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Access to Justice
Revisiting Debtors’ Hell: More work needed to protect consumer defendants ............................................. 1
by Robert Hobbs and José Vazquez

Civil Litigation
Medicare set-asides and personal injury cases — what is the practitioner to do? .............................................. 3
by David J. Berg

Limiting discovery — A step forward or backward?
The report of the American College of Trial Lawyers Task Force on Discovery ............................................. 7
by Albert P. Zabin

Immigration Law
Comparative treaty law ................................................................................. 10
by Adam Birnbaum

The history and impact of Saysana v. Gillen on mandatory detention in immigration cases ........................... 14
by Kerry E. Doyle

Labor & Employment
Social media and the workplace: A comprehensive guide for employers ...................................................... 16
by Renee M. Jackson

Fixing the student achievement gap: A guide to collective bargaining for Massachusetts’ underperforming schools .......... 20
by Allan W. Drachman

Law Practice Management
Should lawyers take credit cards? .............................................................. 25
by Andrea Goldman and John W. Marshall

Probate Law
The Estate of Bartley J. King and In Re: Guardianship of Kenneth E. Simon: Analyzing attorney’s fees in probate litigation ........................................... 27
by Patricia L. Davidson

“Probate litigation” can be a misnomer .......................................................... 30
by Mark E. Swirbalus and Douglass C. Lawrence

Public Law
Section 1983, a Terry “stop and frisk” and the Second Amendment ..................................................................... 32
by Edward M. Pikula

Taxation Law
Consider an ESOP as the buyer of choice for your company in a recovering economy ........................................ 36
by Steven M. Burke and Donna L. Killmon

Review of 2009 Massachusetts tax developments .......................................................... 38
by Richard M. Stone
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Revisiting Debtors’ Hell: More work needed to protect consumer defendants

by Robert J. Hobbs and José I. Vazquez

“The ‘people’s court’ has become the collector’s court,” The Boston Globe concluded in its 2006 award-winning series entitled “Debtors’ Hell.” The series uncovered the surprising — if not shocking — practices of some debt collectors in Massachusetts, as well as the vulnerability of the hundred thousand overwhelmed, unrepresented consumers sued each year in unfriendly small claims and district courts.

The Globe found that there was virtually no representation of consumer defendants in the commonwealth’s small claims courts. With small amounts of debt being litigated, it made no economic sense for consumer defendants to hire private attorneys to represent them in court. Most legal aid organizations could not afford to give priority to small claims cases when they could barely provide urgent representation in evictions, domestic abuse cases and other emergencies.

Lack of representation allowed debt collector lawyers to obtain quick default or agreed judgments and payment orders, often without any evidence of the original debt or of a valid assignment. Default judgments were sometimes entered against defendants who were not properly served notice of the underlying suits. Rather, the court often assumed that defendants were notified unless notices were returned undelivered to the court by the U.S. Postal Service. Nevertheless, most defendants were convinced to settle debts that collectors could not legally prove were owed or could not even identify by account number.

Nearly four years after the Globe’s report, many of these problems persist and are exacerbated by an economic recession that has forced thousands of Massachusetts families to fall behind on payments and leaving them unable to catch up because of exorbitant interest rates and late fees. Debt collection suits continue to swamp civil court dockets, and debt buying — the process in which companies purchase uncollected debt portfolios from creditors for a small fraction of their face value — has become a busy, lucrative industry. Though the commonwealth’s courts and legal service organizations are working to create a fairer playing field for debtors and collectors, it will be the efforts of pro bono lawyers that are likely to make the difference.

Courts work to create a level playing field

In response to the explosive growth of debt collection suits in the commonwealth’s small claims courts, the Supreme Judicial Court amended the Uniform Small Claims Rules, based on recommendations from the District Court’s Small Claims Working Group.

The amended rules, which went into effect on Oct. 1, 2009, include the addition of mandatory address verification requirements, under which a plaintiff must certify that he or she has verified the defendant’s mailing address. If followed, this rule increases the likelihood that debtors will receive notice of any claim against them. Debt collectors not complying with this rule will have their cases dismissed without prejudice. The amended rules also expressly allow debtors to move the court to vacate a judgment if they did not receive actual service, reflecting the due process requirements in Mass. R. Civ. P. 60(b)(4).

The amendments include two other significant changes. First, the amended rules now require substitute or “covering” attorneys to file an appearance for each case they answer. These attorneys, whose law firms had informal agreements authorizing them to answer cases on behalf of collection attorneys from other offices, historically did not file formal notices of appearances with the small claims courts. This amendment allows substitute counsel to file a time-limited appearance, enabling the court to maintain accurate records for all attorneys appearing before it. Second, the amended rules make it inappropriate for the court to endorse any voluntary payment agreement relying on exempt sources of income. While certain property is already exempted from execution on judgment, this amended rule reaffirms that standard and informs legally unsophisticated parties that protections are available to them under state law.

Additionally, several organizations have collaborated to curb debt collector abuses. In 2007, the National Consumer Law Center and WilmerHale Legal Services Center of Harvard Law School developed the Debt Collection Justice Project to expand access to representation for low-income debtors. The project allowed law students certified under Rule 3:03 to represent debtors in small claims disputes at the Dorchester District Court. The students’ involvement led to surprising results. Of the cases chosen for representation, every one was dismissed with prejudice prior to trial due to the debt collector’s lack of evidence.

With this success, the Debt Collection Justice Project recently
expanded its efforts to other courts. This year, in collaboration with the Volunteer Lawyers Project, Senior Partners for Justice and the Boston Bar Association, the Debt Collection Justice Project has worked to establish a Lawyer for the Day program as well as limited assistance representation programs for debtors at the Central Division of the Boston Municipal Court.

Attorneys interested in participating in these programs can contact Emily Jarrell of the Volunteer Lawyers Project at (617) 423-0648 or via e-mail at ejarrell@vlp.org.

Modernizing the commonwealth’s property exemptions

In addition to recommending changes in the Uniform Small Claims Rules, the District Court’s Small Claims Working Group emphasized the commonwealth’s need to review its list of property exempted from seizure by creditors. These state law exemptions, which were last revised in 1975, are woefully antiquated and have not accounted for inflation or changes in technology. Moreover, they depart dramatically from federal law exemptions, which are available to Massachusetts consumers only if the can afford to file for bankruptcy.

Originally enacted in 1698, the exemptions permitted under state law provide varying levels of protections for personal property. Government aid and retirement plans are protected entirely.10

On the other hand, certain personal property is protected up to specified, often inadequate values.11 Most notably, state law allows consumers to protect up to $700 for an “automobile necessary for personal transportation or to secure or maintain employment.”12 While $700 may have represented a reasonable price for a used car in 1975, roadworthy used cars in 2010 cost considerably more. Other outdated state exemptions include protections for rent (up to $200 per month), for weekly wages (up to $125), and for two cows, 12 sheep, two swine and four tons of hay.13 The state exemptions currently provide no protections for household computers so critical to job searchers.

In contrast, federal bankruptcy law affords stronger protections, and the exemptions are readjusted every three years to account for inflation.14 Under federal law, debtors are allowed to protect up to $3,450 of the equity in a car, not of its total value.15

Hence, if the debtor has a car worth $8,000 with a $5,000 car loan balance, the debtor has $3,000 in equity and can fully protect the car through the exemption. In addition, the federal exemptions also allow for exemptions of certain property not exempted under state law, such as jewelry.

In the debt collection context, the purpose underlying the federal and state law exemptions is to protect debtors’ property to the extent that continued possession of the property would allow them to regain financial stability. The exemptions are not designed to shield debtors from paying their obligations. For debtors who must drive to work because public transportation is not available, the low value for the automobile exemption is not effective if it means the debtor must surrender the automobile and thus be unable to earn a living. As uncollected judgments against debtors skyrocket, the need to bring state exemption limits in line with current property values becomes more apparent. Therefore, the Legislature should act swiftly to make these common sense revisions to the values of property exemptions, thereby assisting families to rebound from overwhelming debts during a period of widespread unemployment.

Conclusion

Rebalancing the rights of debtors and creditors is critically needed to assure that more Massachusetts families are able to participate in and strengthen the economic growth that has been so elusive for the last two years.

Notes

3. To emphasize this flawed system, The Boston Globe conducted a simple experiment, in which it sent 100 letters to the same person at incorrect addresses across the state. Of letters sent, only 52 were returned. Beth Healey, Debtors’ Hell Part 2: A Court System Compromised, The BOSTON GLOBE, available at www.boston.com/news/special/spotlight_debt/part2/page4.html.
4. In 2005 alone, debt buyers purchased over $66 billion in delinquent credit card accounts, paying pennies on the dollar for the right to collect from consumers and creating high profit margins.
5. Massachusetts Uniform Small Claims Rule 2(b) available at www.lawlib.state.ma.us/source/mass/rules/tc/small2.html.
11. Common items protected under MASS. GEN. LAWS c. 235, § 34 in-clude: monthly amount needed for fuel, heat, water, hot water and light, not to exceed $75; provisions and money necessary for use by the family, not to exceed $300; homes or amount of money each rental period necessary to pay the rent for the dwelling unit, not to exceed $200 per month; cash, savings or other deposits in a banking institution or money owed to the debtor each pay period as wages, not to exceed $125; car necessary for personal transportation or to secure and maintain employment, not to exceed $700; necessary household furniture, not to exceed $3,000; tools, implements and fixtures necessary for carrying on his or her trade or business, not to exceed $500.
13. MASS. GEN. LAWS c. 235, § 34.
**Medicare set-asides and personal injury cases — what is the practitioner to do?**

*by David J. Berg*

The Medicare Secondary Payer ("MSP") statute makes Medicare the secondary payer "in any case where care can be paid for under any liability insurance policy." The MSP statute affects personal injury and workers' compensation clients and attorneys in two ways.

The first has to do with any medical bills related to the client's personal injury or workers' compensation case that Medicare pays for prior to any settlement or judgment in that case. In such a situation, Medicare has a statutory lien on the client's file for the amount of its payments, and, if the client settles the case or receives a judgment in the case, the client must repay Medicare for all bills that Medicare paid.

The second has to do with settlements of most workers' compensation cases exceeding $25,000 where the settlement will close out medical expenses. In this type of settlement, if the client anticipates receiving medical treatment for the injury after the settlement and is either on Medicare or reasonably expects to become a Medicare beneficiary within 30 months of the settlement date, the client must allocate a specified portion of the settlement to what is called a Medicare set-aside account ("MSA").

An MSA is a separate account that the client will use to fund his/her reasonably expected post-settlement medical bills that are related to the injury in question. Medicare will not pay for future related medical expenses until the properly funded and approved MSA is exhausted.

The size of the MSA is usually determined by a financial consultant who is retained by either the client's lawyer or the insurer. The consultant will review the client's medical records and make a recommendation as to how much money should be placed in the MSA. The consultant's report will then be sent to the administrator of Medicare, the Centers for Medicare & Medicaid Services ("CMS"), formerly known as the Health Care Financing Administration ("HCFA"), for approval. Upon approval, the MSA will be funded from the settlement proceeds. After it is funded, the client must file yearly accountings with CMS until the account is exhausted. If an MSA is not set up in a case where CMS thinks that it should be, CMS may suspend or stop Medicare payments.

Recently, personal injury lawyers have been questioning whether MSAs must be funded in settlements of personal injury cases where the client anticipates incurring future related medical expenses and is either on Medicare or reasonably expects to be on Medicare within 30 months of settlement. A thorough review of the MSP statute, its legislative history, its related regulations, CMS's manuals and memoranda, the case law, and the federal government's pleadings in litigation involving MSAs shows that MSAs are not currently required in settlements of personal injury cases. The American Association for Justice ("AAJ") takes the same position. In a message dated Aug. 11, 2009, that was e-mailed to all AAJ members, AAJ President Anthony Tarricone wrote that "statements from CMS, and other federal entities, make clear that the agency does not require set-asides for liability claims."

As previously stated, the MSP statute makes Medicare the secondary payer "in any case where care can be paid for under any liability insurance policy." This language can be read to implicitly authorize, but not require MSAs. Neither the MSP statute, nor its legislative history, contains any language that addresses or describes MSAs or explains how the MSP statute is to be applied to medical bills incurred after a personal injury or workers' compensation settlement or verdict.

Since the MSP statute and its legislative history do not explicitly require MSAs in tort cases, the regulations promulgated in support of the statute, 42 C.F.R. Part 411, Subparts C and D, should be reviewed. Subpart C addresses workers' compensation cases and subpart D addresses personal injury cases. However, subpart D contains no regulations that mention the settlement of tort cases. The only regulations in subparts C or D that address what must be done when a client expects to incur future medical bills after settling a case are §§411.46 and 47 in subpart C, but these regulations are specifically limited to settlement of workers' compensation cases.

A review of the original Notice of Proposed Rules in the Federal Register confirms this reading of the regulations. In outlining the proposed Subpart C, HCFA wrote, "The workers' compensation rules need revision to remove outdated content and to make them consistent with the rules pertaining to other types of insurance that are primary to Medicare.""}

In summarizing the proposed subpart D, HCFA wrote nothing about settlement of tort lawsuits. One can thus reasonably conclude that the regulations indeed neither require MSAs in tort settlements, nor authorize CMS to demand an MSA in tort settlements.

