such fund is not a donor advised fund. The third prong requirement of advisory privileges exists if both the donor (or the donor’s designee) and the spon- sorizing organization have reason to believe that the donor (or the donor’s designee) will provide advice and that the sponsoring organization generally will consider such advice. An actual provision requiring advisory privileges is not required. The committee report indicates that the advisory privilege must be as result of the donor status as donor and not by reason of a donor’s services to the organization.

Section 4966(d)(2)(B) of the code specifi- cally excludes certain accounts from treat- ment as donor advised funds. A donor advised fund shall not include any account (1) which makes distributions only to a single designated governmental entity, or (2) with respect to which the donor (or the donor’s designee) advises as to which individuals receive grants for travel, study or other similar purposes, if (a) such person’s advisory privileges are performed exclusively by such person in the person’s capacity as a member of a committee, all of the members of which are appointed by the sponsoring organization, (b) no donor or donor’s designee (or persons related to such persons) directly or indirectly control such committee, and (c) all grants from such
account are awarded on an objective and non-discriminatory basis pursuant to a procedure approved in advance by the board of directors of the sponsoring organization, and such procedure is designed to ensure that all such grants meet the requirements for individual grants under Section 4945(g)(1), (2), or (3) of the taxable expenditure rules.

In addition, the secretary may exempt any account not otherwise excluded from treatment as a donor advised fund (1) if the committee advising with respect to the distributions from such account is not directly or indirectly controlled by the donor or the donor’s designee (or any related party), or (2) if such account benefits a single identified charitable purpose.

New taxes imposed on prohibited benefits from a donor advised fund

For tax years beginning after Aug. 17, 2006, the 2006 Pension Act also imposes new taxes on distributions from any donor advised fund which results in a donor, donor advisor or a related person (hereinafter referred to together as the “donor advisor”) receiving directly or indirectly a more than incidental benefit as a result of such distribution. New Section 4967 of the code imposes a tax on any donor advisor equal to 12.5 percent of the amount of any benefit received by the donor advisor. The tax on the fund receiving from such account is not directly or indirectly controlled by the donor or the donor’s designee (or any related party), or (2) if such account benefits a single identified charitable purpose. A donor advisor is any person who is a donor, a member of the donor’s family, or a 35 percent controlled entity of an investment advisor, a member of the family of such donor or designee of the donor, or a 35 percent controlled entity of such person.

Extension of excise tax on excess business holdings to donor advised funds

The 2006 Pension Act extends the excise tax on private foundations’ excess business holdings under Section 4943 of the code to donor advised funds by providing that for purposes of this excise tax, a donor advised fund is treated as a private foundation. In applying the rules under Section 4943 of the code to any donor advised fund, the term “disqualified person” will include any person who is a donor advisor, who has, or reasonably expects to have, advisory privileges as to the distribution or investment of amounts held in the fund or account by reason of the donor’s status as donor, or as a member of the family of such donor or designee of the donor, or as a 35 percent controlled entity of such person.

Donor advisors and investment advisors are disqualified persons for excess benefit transactions

The 2006 Pension Act adds two new categories to code Section 4958’s definition of disqualified person for the purpose of the excess business transactions tax. The first category provides that for any transaction that involves a donor advised fund, the donor advisor is treated as a disqualified person with respect to that donor advised fund. The second category is for any transaction which involves a sponsoring organization, any investment advisor, a member of the family of an investment advisor, or certain controlled entities of an investment advisor is treated as a disqualified person. An investment advisor is any person (other than an employee of the sponsoring organization) compensated by such organization for managing the investment of, or providing investment advice with respect to, assets maintained in donor advised funds owned by such organization.

Under new Section 4958(c)(2) an excess benefits transaction will include any grant, loan, compensation or other similar payment from an account to any donor advisor with respect to such account. In such a transaction, excess benefit includes the amount of any such grant, loan, compensation, or other similar payment.

The 2006 Pension Act now provides guidance as to what constitutes a donor advised fund while at the same time imposing stricter rules. In addition to the above changes regarding private foundations and donor advised funds, the 2006 Pension Act includes changes to supporting organization rules, disclosure rules for exempt organization returns and other rules affecting exempt organizations and charitable contributions. These rules should be considered when advising clients regarding their charitable giving alternatives.