Since the statute and its related regulations do not address MSAs in tort settlements, CMS's memoranda and manuals should be reviewed to determine if CMS ever put the public on notice that it contended that MSAs were required in tort settlements. Although Congress enacted the MSP statute in 1980, and the Department of Health and Human Services ("DHHS"), the parent agency of CMS, promulgated the regulations in 1989, CMS did
Medicare's regulations (42 C.F.R. 411.46) and manuals (MIM 3407.7 & 3407.8 and MCM 2370.7 & 2370.8) make a distinction between lump sum settlements that are commutations of future benefits and those that are due to a compromise between the Workers' Compensation (WC) carrier and the injured individual. This Regional Office letter clarifies the Centers for Medicare & Medicaid Services (CMS) policy regarding a number of questions raised recently by several Regional Offices (RO) concerning how the RO should evaluate and approve WC lump sum settlements to help ensure that Medicare's interests are properly considered.

The Patel Memo continues, “It is important to note that settlement arrangements are only used in WC cases that possess a commutation aspect: they are not used in WC cases that are strictly or solely compromised cases.” Since the Patel Memo, CMS has issued a number of other formal Memoranda on MSAs. All can be found on CMS’s Web site, and all repeatedly refer to “WC,” “WC cases,” “WC carriers” and “WC benefits,” but not to personal injury cases. Only one memorandum refers to third-party liability cases or settlements in liability cases: the April 22, 2003 memorandum, which addressed liability cases only in the context of a work-related injury in which a third party case also exists. The relevant language is in FAQ #19, which states:

19) Does CMS require that a Medicare set-aside arrangement be established in situations that involve both a WC claim and a third party liability claim? Answer: Third party liability insurance proceeds are also primary to Medicare. To the extent that a liability settlement is made that relieves a WC carrier from any future medical expenses, a CMS approved Medicare set-aside arrangement is appropriate. This set-aside would need sufficient funds to cover future medical expenses incurred once the total third party liability settlement is exhausted. The only exception to establishing a Medicare set-aside arrangement would be if it can be documented that the beneficiary does not require any further WC claim related medical services. A Medicare set-aside arrangement is also unnecessary if the medical portion of the WC claim remains open, and WC continues to be responsible for related services once the liability settlement is exhausted.

CMS’s manuals only address the application of MSAs in the context of workers’ compensation cases. No manual refers to MSAs in the context of liability settlements. A brief example of CMS’s position can be seen in its MSP manual, which addresses the procedure that CMS will follow in processing settlements in workers’ compensation cases. The MSP manual has a subchapter titled “Recoveries from Liability Insurance Including No-Fault Insurance, Uninsured, or Under-Insured Motorist Insurance.” This subchapter addresses Medicare’s right to a payback from the settlement proceeds of a tort case, but only in the framework of Medicare’s lien for payments previously made. This subchapter contains no language about MSAs.

The review of CMS’s regulations, memoranda and manuals has shown that the regulations requiring MSAs indeed apply only to workers’ compensation cases, that CMS has only considered those regulations to apply to workers’ compensation cases, and that CMS has never considered the regulations to apply to personal injury cases.

This was also the conclusion of a University of Pittsburgh law student who published a note in the University of Pittsburgh Law Review in 2006 that stated, inter alia, “The regulations dealing with Medicare as a secondary payer to post-settlement medical expenses are specific to worker’s compensation, [which weakens] the argument that the MSP statute applies to future medical expenses in personal injury cases.” The note continued, “Even if the MSP statute arguably applies to a specific allocation of future medical expenses in personal injury cases, Medicare’s authority to disregard a settlement allocation that appears to shift costs onto Medicare refers only to the treatment of a ‘work-related condition.’”

The case law was reviewed next. However, there is no case law that addresses how MSAs should be applied. There are not even any recorded appeals from CMS’s reviews of proposed MSAs in workers’ compensation cases. Accordingly, the pleadings in the very few cases against DHHS with respect to the MSP statute were reviewed in order to determine if DHHS has ever taken a legal position on the purpose of MSAs. Such pleadings would of course constitute judicial admissions. At least two such cases exist and, in each of these cases, DHHS explained the need for MSAs only in the context of the settlement of workers’ compensation cases, and even conceded that MSAs are not mandatory in workers’ compensation cases. These judicial admissions by DHHS strengthen the points that the MSA process is for workers’ compensation settlements only, that current Medicare regulations do not require MSAs in tort settlements, and that DHHS (and thus, CMS) does not take the position that MSAs are required in tort settlements.

Even though CMS does not currently take the position that MSAs are required in tort settlements, it could certainly begin to take such a position at any time. If, however, CMS were to take this position without promulgating regulations authorizing it to do so, its action would be unenforceable as a matter of administrative law for several reasons.

First, there are no regulations that require MSAs in tort settlements, so any attempt by CMS to require them would be invalid unless DHHS promulgated such regulations. Review of the MSP statute shows that Congress did not delegate the authority to DHHS to require MSAs in the settlement of tort cases without promulgating regulations that authorize CMS to do so. The MSP statute provides:

No rule, requirement, or other statement of policy (other than a national coverage determination) that establishes or changes a substantive legal standard governing the scope of benefits, the payment for services, or the eligibility of individuals, entities, or organizations to furnish or receive services or benefits under this subchapter shall take effect unless it is promulgated by the Secretary by regulation under paragraph (1).

The Supreme Court has held that a “substantive rule” is a legal standard “affecting individual rights and obligations,” or one that “implement[s]” a statute. Another well-known description of “substantive rule[]” is one that “effect[s] a change in existing law or policy.” In contrast, an interpretive rule is a rule that is “issued by
an agency to advise the public of the agency’s construction of the statutes and rules which it administers.”

Accordingly, if CMS were to decide that its existing regulations and/or manuals require an MSA in a tort settlement, such an action would clearly effect a change in existing law or policy, and would thus create a new substantive legal standard which could not be implemented without being properly promulgated. For the same reason, CMS could not simply amend its manuals to require an MSA in a tort settlement without properly promulgating them.

Second, if CMS were to require an MSA in a tort settlement without promulgating new regulations authorizing it to do so, CMS would not be entitled to the deference that courts accord an administrative agency’s construction of its own regulations under Chevron, U.S.A., Inc. v. Natural Resources Defense Council. Even the revision of the CMS manuals or the issuance of a new memorandum would be an insufficient basis for this new practice. In this regard, the Supreme Court has held, “Interpretations such as those in opinion letters — like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law — do not warrant Chevron-style deference.”

Without specific regulations requiring MSAs in tort settlements, any demand by CMS that a Medicare recipient create an MSA in a tort settlement, or any threat by CMS to cease a Medicare recipient’s Medicare benefits, should be deemed as nothing more than an agency litigating position. The Supreme Court has held that Chevron deference will not be applied to “agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.”

Third, any demand by CMS that a Medicare recipient create an MSA upon settling a personal injury case or any threat by CMS to cease a Medicare recipient’s Medicare benefits on the grounds that the recipient would violate the administrative law fair notice doctrine. This rule holds that the public is entitled to fair notice of an administrative agency’s interpretation of the statutes that it administers and of the regulations that it has enacted. The District of Columbia Court of Appeals has summarized this doctrine as follows:

If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ‘ascertainable certainty,’ the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency’s interpretation.

The court continued by stating that when “the regulations and other policy statements are unclear, where the petitioner’s interpretation is reasonable, and where the agency itself struggles to provide a definitive reading of the regulatory requirements, a regulated party is not ‘on notice’ of the agency’s ultimate interpretation of the regulations, and may not be punished.” Because neither the Medicare regulations, nor CMS’s manuals, letters and memoranda, require MSAs in personal injury settlements, CMS has not to date provided the public with fair notice that MSAs are required in personal injury settlements.

Of course, CMS may make this whole argument moot by promulgating regulations requiring MSAs in personal injury settlements, but, for now, personal injury lawyers should take the position that MSAs are not required in settlements of non-workers’ compensation personal injury cases.

Notes

1. This article is based on a brief filed in January 2009, in the case of Wilson v. Pacific Gulf/Marine, et. al., Case No. 07-60879-CIV-ALTONAGA (USDC – Southern District of Florida, Miami Division). In that case, the defendants had filed a post-settlement motion to require the plaintiff to create an MSA and asked the court to decide whether an MSA was necessary. See generally Defendants and Third Party Defendants’ Joint Motion to Require Plaintiff to Set Aside Funds for Medicare or in the Alternative Motion for Clarification, Wilson v. Pacific Gulf, No. 07-60879 (S.D. Fla. filed Jan. 20, 2009). Ralph Mellusi of New York represented the plaintiff, and intended to object to the grounds that an MSA was not required in a tort case. Prior to that time, I had researched this issue for a case in my own office, and had already begun drafting a memo for my office’s use. Mellusi and I ended up in touch on this issue, and agreed that, because our firms viewed this issue similarly and because I had already done extensive research on the issue, we should use my research and work together to prepare an objection to the defendants’ motion. See generally Plaintiffs’ Opposition to Defendants and Third Party Defendants’ Joint Motion to Require Plaintiff to Set Aside Funds for Medicare or in the Alternative, Motion for Clarification, Wilson v. Pacific Gulf, No. 07-60879, at 3 (S.D. Fla. Mar. 6, 2009) (Order denying Defendants and Third Party Defendants’ Joint Motion to Require Plaintiff to Set Aside Funds for Medicare or in the Alternative, Motion for Clarification).


6. These documents are the Medicare Intermediary Manual and the Medicare Carriers Manual, which are both available on CMS’s Web site. See Centers for Medicare and Medicaid Services, Paper-Based Manuals, www.cms.gov/Manuals/PBM/


12. Id. at 479.


17. *Id.* at 302, n.31 (quoting the Attorney General’s Manual on the Administrative Procedure Act (1947)).

18. Powderly v. Schweiker, 704 F.2d 1092, 1098 (9th Cir. 1983); *see also* Linoz v. Heckler, 800 F.2d 871, 878-88 (9th Cir. 1986) (where a rule in a CMS manual is substantive and “neither required nor specifically authorized by the enabling legislation,” the agency “was required to conform with the notice and comment procedure of section 553 of the APA”).

19. *Chrysler Corp.*, 441 U.S. at 302 n.31. *See also* Shalala v. Guernsey Memorial Hospital, 514 U.S. 87, 99 (1995) (CMS’s Provider Reimbursement Manual “is a prototypical example of an interpretive rule ‘issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers’”).

20. *Cf. Chrysler Corp.*, 441 U.S. at 302 n.31. *See Shalala* 514 U.S. at 100 (“APA rulemaking would still be required if [the CMS manual] adopted a new position inconsistent with any of the Secretary’s existing regulations.”).


25. *Id.* at 1333-1334. *See also* United States v. S. Ind. Gas and Elec. Co., 245 F. Supp. 2d 994, 1011 (S.D. Ind. 2003) (“The inquiry is taken from the perspective of the regulated party (not the agency), and analyzes whether that party could have predicted the agency’s interpretation of the regulation at the time of the conduct at issue.”).

LIMITING DISCOVERY — A STEP FORWARD OR BACKWARD?
THE REPORT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS
TASK FORCE ON DISCOVERY

by Albert P. Zabin

A task force of the American College of Trial Lawyers (ACTL), appointed to examine the problems of expense and delay of the American judicial system, prepared a report outlining its views of the causes of these problems and proposed some remedies. The report is based on data from a survey conducted on the college’s behalf for the Institute for the Advancement of the American Legal System (IAALS).

The suggested remedies are rule changes that focus largely on excessive discovery and notice pleading, which the task force believed were the most important causes of expense and delay. The report accurately describes some of these changes as radical. The underlying principles of its proposals is that “the default” underlying the discovery rules should be changed from allowing “virtually unlimited discovery,” unless a court orders otherwise, to limiting discovery, unless a court orders otherwise for “good cause.

The report identified three major themes in the survey data: First, cases take too long and are too expensive. Second, the “existing rules structure does not always lead to early identification” of the issues, which “often leads to a lack of focus in discovery [and] [e] lectronic discovery ... needs a serious overhaul.” And third, judges should take a more active role and enforce the rules effectively.

It is this author’s view that the survey responses do not justify the task force’s radical revisions of the discovery rules the task force has proposed. This author’s opinion is due, in part, because the survey does not adequately differentiate between abuse of discovery from excess, evasion or frivolous motions to compel An additional weakness of the report is that the task force’s conclusions are based on opinions of a number (probably not statistically significant) of trial lawyers, rather than objective data. A consensus of expert opinion is valuable to establish hypotheses or possibly even some probabilities, but it here is insufficient to draw firm conclusions.

For example, the survey posited the following statements, asking for agreement or disagreement: “The Rules need minor amendments...” and “The Rules must be reviewed in their entirety and rewritten ...” 41 percent answered the first in the negative; 55 percent answered the second in the negative. (Appendix B, Table III.3) If there were a significant overlap between the respondents to these statements, one would conclude that there was overall satisfaction with the rules. If there were no overlap, one might conclude that the respondents thought that, good or bad, changing the Rules of Civil Procedure would make little difference in improving the civil justice system or that the respondents were generally satisfied with the rules. The report does not indicate whether there was an overlap or, if so, what was its nature.

Two recommendations in the report seem unsupported by the survey responses taken as a whole. It first recommends that discovery be limited to documents and information that “would enable a party to prove or disprove a claim or defense or enable a party to impeach a witness.” The second is that after initial disclosures are made, only limited additional discovery should be permitted. These proposals limit discovery not only quantitatively, but substantively. Their justification is that “[f]ewer than half of the respondents thought that our discovery system works well and 71 percent thought that discovery is used as a tool to force settlement.”

There were many criticism of discovery, but respondents apparently were not asked if they thought that the main or important abuse was excessive discovery. On the contrary, 71 percent agreed with the statement that, “In the majority of my cases, counsel agrees on the scope and timing of discovery.” And 73.5 percent agreed that counsel typically do not seek court limitation of discovery because of perceived disproportionateness (Rule 26(b)(2)). An unrelated report by IAALS, “Civil Case Processing in the Federal District Courts” (2009), states: “[t]he problem is simply stated ... too many civil cases in American courts take too long to resolve.” Its statistical analyses did not find a strong correlation between length of the time to case resolution and discovery.

Responses to other questions in the ACTL survey about discovery are equally inconclusive. 39 percent of respondents agreed that “discovery is abused in almost every case” in state courts, but 57.5 percent agreed when the statement applied to federal court litigation. Moreover, no question defines “abuse.” Did respondents mean “excessive” or “unfocused” discovery? Did some respondents mean “abuse” was excessive discovery. On the contrary, 71 percent agreed that counsel typically do not seek court limitation of discovery because of perceived disproportionateness (Rule 26(b)(2)). An unrelated report by IAALS, “Civil Case Processing in the Federal District Courts” (2009), states: “[t]he problem is simply stated ... too many civil cases in American courts take too long to resolve.” Its statistical analyses did not find a strong correlation between length of the time to case resolution and discovery.

Responses to other questions in the ACTL survey about discovery are equally inconclusive. 39 percent of respondents agreed that “discovery is abused in almost every case” in state courts, but 57.5 percent agreed when the statement applied to federal court litigation. Moreover, no question defines “abuse.” Did respondents mean “excessive” or “unfocused” discovery? Did some mean evasion? The difference is important to determine an appropriate remedy. Significantly, 84.4 percent agreed that “sanctions allowed by the discovery rules are seldom imposed.” Op. cit. at Table VI.1

These responses, taken together, suggest that the more significant discovery abuse involves evasion or even stonewalling,
because discovery scope and timing can hardly be abusive if the parties have agreed on them, and infrequently seek court action to limit discovery. If excessive discovery results from the agreement of counsel, should there not be a better case for limiting discovery than is made in the report? If obstructing discovery is the problem, limiting discovery is no solution. It assists the withholding of information.

Even assuming the survey were without statistical bias, the survey of opinions does not tell much about the quantitative extent of the perceived problems, or whether the presumably “overbroad discovery practices” are actually useful in finding important information. The tools to deal with discovery “abuse” are available in the existing rules. Under the existing rules in Massachusetts and in the federal courts, a judge can limit discovery to a single issue or narrow the range of issues before allowing additional discovery. Why are these powers inadequate? The report does not say. However, the clear implication of the responses described above is that lawyers do not ask the courts to exercise them.

The ABA did a survey of ABA member litigators (ABA Litigation Section Survey on Civil Practice, Detailed Report) substantially similar to the ACTL survey, with some additional questions, one of which was, “[W]hat percentage of firm revenues in civil litigation practice are attributable to discovery costs?” Defense lawyers and mixed-practice lawyers both responded that discovery accounts for 50 percent or more revenue in their practice, while only an average of 29.3 percent of revenue was reported as attributable to discovery in the practices of plaintiffs’ lawyers. Supra. P. 86. The implications of the responses are obvious.

The third conclusion of the task force, that electronic discovery needs a “serious overhaul,” seems to be an overstatement of what the data show. While an overwhelming majority (87.2 percent) of the respondents agreed that e-discovery increases the costs of litigation, disproportionately (75.2 percent) to the total litigation costs, 65.6 percent believe that the “2006 e-discovery amendments allow for efficient and cost-effective discovery of electronically stored information.” And 71.5 percent of the respondents agreed that “E-discovery has enhanced the ability of counsel to discover all relevant information. These responses suggest strongly that the rules governing e-discovery do not require radical overhaul.

Other responses show that in the opinion of a substantial majority of respondents, all is not well with e-discovery. Like other discovery, it is “abused by counsel” (66.4 percent),” outside vendors have increased the costs of e-discovery without “commensurate value to the client” (74.1 percent) and “Courts do not understand the difficulties in providing e-discovery (79.8 percent).

The report, however, sensibly proposes requiring parties to confer and seek agreement about e-information preservation and, in the absence of agreement, prompt judicial intervention. Electronic discovery, it recommends, should be limited by proportionality. This recommendation can be followed with intelligent use by litigants and judges of federal rule 26(2)(C) or the adoption of this rule by state courts. Finally, the report recommends that judges and lawyers obtain training to understand the technical aspects of e-discovery. The sometimes gargantuan costs of electronic discovery may well be an inherent cost of the new technology and the ubiquitous use of e-mails, just as the increase in medical costs is related to the use or overuse of new technology and drugs. If so, rule changes, short of extreme and universally unacceptable limits on e-discovery, are unlikely to be useful.

The recommendation of the ACTL report that has engendered the most heat is the recommendation to return to fact pleading. Spokesmen for the plaintiffs’ and defendants’ bar see black where the other sees white. Nevertheless, it seems intuitively obvious that a set of rules that significantly limits discovery before a litigant has to defend its pleading is in the interest of the party that has possession of evidence.

The visceral opposition to the recommendation to adopt fact pleading, seems to be based on two decisions of the Supreme Court — Bell Atlantic Corp. et al. v. Twombly 550 U.S. 544 (2007) and Ashcroft et al. v. Iqbal, 566 U.S., 129 S. Ct. 1937 (2009). The Supreme Judicial Court in dictum in Iannacchino v. Ford Motor Co., 451 Mass 623 (2008), stated that it follows Twombly. It is possible, even likely, that the Supreme Judicial Court will require much restraint in applying the judicially revised Rule 8(a), especially as it has not actually held that fact-based pleading is what the words of that rule really mean. Compare Feeney v. Dell, Inc., 453 Mass. 192, 213(2009) (complaint dismissed without prejudice, with leave to amend to allege fact critical to the M.G.L. c. 93A claim).

Much ink has been spilled discussing these cases; there is little that this author can add. However, opposition to fact pleading, at least as defined by Twombly, Iqbal and Iannacchino is not limited to plaintiffs lawyers. Professor Arthur Miller predicted that these cases “will weigh heavily on under-resourced plaintiffs who typically contest with industrial and governmental goliaths, often in cases in which critical information is largely in the hands of defendants that is unobtainable without access to discovery.” Sen. Arlen Specter, (D-Pa.) a ranking member of the Judiciary Committee, has introduced legislation to overrule Twombly. A similar bill has recently had hearings in a subcommittee of the House Judiciary Committee. The New York Times’ editorial page has called for Congress to overrule these cases. It remains to be seen how the Massachusetts appellate courts will apply the new Iannacchino fact-pleading standard.

Whether the evidence is adequate for major changes in procedural rules that may significantly affect outcomes in litigation, particularly if the changes adversely affect the outcomes for certain classes of litigants, should be very carefully evaluated. The IAALS report, “Civil Case Processing in the Federal District Courts,” appears to conclude that what is needed is less rule changes than better management by the courts. The ACTL report strongly recommends that a judge be assigned to each case to actively manage it. The budget problems for Massachusetts may make that recommendation impractical at the present time, and the opposition of some members of the judiciary, and many lawyers, make the implementation of that recommendation virtually unattainable. It is necessary for the bench and the bar to think out of the box for at least temporary solutions to the case management issues that create delay and consequently unproductive expense.

The IAALS report, supra, makes recommendations that do not necessarily require cases to be assigned to the same judges. They include setting reasonable but firm dates early in the pre-trial process for the close of discovery, for the filing of dispositive motions, ruling expeditiously on motions, even when denied, and limiting extensions of time. In addition, anecdotal evidence, of which this author is aware, supported by some of the survey questions of both ACTL and the ABA, suggest that judges must rigorously sanction discovery abuse of all kinds, particularly evasion, frivolous objections and motions to compel, as well as useless and meaning-
less responses to interrogatories propounded to discover expert opinions, under M.R.C.P. 26(b)(4). Perhaps most important is that judges and trial lawyers, by word and deed, should foster “a legal culture that accepts efficient case processing as the norm.”

One major contributor to the problem of the expense and burden of discovery, as the ACTL report recognizes (p.11), is the explosion of data and the ease with which e-mails are generated. Despite the “Miranda warnings” that lawyers give their clients about e-mails, the use, overuse and misuse of e-mails continue unabated. That use not infrequently creates discoverable and highly relevant evidence. Therein lies the rub. To save money, is it defensible to limit the ability of litigants to obtain such relevant evidence? It may be, but who should have the burden of persuasion on that point — the party seeking evidence or the party withholding it?

Finally, lawyers, like doctors who are concerned with the costs of health care need to face the role that fee-for-service plays in the rise of health care costs, need to face the question, about which the ACTL report only drops a hint, but which is more plainly advanced in the ABA Report, supra at 86, is whether the way most litigators are paid — by the hour — contributes to discovery “abuse.” If this is a significant contributor to the undue expense of litigation, clients, particularly in-house lawyers, can do much to reduce the costs of litigation without risk to the ability of the courts to decide cases using all-important evidence.

Notes


5. Out of 1,398 respondents who responded to “Notice pleading has become a problem….” 1,055 primarily represented defendants, 343 primarily represented plaintiffs. Appendix D, Table IV.1. If the number of survey respondents were equalized, the percentage of ACTL members who agreed with the statement would be close to 50-50 between plaintiffs’ lawyers and defendants’ lawyers.


7. A survey of federal and state court decisions found that electronic discovery doubled in 2009 over the previous year and 42 percent of those resulted in sanctions for failure to fulfill discovery obligations. Gibson, Dunn & Crutcher 2009 Discovery and Information Law Update (Jan 2010) (newsletter for “clients and friends). This survey of decisions suggests strongly that the primary form of discovery abuse is non-compliance with discovery obligations — stonewalling or evasion.

8. The “fact pleading” suggested in the ACTL proposed rule 2.1 and its illustrations (automobile negligence and simple breach of contract claims) seem at variance with the report’s “first principle” that “one size fits all” is not the most effective approach. They cover types litigation, which clearly do not involve the discovery problems the proposed rules are intended to cure.


10. Institute for the Advancement of the American Legal System, pp. 9-10.

**Comparative treaty law**

by Adam Birnbaum

Like most lawyers, advocates for asylum applicants are primarily concerned with American laws and procedures. Unlike most lawyers, however, advocates for asylum applicants, whether they consider it on a regular basis or not, regularly deal with issues of treaty interpretation, public international law and comparative law.

Most of the countries in the world are party to some or all of the international instruments protecting the rights of refugees and asylum seekers, but because there are several different mechanisms by which states incorporate (or fail to incorporate) international law into their domestic legal systems, there can be widely divergent outcomes for the applicant depending on where he makes his application. In order to be complete, the careful advocate should consider not only the likely result of an application made within the United States, but also the comparative advantage, if any, that his client may gain by filing an application elsewhere instead.

This article is by no means an exhaustive guide to foreign legal practice with respect to asylum and refugee procedures. It is merely meant to illustrate that the place of application can have a dramatic impact on the likelihood of an asylum or refugee application succeeding, and to serve as an introduction to the subject and a guide to further research, almost all of which can be undertaken with the resources readily available online. I will discuss the three main regional systems for dealing with the rights of asylum seekers and state duties to applicants (African, European and Inter-American), and how those systems affect the practices of states within their respective regions.

In cases where no application has been formally filed, or no declaration of intent has yet been made, a thorough advocate should consider whether the client might be better served by bringing his application in another jurisdiction. There are, of course, practical difficulties with this proposition; many states do not allow applications for asylum to be made outside of their national territory, so making this decision may necessarily involve the risk of additional international travel. Not every state offers the same benefits to successful applicants that the United States does, although in certain cases, benefits abroad may be more generous. Finally, the applicant may have an existing support network in the United States that drove his decision to come here to begin with, and this interest may override other considerations.

**International instruments and American law**

We are all aware that, except in the case of self-executing instruments, for a treaty to have legally binding effect in the United States, it must be accompanied by enacting legislation. Because American laws render nearly all multilateral international agreements non-self-executing, and because the United States has an uneasy relationship with both international law generally and international dispute resolution bodies in particular, it is basically impossible to plead treaty provisions or to use the legal tools that would allow us to understand those treaties in American courts. Should the American government fail to honor its obligations under international instruments such as the 1967 Protocol to the United Nations Convention Relating to the Status of Refugees, or the International Covenant on Civil and Political Rights, we cannot avail ourselves of either domestic courts or international bodies to resolve the problem.

That said, there are actually few global international instruments which deal with the rights of asylum seekers and refugees other than the ones mentioned above. In international law, generally speaking, the right of asylum is still only a right to seek asylum; there is no obligation on the part of the receiving state to approve the application, although the asylum seeker must be able to submit that application. Indeed, the only absolute international legal limitation on the receiving state's ability to send the applicant back to his country of origin is the rule of non-refoulement, which prevents the receiving state from deporting the applicant to any country where he faces a threat to his life or freedom. The degree of how much and what sort of risk he must face is, of course, dependent on national legislation.

The United States undoubtedly has one of the most generous support systems in the world in place for those whose asylum or refugee applications are approved. The application process, standards on refoulement, the availability of the court system to applicants, and national policy on pre-approval detention is, unfortunately, not as generous here as it is in some other countries.

As most readers are probably aware, there have been several categories of applications that the immigration courts have approved only sporadically (by finding creative applications/definitions of “social group” for example, some courts find a place for homosexuals within existing law), or not at all (e.g., refugees from generalized disorder or criminal violence not sponsored by governmental or rebel groups). Detention, sometimes long-term, of individuals bringing claims is also unfortunately common.

Additionally, even in cases where the underlying claim may not be meritorious, American immigration authorities may apply overly-stringent burdens of proof upon the applicant concerning
the fear of torture or other serious abuse on return to his country of origin. While the United States is not alone in these problems, some other states in the Western Hemisphere (e.g., Canada and Costa Rica[11]) and in Europe apply more forgiving standards to applications in these circumstances. Possible outcomes can range from positive consideration of an application that would be virtually doomed in the United States, to equally negative consideration that nonetheless results in non-deportability on refoulement grounds. The authority deciding such cases either has a different standard of proof or persuasion, or else avails itself of different sources of information independently of any documentation that the applicant can bring forward.12

**International instruments as sources of foreign law**

Instead of universal treaties, some of the best protection for the rights of displaced persons is actually enshrined in the three main regional instruments — the 1969 Organization of African Unity Convention on Refugee Problems in Africa (“OAU Convention”), the 1984 Cartagena Declaration on Refugees, and Europe’s two main human rights conventions, the Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, (“European Convention”) and the Charter of Fundamental Rights of the European Union, [2000] OJ C364/1 (“European Charter”). All came after both the U.N. Convention and its 1967 protocol, and while all of these regional instruments only deal with a particular territory and arose from a particular historical context, they all contain elaborations of the original U.N. Convention that make them useful launching points for further research into national laws and practices.

As of the entry into force of the Lisbon Treaty in 2009, the European Charter is “hard law” which can actually be used as a rule of decision in courts, or used as a basis for actions before an international tribunal, the European Court of Justice. Even though they are “soft law,” many of the state parties to the Cartagena Declaration and the older African Unity Convention take their responsibilities under those instruments seriously, and as time has passed, the Cartagena Declaration in particular has grown in importance as a regional source of persuasive law.

Because some of its language has been enshrined in the national legislation of some states in the region, the declaration likewise can act to bind national authorities to more inclusive definitions that would otherwise be available under the United Nations instruments. Both the OAU Convention and the Cartagena Declaration establish a broader definition of what a refugee is than the earlier U.N. Convention and its protocol; the OAU Convention in particular is notable for expanding the definition of a refugee to cover anyone compelled to “leave his place of habitual residence” because of man-made disasters in even a part of his country.13

The parties to the Cartagena Declaration initially included only 10 Central American states, plus Mexico. Today, the scope of the declaration has grown to encompass much of Latin America and the Caribbean. The degree to which the declaration has affected the development of legal protection for asylum seekers varies from country to country. Mexico, for example, was one of the original parties to the declaration but only passed its first enacting legislation for the U.N. Convention in 2000.14 It is therefore best to not take it for granted that the state parties to the Cartagena Declaration have extensively reformed their national practices based on its provisions.

The European Convention is a general human rights document which deals in Article 18 with the rights of asylum seekers. Because of this inclusion, it has (thanks to jurisprudence of national and international courts and other sources such as directives of the Council of Europe) grown into a body of law that extends significant protections to asylum seekers and refugees. The collective effect of these is to prod the member states of the EU to interpret the 1951 U.N. Convention and the 1967 protocol in a “liberal” manner — e.g., to err on the side of extending protection to displaced persons, and to refrain as much as possible from employing adversarial procedures to asylum application.15

Despite this, suits at the ECHR still occasionally crop up in response to excessively restrictive or prejudicial procedures employed in state parties to the European Convention. Because the ECHR can and does apply general principles of international law which are binding *erga omnes*, it has some flexibility to consider general international human rights legal standards when reviewing applications.

**Practical research tips**

If the client’s case is of a type not likely to be approved in the United States, the advocate should determine whether there are alternative interpretations of the relevant international instruments that might allow the client to more successfully apply elsewhere. Differing standards for non-refoulement, different methods of inquiry into country conditions, and varying requirements for the gravity of the threat to the client’s life, freedom, etc., may all result in a more favorable application. This will require the advocate to look into national legislation or summaries of such legislation from local NGOs, a process which can be greatly aided by inquiring into the jurisprudence of international bodies. The case reports of the European Court of Human Rights or the Inter-American Court of Human Rights, for example, will often mention the relevant national legislation and practices under review in its decisions.

Most developed countries have a ministry or department set up to deal with refugee and asylum issues. A simple Web search will usually turn up official homepages for these state agencies, although the pages themselves are not always available in English. The French government’s Web portal for refugee and asylum issues, for example,16 is available in French only. These Web portals will usually include references to relevant statutes and procedures used when assessing applications for asylum and refuge. Even when the government in question does not maintain an English-language Web page, however, local NGOs will often offer guides with basic information on the application process and on obtaining local legal representation in English.17

Most foreign legal systems do not make use of precedent in the same manner that American or other common law courts do, and the discovery of a court decision on point may thus not be as helpful as it would be at common law. Nonetheless, most civil law countries have a supreme court or constitutional court that does establish binding or highly persuasive precedent, and if an advocate is armed only with a foreign law statutory provision, then a search for that provision within the reports of the high court may reveal additional information on how these provisions are interpreted and applied. In countries where international law is directly integrated into the municipal legal system,18 a search by name for the interpretation of national practices in the light of regional or universal instruments can be particularly helpful.
Some final caveats

The advocate should be aware that in other nations, as in the United States, the route that the applicant took to arrive at his final destination, the relative safety he enjoyed within the borders of other states before his arrival at that destination, and the status of applications filed elsewhere (if any) can all have a negative effect on a final decision on an application. Other states can also have political problems harmonizing domestic laws with international commitments, and so the appearance of a state as a party even to a binding international instrument does not guarantee observance of the standards enshrined within that instrument. Finally, rules of statutory construction and interpretation vary widely among different legal systems — unless the advocate has a license in the foreign jurisdiction or has co-counsel with same, when reviewing the meaning of a foreign legal provision, he must always consult a member of that country’s bar.

Further research

Many of the links below are to organizations or bodies mentioned above, and are provided for the convenience of the reader.

International Organization for Migration
www.iml.db.iom.int/
A wide-ranging database of national and international laws dealing with migration issues.

Council of Europe
www.coe.int/t/e/legal_affairs/legal_co-operation/foreigners_and_citizens/
Select “Asylum, refugees and displaced persons”

The Council of Europe’s Legal Affairs division. Contains an archive of policy recommendations and reports of asylum and refugee policy within Europe.

U.S. Committee for Refugees and Immigrants:
www.refugees.org/
Provides country condition reports and general information.

Eurasylum Portal:
www.eurasylum.org/Portal/
Provides links to national legislation and a country-by-country list of NGOs dealing with refugee, asylum and general immigration issues in Europe.

European Court of Human Rights Search Engine:
http://cmissp.echr.coe.int/tkp197/search.asp

Refugee Survey Quarterly (subscription required):
http://rsq.oxfordjournals.org/
Published on behalf of the U.N. High Commissioner for Refugees. Provides a survey of recent developments in refugee and asylum law and issues.

Notes

1. 147 states are party to either the 1951 Convention or its 1967 Protocol, or both. A full list is kept by the Secretary General of the United Nations as depository of the Convention, and may be accessed at http://treaties.un.org by clicking on “Status of Treaties (MTDSG),” then selecting “CHAPTER V,” and then choosing either the Convention or its Protocol from the list.


4. The United States signed and ratified the International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171, in 1992, but made reservations and declarations with respect to its ratification that, practically speaking, robbed the covenant of all possible domestic effect. See 138 Cong. Rec. S4781-01 (daily ed. April 2, 1992). It is debatable whether the reservations were compatible even with American law; they are almost certainly incompatible with international law as they are in direct opposition to the purpose and spirit of the instrument.


8. U.N. Convention, supra note 3, art. 33(1) provides that “[n]o Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” This principle is also enshrined in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, June 26, 1987 1465 U.N.T.S. 85.


10. Article 31(1) of the U.N. Refugees Convention, for example, provides that:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

For a summary of these issues and a discussion of the incompatibility between American practice and international humanitarian law standards, see e.g., Human Rights First, U.S. Detention of Asylum Seekers (2009),

11. See e.g., Ley 8487 — La Ley de Migración y Extranjería [The Law of Immigration and Alienship] (Costa Rica).


15. This position is not a new one. See e.g., Parliamentary Assembly of the Council of Europe, Recommendation 434 on the granting of the right of asylum to European refugees (Oct. 1, 1965) (dealing with the then-current 1951 U.N. Refugees Convention) available at www.unhcr.org/refworld/docid/3ae6b38110.html.

16. See e.g., Office Francais de Protection de Réfugiés et Apatrides [French Office for the Protection of Refugees and Stateless People], www.ofpra.gouv.fr/ (last visited Apr. 15, 2010).

17. For instance, N.O.A.S., an organization which provides assistance to displaced persons seeking refuge or asylum in Norway, has several English-language informational pages. See Norwegian Organization for Asylum Seekers, A Watchdog for Asylum Seekers, www.noas.org/?p=news&news_id=66.

Mandatory detention was ushered into being by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”).1 IIRIRA added sections to the Immigration and Nationality Act (“INA”) requiring the detention of certain non-U.S. citizens who meet particular criteria — mainly certain types of convictions or persons who have engaged in terrorist activities — during the pendency of their immigration deportation court proceedings without release or access to a bond hearing before an immigration judge.2

Following the passage of this law, mandatory detention as a concept was challenged, but upheld as constitutional by the Supreme Court in *Demore v. Kim*.3 Nonetheless, the actual application of the mandatory detention provision by Immigration and Customs Enforcement (“ICE”) continues to be challenged on various grounds and under various theories. *Saysana v. Gillen*4 was the culmination of a major challenge to ICE’s over-broad interpretation of the mandatory detention statute when the government’s interpretation of part of the mandatory detention statute was struck down.

In 1996, IIRIRA §303(b)(2) established the effective date for mandatory detention and created the Transitional Period Custody Rules (“TPCR”) to govern in the interim.5 The TPCR expired Oct. 8, 1998. Therefore, anyone released from custody prior to the expiration date would be unaffected by the new mandatory detention law, regardless of the type of conviction they had or the criminal behavior they had engaged in.6 The Board of Immigration Appeals (“BIA”) generally upheld the non-retroactive nature of the mandatory detention statute regarding the TPCR in two published cases in 1999 and 2000.7 Additionally, a memorandum from legacy-Immigration and Naturalization Service (“INS”) from July 1999, known as the “Pearson Memo,” established the immigration service’s policy on mandatory detention under the newly passed law and clearly defined the new statute as non-retroactive.8

Despite the BIA’s and the then-INS’ pronouncement that the new mandatory detention law was non-retroactive, a few years later, ICE started applying mandatory detention to a broader group of people in contradiction to the earlier INS Pearson Memo. By 2005 or 2006, immigration court after immigration court across the country saw the government arguing that persons who had a conviction that would have subjected them to mandatory detention under the new INA §§236(c)(1)(A)-(D),9 but for the fact that he or she had been released prior to the expiration of the TPCR on Oct. 8, 1998, could nonetheless be subjected to mandatory detention if they had another arrest and release from custody unrelated to the enumerated offense after Oct. 8, 1998. The government began eagerly arguing for mandatory detention for persons in this group, even if the post-Oct. 8, 1998 arrest and release did not result in a conviction, or even if it was a mistaken or unconstitutional arrest. In other words, ICE began bootstrapping the pre-Oct. 8, 1998, criminal conviction on to any post-TPCR detention or arrest and release in order to enforce mandatory detention against a broader group of persons.

Ironically, this very group ICE wanted to keep in mandatory detention had some of the strongest claims for relief and release on bond, because by definition, by 2005 or 2006, they would have been in the United States more than 12 years in order to have a pre-October 1998 conviction and a post-1998 arrest and release, and therefore, be before the immigration court during the change of policy by the government. In fact, one of the two plaintiffs from the first *habeas corpus* case filed in the Massachusetts District Court challenging the government’s broader interpretation of mandatory detention in March 2007 not only won his case for relief in the immigration court, but is now a U.S. citizen.10 The other plaintiff was granted withholding of removal as a person who would more likely than not face persecution upon return to his home country before the federal judge could rule on the case, thus causing the case to moot out.11 This was another challenge we faced with this group — many of them won their cases in immigration court before we could get rulings from the federal district court.

What followed from that first case in 2007 was a long line of successful individual *habeas corpus* filings in Massachusetts as well as Southern District of New York, Middle District of Pennsylvania, and districts of New Jersey and Pennsylvania.12 In the midst of this, Houng Saysana was arrested and placed in removal or deportation proceedings with an immigration judge. During a bond reconsideration hearing, he was granted bond by the immigration judge over the government’s objection.13

The government appealed the immigration judge’s decision, but meanwhile, Saysana was released from custody. On Aug. 27, 2008, the Board of Immigration Appeals overturned the immigration judge’s bond decision, and in a precedent case binding on all immigration courts nationwide, found that the government’s interpretation should be adopted and that a pre-1998 offense enumerated in INA §§236(c)(A)-(D) combined with a post-October 1998 release from criminal custody, even on an unrelated matter, could be the basis for mandatory detention.14

In Saysana’s case, he had a pre-1998 conviction for indecent assault and battery with a five-year suspended sentence. With this conviction and sentence, pursuant to INA §236(c)(B), he would be subject to mandatory detention as an aggravated felon,15 except that...
he was released from custody prior to the expiration of the TPCR and therefore should have been exempt. He was arrested again after October 1998 and charged with failure to register as a sex offender in 2005. This charge was dismissed, but his “release” from that arrest arguably triggered mandatory detention because he was “released” from custody after 1998 and also had an enumerated offense.

A little more than a month later, in early October 2008, Saysana was arrested by ICE and detained once again. A habeas corpus action was filed on his behalf in the Massachusetts District Court. Following a hearing with District Judge Stearns in November 2009, the judge issued a decision ordering an individualized bond hearing for Saysana and rejecting the government’s arguments and findings in Matter of Saysana. Saysana was granted bond again by the immigration judge and released.

Meanwhile, the government appealed Stearn’s decision to the First Circuit Court of Appeals, the first court of appeals to review the Saysana issue. On Dec. 22, 2009, the First Circuit issued its decision overturning Matter of Saysana in the circuit and finding that the statute was clear on its face and that a person must be released after October 1998 as a result of an arrest for an offense enumerated in INA §§236(c)(1)(A)-(D) in order for a person to be subjected to mandatory detention. The court also found that even if the statute were not clear on its face that the release from custody must relate to the enumerated offense, the impact of the government’s interpretation of the statute in a manner to link pre-TPCR convictions to the enumerated offense, the impact of the government’s interpretation of the statute in a manner to link pre-TPCR convictions with post-TPCR releases from custody was unreasonable.

In light of the success overturning the government’s position and the BIA’s precedent in the First Circuit Court of Appeals, combined with numerous district court wins throughout the country, ICE now appears poised to reverse its legal position outside the First Circuit as well. Unfortunately, because district court habeas corpus decisions apply only in individual cases, the BIA’s decision in Matter of Saysana is still in effect outside the First Circuit. Uniform national policy will require a reversal by ICE itself in applying the law, or more likely, a new precedent decision by the BIA overturning Matter of Saysana.

Recently, it appears that both have occurred. A case currently pending at the BIA, which raises the Saysana issues, has given the board a chance to reconsider its position and re-establish uniform law that properly narrows the mandatory detention statute, rather than impermissibly expanding it. The Amicus Committee of The American Immigration Lawyers Association (AILA) recently contributed an amicus brief in the pending case of Luis Felipe Garcia-Arreola. Garcia-Arreola was granted a bond by the immigration judge, but the government appealed the decision, stating that his bond was granted in violation of Matter of Saysana.

After the First Circuit’s decision, in a very unusual step, the government appears to have recognized its untenable argument in attempting to uphold Matter of Saysana. David Martin, principal deputy general counsel of the Department of Homeland Security, sent a letter to the board in Garcia-Arreola’s case asking the immigration appeals court to reconsider Matter of Saysana. AILA’s amicus brief applauded the government’s new position, but urged the board to reconsider its approach to mandatory detention in general, not just in Matter of Saysana. The board was asked to narrow its interpretation of the mandatory detention statute in additional ways.

It is a hopeful time that the success in the First Circuit and the various district courts has forced the government to take a narrower approach to mandatory detention. The government did not do it willingly, however; they were forced into the position. These types of challenges to mandatory detention are particularly important at a time in which the number of persons detained by ICE continues to rise and the number of stories regarding people being lost or mistreated in the immigration detention maze grow.

Unfortunately, immigration detention policies and practices have existed in a dark corner of our society, invisible to all but a few who practice law on behalf of detained immigrants regularly. Even then, unpleasant surprises can lurk in the vast network of immigration detention centers nationwide. The best approach to avoid abuses in detention is to keep people out of detention in the first place. Saysana v. Gillen has gone a little way in reducing the immigration prison population, but the fight continues.

Notes

2. 8 U.S.C. § 1226(a), (c) (2006).
4. Saysana v. Gillen, 590 F.3d 7 (1st Cir. 2009).
6. 8 U.S.C. §1226(c).
11. Id.
13. See Saysana v. Gillen, 590 F.3d 7, 9 (1st Cir. 2009).
17. Saysana v. Gillen, 590 F.3d 7, 18 (1st Cir. 2009).
18. Id. at 14-15.

The use of social media — by both employees and employers — has become prevalent in the workplace. This presents both opportunities and challenges for employers, who are not always fully aware of the legal and business implications of the use (and misuse) of social media.

What are social media?

“Social media” are any type of Internet-based media created through social interaction, where individuals primarily produce (rather than consume) the content. Social media relevant to the workplace can be broken down into four subgroups:

- **Social networking Web sites**: These Web sites host Internet communities that allow individuals to interact with each other in various ways, such as connecting with friends and family (Facebook), sharing music (MySpace), and building a professional network (LinkedIn).
- **Blogs (“Web logs”)**: These are usually individual online journals or commentaries that allow for social interaction through a public “comment” feature. Some businesses also sponsor or create content for corporate blogs (for news sharing, marketing or public relations purposes). Twitter is considered a “micro-blog.”
- **Online multi-user virtual worlds**: These are online gaming communities where individuals interact and communicate via their customizable online characters (called “avatars”), which often appear to be three-dimensional. Popular virtual worlds include Second Life (interaction through a virtual economy) and World of Warcraft (interaction through virtual gaming). These virtual worlds generally include a chat or instant messaging feature through which participants can communicate.
- **Video-sharing Web sites**: These are online communities where individuals upload, view and comment on videos. YouTube is the most widely-known of such sites.

The content of these media is generally created for individuals, by individuals, so why should employers care? Because each medium is ripe with opportunity and risk.

Why should employers care about social media?

In a 2009 study by Deloitte LLP on social media and the workplace, 74 percent of the 2,008 employed adults surveyed responded that they believe it is easy to damage a brand’s reputation via social media. Alarmingly, 61 percent of the employed adults responded that even if their employer is monitoring their social networking profiles or activities, they won’t change what they are doing online, and 53 percent responded that their personal social networking pages are none of their employer’s business. Contrast this with 60 percent of the 500 business executives surveyed, who believed that employers have a right to know how employees portray themselves and their organizations online.

Another 2009 study confirms that employers are acting on this perceived “right to know.” In a study by Russell Herder and Ethos Business Law on social media and the workplace, 36 percent of the 438 management, marketing and human resources executives surveyed use social media to see what current employees may be sharing online, and 25 percent use social media to check the background of prospective employees.

Despite these social media use statistics, employers have not adopted a uniform approach to addressing social networking in the workplace. In a 2009 study on social media and the workplace by Robert Half Technology, 54 percent of the 1,400 chief information officers surveyed completely prohibit social networking sites in the workplace, while 19 percent permit social networking sites in the workplace for business purposes only. Of the 438 management, marketing and human resources executives surveyed in the Russell Herder/Ethos Business Law study, 40 percent block employee access to social media, while 26 percent encourage employees to use social media to further business objectives. A stunning 69 percent of these 438 respondents indicated that their company does not have a written social media policy.

What are the major issues for consideration regarding social media in the workplace?

Social media now permeate the entire life cycle of employment: during pre-employment inquiries, throughout the period of employment, and after separation from employment. Employers must consider the use and misuse of social media at each stage.

**Pre-employment: Whether to search for applicant information in social media**

In this Information Age, employers can now access more information about applicants by using social media than is typically available by using an application form or résumé drop. For example, an employer can follow an applicant on Twitter, search the
applicant’s public Facebook or LinkedIn profile, or browse the applicant’s personal blog. Applicants may reveal more information about themselves through text and photos in social media than they would in an interview, and, in making a hiring decision, employers can use information relating to an applicant’s illegal drug use, poor work ethic, poor writing/communications skills, feelings about previous employers, and racist or discriminatory tendencies. Employers can clearly benefit from this lawful use of information obtained from social media in the screening process.

However, employers can face lawsuits for unlawful use of the information obtained from social media. Employers may face liability under federal and state law (e.g., Title VII, Americans with Disabilities Act, Age Discrimination in Employment Act, state anti-discrimination laws) for using any information learned from social media about an applicant’s protected class status (e.g., race, age, gender, national origin, military status, disability, religion, marital status, and in some states, political affiliation or sexual orientation) in a hiring decision. The employer’s search of an applicant using social media may be revealed in later discovery, and it may be hard for the employer to prove in later litigation that it didn’t use the information obtained in a social media search when making its employment decision.

In addition, employers may face liability under certain state privacy laws for basing employment decisions on an applicant’s lawful, off-duty recreational activities (e.g., smoking). Employers should consider whether the benefits of using social media to screen applicants outweigh the risks. If an employer wants to supplement traditional hiring practices (application form, résumé, writing sample and/or interview) with a social media search, the following is a suggested approach for creating a global policy for using social media in hiring decisions:

- Screen applicants in a uniform manner. Create a list of the social media sites that will be searched for each applicant. Create a list of the lawful information about applicants desired from every social media search. After these search criteria are compiled, screen all applicants using that lawful criteria. If employers do not have the time, resources or inclination to screen all applicants using social media, they can choose a non-discriminatory subset of applicants to screen (i.e., choose to screen applicants for certain positions, levels or grades of employment).

- Have a neutral party (e.g., an employee in a non-decision-making role) conduct the social media search, filtering out any protected class information about the applicant and reporting only on information which may lawfully be considered in making the hiring decision.

- Don’t “friend” applicants in order to gain access to their non-public social networking profiles. The applicant may feel that he or she must accept the request in order to get the job offer, and such a request may make it harder for the employer to prove that it didn’t use the information discovered when making its employment decision.

- As always, employers must be able to point to a legitimate, non-discriminatory reason for the hiring decision, with documentation to support the decision. Employers who are considering making an employment decision based on information found in social media should always consult with employment counsel prior to doing so.

During employment: Whether to allow or encourage employees to use social media

There are many benefits to allowing or encouraging employees to use social media in the workplace. The use of social media in the workplace can create a more collegial atmosphere through less formal communications between co-workers, and learning personal information about co-workers through social media can lead to shared experiences and stronger working relationships. Social media can also be used for business development purposes. In addition, blogs and social networking sites can provide a great opportunity for customers to discuss the company’s products or services, and for employers to monitor and change their business practices, services, and products accordingly.

On the other hand, employers trying to foster camaraderie in the workplace through social media can instead foster awkward and potentially harassing situations when use of such sites turns inappropriate. When a supervisor wants to be a subordinate’s “friend” on a social networking site, it can create an awkward interaction between the supervisor and subordinate. This can be especially true if the subordinate accepts the invitation, the supervisor can see the subordinate’s other friends, photos, “wall” postings, social activities, and other personal information (and vice versa), unless privacy settings are adopted. If the subordinate doesn’t accept the invitation, he or she may be concerned that his or her employment opportunities may suffer or that the supervisor will be offended. Either way, the supervisor/subordinate dynamic is changed.

In more extreme cases, misuse of such sites can give rise to claims of co-worker or supervisor sexual harassment, or even cyber-stalking. Co-workers or supervisors can “poke” other employees or subordinates on Facebook. Co-workers or subordinates can harass the avatars of other employees or subordinates in Second Life. Derogatory or harassing comments on social media sites directed at fellow employees could create a hostile work environment.

The most obvious hazard to allowing or encouraging the use of social media in the workplace is that employees can spend so much time using social media during working hours that efficiency and productivity fall, but the biggest risk of social media in the workplace is the external employee misuse of such media. For example, employees can:

- abuse their access to their employer’s confidential or inside information by making unauthorized disclosures of company information (confidential, proprietary and/or trade secret) via social media, especially anonymously;
- misuse social media in a way that leads to corporate embarrassment and public relations issues;
- comment or post photos on social media sites that disparage the employer or its customers, thus negatively impacting the employer’s brand or image; and
- blog or comment via social media regarding confidential information about mass layoffs, confidential settlement or severance agreements, and the like.

A few recent examples demonstrate this risk:

- The Kansas City Chiefs football team suspended and then released its record-breaking running back Larry Johnson after he made Twitter postings insulting fans,
questioning the head coach’s experience, and using a gay slur. In the interim between the Twitter posts and the release, the gay-advocacy group GLAAD called for an apology from and punishment of Johnson for the slur, and Chiefs fans started an online petition demanding his termination from employment.

> Virgin Atlantic terminated 13 cabin crew members after they posted disparaging comments about the airline and its customers on Facebook. Although these employees did not have traditional “desk jobs,” and therefore were not online during working hours, they still managed to use social media in a way that disapp - aged the employer.

> A Domino’s Pizza employee in North Carolina made a video of himself (with another employee narrating) preparing sandwiches for delivery in a way that violated health code standards and generally disgusted viewers. The video went viral on YouTube, and Domino’s was dealt an immediate and urgent public relations crisis.

> Three teenage employees of Kentucky Fried Chicken were fired after turning a restaurant sink into their own personal hot tub. The employees posted photos of themselves in the sink, wearing only underwear, on MySpace, and the comments on the pictures and the name of photo album made it clear that the stunt took place at Kentucky Fried Chicken.

> A Delta flight attendant was suspended and eventually terminated in 2004 for posting pictures of herself in uniform and inside a Delta plane on her anonymous personal blog, originally called “Diary of a Flight Attendant,” where she referred to herself as “Queen of Sky.” She later sued the airline for sex discrimination, alleging that male flight attendants posted similar pictures of themselves in uniform on match.com and were not subjected to discipline.

Examples such as these support the Deloitte LLP study, cited above, in which 74 percent of the 2,008 employed adults surveyed responded that they believe it is easy to damage a brand’s reputation via social media.

To address these risks, employers must first consider the proper level of encouragement (versus an outright ban) of social media use in the workplace. This will depend on the employer’s industry, culture and workforce. For some professions, industries or positions, the use of social media might be appropriate or beneficial for business development purposes (i.e., for sales people to make and maintain contacts). For others, an outright ban may be appropriate for a workforce that simply has no business reason to access or use social media while at work or while using the company networks, facilities or equipment. However, such a ban could alienate employees, especially younger employees who grew up using social media, and could make all employees wary of the employer’s “Big Brother” appearances.

Employers can combat some risks of social networking in the workplace by implementing and enforcing information technology, code of conduct, harassment, and confidentiality policies that specifically reference social media. At a minimum, employers must insert broad language encompassing social networking sites, blogs, virtual worlds and video-sharing Web sites into current IT, code of conduct, harassment and confidentiality policies. Employers should consider adding the following features, if appropriate, to create a comprehensive social media policy:

- A clear statement that misuse of social media can be grounds for discipline, up to and including termination.
- A prohibition on disclosure of the employer’s confidential, trade secret or proprietary information.
- A request that employees keep company logos or trademarks off their blogs and personal Web pages or profiles (including photos of employees in uniform) and not mention the company in posts, unless for business purposes.
- An instruction that employees not post or blog during business hours, unless for business purposes.
- A prohibition on using company e-mail addresses to register for social media sites.
- A prohibition on posting false information about the company or its employees, customers or affiliates.
- A general instruction that employees use good judgment and take personal and professional responsibility for what they publish.
- The name of someone within the organization for employees to contact if they have questions about any social media use or policy.
- A statement that all employees with personal blogs that identify their employer must include a disclaimer that the views expressed on the blog are those of the individual and not the employer.
- An instruction on proper topics for discussion that add value, if encouraging employee use of social media for marketing or business development purposes.

All supervisors and human resources professionals must be trained on the appropriate use of social media and how to consistently enforce the employer’s social media policies. Any policy addressing social media must use broad language and be updated frequently, because social media will develop and change over time. A general culture of professional responsibility will go a long way towards ensuring that employees do not misuse social media.

**Post-employment: Whether to “recommend” a former employee using social media**

Social media even creep into the post-employment relationship between the employer and the former employee. Supervisors and co-workers are increasingly asked to “recommend” former employees on LinkedIn after separation from employment. This “recommend” feature allows people in a professional network to write positive professional reviews about other people in their network. Such a recommendation, as well as the recommender’s name and company affiliation, will be visible on the former employee’s LinkedIn page.

A positive recommendation on a person’s LinkedIn page is the same as an employment reference, and should uniformly be treated as such. Supervisors may unintentionally run afoul of the employer’s post-employment reference policy by posting a recommendation of a former employee on LinkedIn. An individual supervisor’s recommendation on LinkedIn could conflict with the official position taken by the employer regarding the employee’s performance; and a positive review of a former employee on LinkedIn could harm the employer in an employment discrimination
litigation where the employer has said that the termination was performance-related, the former employee has alleged that it was because of his or her protected class status, and the LinkedIn recommendation indicates that the former employee's performance was stellar.

In order to avoid such situations, the employer’s general post-employment reference policy must specifically cover recommendations via social media. For example, if the employer’s post-employment reference policy is to only confirm a former employee’s dates of employment and position, this stance should translate to social media as well — meaning, in most cases, that a supervisor will not be able to recommend a former employee on LinkedIn. Employers could also consider adding to their post-employment reference policy a prohibition on managers from “recommending” or commenting on the job performance of former employees via social media without prior specific authorization from the human resources department. If a post-employment reference policy regarding social media is adopted, employers should communicate such policy to current employees via an employee handbook or similar notification, and should consider notifying separated employees of such a policy in release agreements upon separation from employment.

Conclusion

Employers can no longer ignore the risks of social media in the workplace. Employers must be cautious in addressing these emerging workplace issues, even though employment-related litigation over social media is in its infancy. First, employers must understand the myriad issues surrounding social media in the workplace in order to strike the appropriate balance in the eyes of their employees and the law. Then, employers must craft appropriate policies and procedures regarding social media that are consistent with their industry and firm culture, and apply such policies in a consistent and non-discriminatory way.

Notes

1. Although virtual worlds may not be familiar to many employers, these communities are popular among certain demographics, including men and those of Generations X and Y. Co-workers can and do interact employees and the law. Then, employers must craft appropriate
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5. This is especially true in light of Facebook’s recent changes to its pri-

vacy settings. On Dec. 9, 2009, Facebook changed the default privacy set-
tings of its more than 350 million users. Now, certain information about
each Facebook user (name, profile picture, current city, gender, networks,
list of friends and list of “Pages” that the user is a “fan” of) is publicly avail-
able to all other Facebook users. The user can alter or hide some of this
information, but only through obscure privacy settings. Facebook also un-
wittingly set some users’ photo albums to public, although this setting can
be altered (but unless the user takes steps to adjust the setting, the albums
facebook.com/privacy/explanation.php?ref=pf; Facebook, Privacy Policy,

6. Some of these practices also carry legal risk. For example, it may not
be possible to conclude from perusing an individual’s Web posting that he
or she is currently using an illegal drug, and making an employment deci-
sion based on assumption of such use may also constitute discrimination
on the basis of a perceived disability.


8. This list will likely include the most popular social networking sites
(Facebook, MySpace and LinkedIn), any widely used blogs (Twitter), and a
Google search for the applicant’s name to reveal any other personal blogs.
This list must be revised over time, as the use of currently popular social
media sites declines and new ones become more widely used.

9. A recent Associated Chambers of Commerce and Industry of India
survey of 4,000 employees found that the average employee spends one
hour per day at work on social media sites. See The Associated Chambers
of Commerce and Industry in India, Corp. Employees Productivity Is Killed
By 12.5 percent In Surfing Sites, (Dec. 20, 2009) available at www.asso-
cham.org/preflshownews.php?id=2265.

10. Employers should also be mindful of the new Federal Trade Com-
mission Endorsement Guides, effective Dec. 1, 2009. These guides are
aimed at professional bloggers — those who blog for pay or free items.
The guides address the FTC’s concerns about deceptive practices through con-
sumer-generated media and endorsements, and were drafted in such a way
that employees who use social media in ways that promote their employer
are bound to follow. Under the guides, any material connection between
endorser (employee) and seller (employer) of a product or service must be
fully disclosed. The endorser (employee) and seller (employer) each face
potential fines of $11,000 per violation. See 16 C.F.R. § 255.5 (2009).

11. Post-employment, employers should also incorporate language spe-
cifically referencing social media into the confidentiality provisions of
their separation and settlement agreements. Employers should also con-
sider adding a statement to the employee handbook or separation letter
stating: “On or before your separation date, you agree to remove from your
personal social media any designation or indication that you are a current
employee of the Company.”

12. In a December 2009 opinion letter from the National Labor Rela-
tives Board Office of the General Counsel, the OGC’s office opined on
whether a particular employer’s social media policy “could possibly be con-
strued to chill Section 7 protected activity.” In this opinion, the employer
in question had a social media policy that prohibited “disparagement of
company’s or competitors’ products, services, executive leadership, em-
ployees, strategy and business prospects,” among other prohibitions.
The employees who routinely used Yahoo! Groups to discuss an ongoing union
organizing campaign were unsure whether this activity violated the social
media policy, and felt that the social media policy infringed upon their
freedom of expression. The OGC found that, taken in context with the
rest of the social media policy — which prohibited, according to the OGC,
other “plainly egregious conduct” — the prohibition in question could not
reasonably be construed to apply to Section 7 activity: “Taken as a whole
... the Policy contains sufficient examples and explanation of purpose for
a reasonable employee to understand that it prohibits the online sharing
of confidential intellectual property or egregiously inappropriate language
and not Section 7 protected complaints about the Employer or working
conditions.” See 2009 NLRB GCM LEXIS 67 *10 (Dec. 4, 2009).
Fixing the Student Achievement Gap: A Guide to Collective Bargaining for Massachusetts’ Underperforming Schools

by Allan W. Drachman

The new Massachusetts law, Chapter 12 of the Acts of 2010, “An Act Relative to the Achievement Gap,” effective upon enactment on Jan. 14, 2010, represents a revolutionary restructuring of the public sector collective bargaining and dispute resolution process effective in Massachusetts public schools since 1973 (and in Boston and some other cities, since 1966). The purpose of the new law is to arrest, reverse and upgrade poor student achievement in Massachusetts public schools which are designated as “underperforming.”

The following is a look at the new collective bargaining and dispute resolution provisions and the labor relations challenges created for professionals accustomed to operating under the general collective bargaining law, G.L. Ch. 150E (“150E”).

Comparison with collective bargaining under bankruptcy or fiscal takeover

We are accustomed to seeing private sector collective bargaining agreements (“CBAs”) rewritten to satisfy creditors during a federal bankruptcy process; or provisions of public sector CBAs bent when state law takes fiscal control of a city and turns it over to an outside financial control panel, as took place a few years ago in the City of Springfield. However Chapter 12 is the first Massachusetts law which authorizes a public employer, state official or a receiver to override the provisions of a CBA not in furtherance of financial stability, but rather, in this case, in furtherance of state legislative policy to rapidly upgrade poor student achievement.

Turnaround plan may supersede prior law and may override a CBA

The first event under Chapter 12 is the designation of underperforming schools. Next, a turnaround plan (“TP”) must be proposed by the superintendent of schools, approved by the commissioner, and ultimately implemented by the superintendent of schools (not by the principal who previously was in charge of such underperforming school, and not by the school committee.)

The law expressly anchors the power to create a TP for an underperforming school under the laws generally regulating public schools, except that when the provisions of this section or of the turnaround plan TP require otherwise, the provisions of this section or of the TP govern.

Under a TP, the superintendent has the power to alter or modify one or more provisions of an existing CBA and to force the exit of personnel from the underperforming school. This explicit statutory provision supersedes any contrary provision of 150E.

Role of the teachers’ union

All the unions representing employees at an underperforming school have roles under Chapter 12. In this guide, the focus is on the teachers’ union.

These roles include:

- Participation in a local stakeholder group (“LSG”) to provide initial input into the creation of a TP;
- Prior consultation with the superintendent over some, but not all of the mandatory bargaining subjects which may be included in a TP;
- Collective bargaining with the school committee over the terms of a proposed TP which alter an existing CBA;
- After a final TP has been proposed by the superintendent to the commissioner, the right to appeal to change the final TP before it is adopted by the commissioner; and
- The right to engage in future collective bargaining over subsequent modifications of the TP and to process grievances during the period when the final TP is in force.

Local stakeholder group

Before the superintendent creates the TP, he must convene an LSG of up to 13 individuals to make recommendations as to what shall be included in the TP, and must consider their recommendations in the establishment of the TP. The LSG includes:

1. The commissioner or designee;
2. The chair of the school committee or designee;
3. The president of the local teacher’s union or designee;
4. A school administrator chosen by the superintendent, who may be the principal, but more than likely will not be the principal if the principal is being blamed in whole or in part for the underperformance;
5. A teacher from the school chosen by the school faculty;
6. A parent from the school chosen by the local parent organization;
7. Representatives of applicable state and local social service, health and child welfare agencies chosen by the superintendent;
8. As appropriate, representatives of state and local workforce development agencies chosen by the superintendent;
9. For elementary schools, a representative of an early education and care provider chosen by the commissioner of the Department of Early Education and Care; and for the middle or high schools, a representative of the higher education community selected by the secretary; and
10. A member of the community appointed by the chief executive of the city or town.

Public recommendations

The recommendations submitted by the LSG to the superintendent are required to be publicly available immediately upon submission.

Unlike collective bargaining sessions which are bilateral and conducted in private, the meetings of the LSG are all multilateral and public. None of the exceptions applicable under the Open Meeting Law apply to meetings of the LSG.

Management rights which may be included in a TP

Section (d) of the law lists the “management rights” which the superintendent may include in a proposed TP after considering the recommendations of the LSG, including:

- Clause (4): Funding incentive salary increases for teachers and administrators in underperforming schools; prior consultation required.
- Clause (5): Expanding the school day or school year or both; prior consultation not required.
- Clause (8): Altering one or more provisions of any CBA; prior consultation not required.
- Clause (9): Altering one or more district policies or practices; prior consultation not required.

No prior collective bargaining; no prior union consultation

Under 150E, an employer is required to commence collective bargaining when it contemplates a change in any mandatory bargaining subject, but before it decides to make such change. The reason is to allow for the maximum union bargaining input before the employer’s decision has hardened. Here, however, there is no obligation for collective bargaining before the superintendent issues his recommended TP.

Prior union consultation is a lesser obligation than traditional collective bargaining under 150E in that it does not contemplate negotiation to impasse or access to a statutory impasse resolution procedure. Here, not even prior consultation is required, except under Clause (4).

Timetable for adoption of a final TP

11. Under section (e), within 30 days of receiving LSG recommendations, the superintendent submits a TP to the LSG, the school committee and the commissioner, all of whom may propose modifications to the TP. The superintendent concurrently releases the TP to the public.
12. Within the next 30 days, the LSG, the school committee and the commissioner submit their proposed modifications, to the superintendent, which are made public immediately.
13. Within 30 days after receiving such proposed modifications, the superintendent issues a final TP, with or without any of the proposed modifications.
14. Within 30 days after issuance of the final TP, the school committee or union may appeal to the commissioner regarding one or more components of the TP, including the absence of one or more of the previously proposed modifications.
15. Within 30 days after receiving an appeal, the commissioner issues a final decision on any such appeal. The commissioner may, in consultation with the superintendent, modify the plan based on listed statutory standards, or may deny the appeal.

The collective bargaining process under section (g): Meshing the timing with section (e)

Under section (e), within 30 days of receipt of LSG recommendations, the superintendent is required to issue his proposed TP publicly, and the LSG, the school committee and the commissioner (but not the union) have 30 days to propose modifications to the superintendent’s proposed TP.

The language of section (g), “if after considering the recommendations of the group of stakeholders,” which triggers the commencement of the bargaining process, is not clearly integrated with the timetable in section (e).

Reading the two sections together, it would appear that the superintendent recommends that the school committee and union commence the collective bargaining process under section (g) at the same time that he releases his proposed TP to the LSG, the school committee and the public. If the combined collective bargaining and dispute resolution process runs its full course, that process would be completed after the superintendent receives proposed modifications from the LSG, school committee and commissioner, but before he issued his final TP.

The superintendent will presumably include the results of the collective bargaining and dispute resolution process in his final TP, but the ability of the LSG to respond to the modified TP prior to issuance would be compromised unless the timetable was further extended.

Section (g) contains no provision requiring the superintendent to modify the originally proposed TP to include in the final TP a CBA reached and ratified under section (g). Likewise, there is no provision requiring the commissioner to accept without modification a final TP proposed by the superintendent which includes such CBA or mandating that the commissioner accept any alteration or modification to the proposed TP. This lack of finality may raise questions concerning the authority of the school committee to bargain in good faith for the school district, where the final authority does not rest with the school committee. See the discus-
sion under “bargaining in good faith” and “ratification by the school district.”

Scope of collective bargaining

Under section (g), collective bargaining is triggered by a superintendent’s determination that rapid academic achievement of students at an underperforming school can be achieved

“by altering the compensation, hours and working conditions of the administrators, teachers, principal and staff at the school or by altering other provisions of a contract or collective bargaining agreement....”

Under 150E, if a change in past practice or school policy has an impact on conditions of employment, a collective bargaining obligation would apply to such change or the impact of such change, whether or not the policy or practice was referenced in the CBA. Here, under section (g), even though such change in practice or policy is includable in a TP under clause (9) of section (d), it is not clear whether the bargaining obligation under section (g) applies when such policy or practice is not covered under the express provisions of an existing CBA.

Also, it is not clear what the scope of bargaining is under section (g) if the basic CBA has expired; the parties are continuing negotiations for a successor CBA; and there is no agreement between the parties to extend the expired CBA during such negotiations.

The duty to bargain in good faith

Regarding the duty to bargain in good faith, section (g) provides:

“The bargaining shall be conducted in good faith and completed not less than 30 days from the point at which the superintendent requested that the parties begin.”

Because of the different bargaining requirements under Chapter 12, good-faith collective bargaining may acquire a different meaning under section (6) than under 150E. Under 150E, the school committee is the public employer and designates a bargaining representative to conduct collective bargaining for the school district. To the extent that the superintendent of schools is involved in the bargaining process, it is as an agent of the school committee.

Here, however, under section (g), although the school committee has retained its traditional responsibility to conduct collective bargaining for the school district, it appears that, except for bargaining over salary increases and other cost items, the school committee is the collective bargaining agent for the superintendent, rather than visa versa.

The superintendent is in charge of the decision to request the school committee and union to bargain. The superintendent is accountable to the commissioner for designing a TP which will be acceptable to the commissioner as likely to succeed in developing rapid student achievement. The superintendent may consult with the commissioner whether or not Chapter 12 expressly requires him to do so.

Under 150E, bargaining in good faith is conducted under baseball rules, with extra innings possible, indeed likely, particularly if the parties reach genuine impasse, and there is no predetermined time when the bargaining must stop. Here, under section (g), the duty to bargain in good faith is defined in relation to a time clock.

The concept of bargaining to impasse has basically been eliminated. Collective bargaining has been reduced to managing the bargaining time clock in the shadows of policy decisions by the superintendent in consultation with the commissioner. When the statutory clock runs out, game over. The main legislative imperative is more to complete the process and try to quickly improve student performance at an underperforming school, rather than to level the playing field between labor and management in determining wages, hours and conditions of employment.

The time clock forces the parties to choose carefully the collective bargaining subjects. Because the commissioner ultimately ends up deciding the outcome, it is more likely than not that the parties will focus their negotiations on resolving issues concerning wages and hours generated by the proposed TP, over which a school committee retains authority, rather than engage in decision bargaining over subjects which Chapter 12 has removed from the authority of the school committee.

Jurisdiction of the state’s Division of Labor Relations over the duty to bargain in good faith

Under 150E, the Division of Labor Relations (“DLR”) determines whether a school district or a union engages in a prohibited practice by bargaining in bad faith. Thirty-plus years of case law have defined the duty to bargain in good faith over a broad range of subjects, including: unreasonable insistence on the time and place for meeting; taking unilateral action to implement a proposal without having bargained to agreement or impasse; and entering negotiations without authority to bargain. DLR has broad remedial power for a violation by an employer, including restoration of the status quo ante and back pay.

No provision of section (g) removes collective bargaining from the provisions of 150E which are not in conflict with subsection (g). Accordingly, DLR retains statutory jurisdiction to enforce the obligation to bargain in good faith as specified in Chapter 12.

Ratification by the employer school district

In traditional collective bargaining, 150E does not mandate ratification of a CBA, but assumes ratification by the employer as well as the union. Under 150E, a school committee has the power to ratify or not, and if it ratifies, the CBA is binding on the school district. Although section (g) is silent on employer ratification, the time clock governs. Therefore, if a CBA reached under section (g) is conditioned on school committee ratification, it needs to happen within the same timetable as exists for ratification by the bargaining unit members in the school.

Ratification by the bargaining unit members in the school

In traditional collective bargaining under 150E, a settlement of new contract terms affecting only a small percentage of bargaining unit members is subject to ratification by the entire bargaining unit, not just by the sliver of members directly affected.

Additionally, a union constitution and bylaws may mandate ratification by an entire bargaining unit. Here, under section (g), a “yes” vote by employees at the underperforming school would appear to constitute a binding ratification without any vote by teachers covered by that CBA but employed outside of the underperforming school.

The solution may be for the union to hold two ratification votes. The first vote would be by the entire bargaining unit, to determine whether or not there was a union-supported agreement ratifiable under section (g). With a “yes” vote, the members at the school...
would then vote on ratification. With a “no” vote, there would be no second vote.

Where a union and school committee are able to reach agreement on a CBA, it may serve their mutual interests to finesse the ratification issue by dumping the negotiations into the dispute resolution process, where ratification of a decision is not required by section (g).

Timing of dispute resolution process

Because there are only 10 business days to complete the statutory dispute resolution process, the likelihood is that the parties will try to have the three members of the JRC, including a conciliator, appointed and ready to work before the 30-day bargaining period has expired.

Nature of the process; role of conciliator

This dispute resolution process is correctly described as non-bindingconciliation rather than binding interest arbitration because of the residual power of the superintendent or commissioner to alter any agreement reached between a union and a school committee. However, the process functions more like interest arbitration than traditional mediation or conciliation.

In traditional mediation or conciliation under 150E, the conciliator is not a decision-maker, and if the parties fail to reach agreement, the impasse continues. Here, under section (g), a conciliator has in his toolbox the possibility of voting with or against either party and may use that power to press the parties, just like an interest arbitrator. Pure conciliation depends on the parties being willing to convey their interests privately to the conciliator without fear that such disclosures will be used against them. That dimension is lacking in this hybrid role when the conciliator may also be the pivotal decision-maker.

Public or private dispute resolution process

Under 150E, there are a multitude of prohibited practice cases where the Labor Relations Commission (the predecessor to the DLR) held that it is a prohibited practice for a party to insist to the point of impasse on public collective bargaining sessions.

Section (g) appears to integrate the dispute resolution process into the collective bargaining process. On that basis, a party which insists on conducting the dispute resolution process in public would likely be engaging in bad-faith collective bargaining.

Role of American Arbitration Association (AAA)

Section (g) looks to the AAA to maintain a roster of conciliators “with professional experience in elementary and secondary education.” The statute does not state whether such professional experience includes prior service as a teacher or administrator in elementary/secondary education, or school committee member, as well as prior labor relations experience as a labor negotiator, mediator or arbitrator. There is no minimum or maximum number of AAA panelists. Nothing in the statute prevents the parties from requesting to examine the AAA’s list of conciliators or from jointly requesting a particular person to be appointed ad hoc to the AAA conciliator panel.

As a practical matter, only a few school districts, mostly urban, are likely to be exposed to collective bargaining in underperforming schools, and when it happens, there will be a continual need for conciliation services. Therefore, the parties in such school districts may wish to jointly explore in advance who might serve as their conciliators and present their names to AAA for inclusion on the AAA conciliator panel.

The dispute resolution process is to proceed “under the rules of the AAA and consistent with this section.” There are currently no AAA rules for this process.

Written decision; contents; written opinion

There is no specific requirement in section (g) that the decision be in writing, or in any particular form, or unanimous, or supported by any opinion showing how the statutory factors (the positions of the parties, the designation of the school as underperforming, and the needs of the students) were applied.

At a minimum, the decision should be in writing and should embrace all of the terms of the CBA, which was reached prior to the commencement of the dispute resolution process but which failed ratification. If no CBA was reached prior to the commencement of the dispute resolution process, the written decision should embrace all of the issues upon which agreement was reached, together with a decision on all the issues over which the parties were in disagreement during the prior collective bargaining process but which were “decided” by the joint resolution committee.

There is no statutory language requiring that the decision be accompanied by a written opinion explaining why the decision-makers accepted or rejected any proposal or how the statutory factors were applied in reaching the decision. Because of statutory time-clock restraints, the joint resolution committee may issue the decision within the statutory time limit and postpone the supporting opinion until a later date, or elect to issue just a decision, with no written opinion.

Because a decision by the joint resolution committee functions as a form of CBA or settlement agreement, it should be signed by at least two decision-makers.

Grievance processing, CBA administration and collective bargaining during the life of the TP

Under sections (h) and (i), the superintendent may select an external receiver to run an underperforming school for up to three years under a TP. An external receiver has full operational control over the underperforming school, but the school district remains the employer of record.

The provisions of a CBA, which were not altered by the TP, together with the alterations, agreements and decisions of the joint resolution committee which are incorporated in the final TP, have to be administered. Because the school committee remains the employer even after the management of the underperforming school has been outsourced, the school committee remains responsible for the processing of grievances and other aspects of CBA administration.

Under section (j), the superintendent or external receiver may develop additional components of the TP pursuant to sections (b)–(g). To the extent that such additional components alter one or more provisions of the CBA, such development may trigger a new round of collective bargaining and dispute resolution process.

Under section (k), if the commissioner determines that the underperforming school has failed to meet multiple goals, in the TP, he can require changes in the TP. If those changes require further changes in CBAs, this may trigger a further round of collective bargaining and dispute resolution process.
After a TP expires:

A) School determined to be no longer underperforming: restoration of altered terms of CBA

Under section (l), when a three-year TP expires, the commissioner may determine that an underperforming school has sufficiently improved so that the “underperforming” label may be removed. It is unclear whether the provisions of CBAs which were altered by the TP pop back up automatically, as if the alterations were established with a sunset clause, or whether the expiration of the TP triggers a re-opener on such altered provisions; or both the automatic restoration and the re-opener.

At the very least, before the TP expires, collective bargaining should take place over whether any of the changes which became effective under the TP are intended to remain in force even though the TP will have expired.

B) School remains underperforming: New or modified TP; further alterations of CBA

The commissioner may also determine that the school is still underperforming; in which case the commissioner may renew the TP for up to an additional three years, or may create a new or modified TP, generating another round of collective bargaining/dispute resolution process with respect to any further alterations of CBAs.

C) TP failed: school designated as chronically underperforming

The commissioner may also determine that the TP failed, and designate the school as chronically underperforming. In that case, pursuant to sections (m), (n) and (o), the commissioner is required to convene a LSG and develop a new TP.

The following language in section (m), clause (7) governs collective bargaining over limits, suspensions or changes in CBAs or reductions in compensation and hours proposed by the commissioner: “… (t)he commissioner may require the school committee and any applicable unions to bargain in good faith for 30 days before exercising authority pursuant to this clause.”

There is no mention of trying to reach a ratified agreement on the altered CBA or a dispute resolution process.

Section 1K: Underperforming school districts

A school district may be designated by the Board of Elementary and Secondary Education as a chronically underperforming district compared to other school districts. A receiver is appointed to run the school district and to work closely with the commissioner to quickly raise student performance.

The statute follows the same process for district as for an underperforming school: LSG, TP, a 30-day bargaining period, followed by a dispute resolution process including a district representative, a union representative and a conciliator appointed by the AAA. This dispute resolution process is the same as the DRP in an underperforming school, with one exception. In an underperforming school, the decision of the joint resolution committee is effective with only two votes. Here, the decision of the joint resolution committee must be unanimous on the disputed issues; else the commissioner decides them.

Summary and conclusion

By putting collective bargaining in underperforming schools on a time clock and subjecting CBAs to override, the General Court has made it clear that quickly raising student performance and eliminating underperforming schools is its highest priority. It remains to be seen whether the labor management community will rise to this challenge and find a way to use the revised collective bargaining process to be part of the solution.
Many of us have been debating whether we should take credit cards for quite some time. On the one hand, there’s a stigma attached to accepting credit cards. For lawyers, it does not feel entirely professional or dignified to reduce one’s payment to such an obvious process. Most of us do not like asking for money. It’s more comfortable to work on retainer or send out a bill with the hope of getting paid. There’s also the issue of ethics. How does one handle credit card payments when processing them through IOLTA and/or operating accounts? What is the proper procedure? How does one avoid running afoul of ethics rules?

While it is natural to want to avoid the distasteful notion of commercializing the profession, it is time to realize that the world has changed. We do not blink an eye when the doctor’s office expects our co-pay before treatment, and yet, as attorneys, many of us still end up working without getting paid. The longer I practice, the tougher I get about money. It took the experience of reviewing my books and realizing that my receivables had skyrocketed before I started taking a stand with clients and making sure that they paid their bills.

It is hard to get used to getting the money up front, but in this economy, it is quite possible that the amount you collect at the beginning of a matter may be all the money that is ever collected. Even though my engagement letter includes an Evergreen retainer and the clients agree to replenish once the retainer drops below a certain amount, the truth is, they rarely do. They frequently just start paying their bills as they arrive, and most clients do not rush to get the check in the mail. Shame on me.

When the ABA Techshow came to Boston, Jim Calloway, a noted law practice management advisor, said he believes that all lawyers should start taking credit cards. He felt that in this economy that is the only way to ensure that one would get paid. After suing my first client for fees, I now agree. As they say on the ABA’s Solosez, “you get more value from cleaning your own toilet than from working for free.”

For some reason, clients do not view legal services as a commodity for which they should pay. It is our job to provide clients with detailed bills and clear explanations that reflect the value that we are providing. Despite the fact that I know that none of my clients would steal a turkey from the supermarket, many do not hesitate to “steal” my time. It is important to manage expectations, ask for big enough retainers, and include a credit card provision in your engagement letter. If payment is not forthcoming, you have the right to run the credit card for the amount due.

Can lawyers take retainers on credit cards?

Here is the viewpoint from the Board of Bar Overseers: Credit cards are here to stay and it is generally considered acceptable to take payment of earned fees by credit card. But can a lawyer take a retainer — an advance against unearned fees — on a credit card? Ethics opinions across the country are divided on this question and neither the Massachusetts Rules of Professional Conduct nor any decisions by the Board of Bar Overseers or the Supreme Judicial Court provide a direct answer. The Office of Bar Counsel strongly discourages accepting payment of retainers by credit card for the following reason.

In Massachusetts, unearned retainers must go into an IOLTA or other trust account until earned. Credit card agreements generally permit the issuer to “charge back” any payments subsequently disputed by the cardholder and require that the issuer’s chargeback rights attach to the account where the funds were deposited.

Assume you accept a retainer on a credit card, which is deposited to your IOLTA account. You do the work and pay yourself from the retainer. Your client then contests your charges and the issuer withdraws from your IOLTA account the disputed charges. Since you have already paid yourself, this chargeback will draw upon funds of other clients held in the account — funds that you are required to safeguard.

The best and possibly only foolproof solution to this problem would be to limit the issuer’s chargeback rights to your operating account. While some ethics opinions from other states suggest taking credit card retainers into an operating account and transferring the unearned portion to a trust account, or holding earned...
portions of a retainer in a trust account until the issuer’s dispute period has ended, these would not be in compliance with the current Massachusetts trust account rules.

There also exist other regulatory, bookkeeping and confidentiality problems with credit card payments of fees. See Vecchione, “No Easy Credit,” www.mass.gov/obcbbo/credit.htm, on bar counsel’s Web site. Lawyers taking credit card payments should also be familiar with federal and state consumer credit, truth in lending and consumer protection laws that may apply.

What to do if you decide to use credit cards

If you are now persuaded that taking credit cards is necessary, what are the best options for attorneys? There have been numerous conversations about taking credit cards on Solosez, and the one service that is touted by all is Lawcharge.com. This is not meant to be an advertisement for Law Charge, but as it says on Tracy Griffin’s Web site, “Designed by an Attorney for Attorneys.”

These are the types of fees associated with maintaining a credit card account (from the Law Charge Web site):

- Discount fee: This is a percentage of the transaction amount. It covers the costs of ‘moving the money’ from the cardholder’s account to your merchant account through the Federal Reserve’s Automated Clearing House (ACH). The fee is determined upon the type of processing you choose.
- Transaction fee: This is the fee charged for obtaining the authorization to deposit the funds to your account. It is usually between 15 and 75 cents per transaction, depending on the type of processing you utilize.
- Set-up fees and equipment: Dependent upon the type of processing you choose, you may be charged a set-up fee or be required to purchase or lease equipment or software. Law Charge does not require you to purchase software and highly discourages the leasing of equipment as it is not cost effective.
- Junk fees: These fees are where the banks and processors make money off you. You may be charged a monthly fee whether you process or not, a statement fee, or a service call fee. Law Charge does not charge any of these junk fees.

The first step in setting up credit card processing is to open a merchant account. This is usually your business operating account. Once your account is established, you can start receiving payments. You do not want the fees and other charges to go through your IOLTA account because this would violate IOLTA rules. One could buy or lease a point of sale terminal, but most attorneys process their payments through the Internet.

Some companies will require you to purchase software and others have online service. At Law Charge, you log into their secured Web site, and depending on the username and password you enter, the funds will be deposited to that account. You will have the option of depositing to either your trust/IOLTA account or your operating account. Regardless of which account you deposit to, all fees will be debited from your operating account.

What will it cost? This article is not intended to be a review of all of the various services out there, but at Lawcharge.com, the initial set-up fee is $200 for a virtual terminal to one’s IOLTA and operating accounts. This includes a link for clients to go to the attorney’s Web site to make payments. Electronic check conversion from the check writer’s account is also included (automatic debit from the client’s bank account). There is a $150 set-up fee just for a virtual terminal. The set-up fee is payable over time with no interest. There is no monthly minimum payment. If there is activity in a given month, the monthly rate is $10. Finally, the discount fee is currently 2.7 percent for the virtual terminal plus a 19-cent transaction fee. There is encryption for data privacy.

If clients dispute a bill, they can call Law Charge and ask for a retrieval request. Rather than issue a chargeback to the lawyer’s operating account, Law Charge requests that the client and lawyer submit documentation to resolve the dispute. Law Charge has had one chargeback in 10 years. The company also supplies language to insert in one’s fee agreement. The cardholder agrees that disputes will be settled through arbitration or the judicial process rather than issuing an automatic chargeback.

A Solosez member uses the following language in her engagement letter:

**Payment by credit card**

All clients may pay their bills via credit card. The X Law Office accepts Visa or MasterCard. If you choose to pay by credit card, please complete the form below:

I authorize the X Law Office, to charge the amount of $__________ on my credit card. Credit card type__________________________________________

Credit card number__________________________________________ Exp. date______ Verification code____

Billing address (must be provided):

If, after a payment by credit card, you later dispute the charges, unless prohibited by law, you agree not to cancel, revoke, charge back or dispute any previously entered charge on your credit card. If you do so, and it is later determined that the charge was properly authorized, you agree to pay all out-of-pocket fees and costs incurred by the X Law Office as a result of the improper cancellation, revocation, charge back or dispute

Client__________________________________________ Date

Paypal.com has a rate of 2.9 percent plus 30 cents per transaction, but it is not clear whether there is a monthly minimum. Tracy Griffin suggests that one use Paypal for operating account payments only. The reason for this is that the payment goes first to Paypal and then to the attorney’s account. IOLTA rules state that trust money has to go straight to a trust account which is an approved trust account depository. There is no set-up charge or monthly fee. The merchant rate requires a one-time application, qualifying monthly sales volume, and account in good standing.

Costco has an Internet processing rate of 1.99 percent plus 27 cents per transaction. There is a one-time $25 application fee and a $4.95 monthly statement fee, both of which are waived for executive members. A monthly minimum charge applies when qualified transaction fees and per-item charges are less than $20 per month.

Given the current economic situation, it is time for all lawyers to seriously consider taking credit cards. After all, you deserve to be paid.
One particularly introspective task that a lawyer can undertake is the preparation of an affidavit of attorney’s fees in conjunction with a client’s motion for fees. If you are preparing such an affidavit, chances are your client has already prevailed in some way. But having a court evaluate your efficiency and scrutinize your strategy (and perhaps your and your client’s personal conduct) can quickly lead to more than just a little second-guessing about the handling of a case.

As part of its usual business, Probate Courts review applications for fiduciary fees, frequently assessing attorney’s fees incurred by guardians, conservators, executors, administrators and trustees carrying out their duties. Probate Courts are thus accustomed to evaluating the monetary value lawyers provide. Probate Courts review attorney’s fees in other contexts as well. Probate litigation differs from most other types of litigation in that there is a greater risk that an opposing party may pay a prevailing party’s attorney’s fees. Under G.L. c. 215, §45, Probate Courts are thus accustomed to assessing attorney’s fees incurred by guardians, conservators, executors, administrators and trustees carrying out their duties. Probate Courts are thus accustomed to evaluating the monetary value lawyers provide. Probate Courts review attorney’s fees in other contexts as well. Probate litigation differs from most other types of litigation in that there is a greater risk that an opposing party may pay a prevailing party’s attorney’s fees. Under G.L. c. 215, §45, Probate Courts, unlike other Massachusetts courts, have the discretion to award attorney’s fees in contested matters “as justice and equity may require.”

G.L. c. 215, §45 deviates from the “American Rule,” which provides that litigants pay their own attorney’s fees, regardless of the outcome of lawsuits, unless a statute specifically provides for the recovery of fees. The purpose of the American Rule is to encourage parties to utilize the judicial system to resolve good faith disputes even though their claims or defenses may not ultimately be successful. The American Rule permits parties to advocate their positions without the risk that they would have to pay the opposing parties’ — as well as their own — legal fees if they do not prevail. A byproduct of the American Rule mindset is that payment of attorney’s fees is usually not part of settlement negotiations.

Parties who litigate in Probate Court, however, face a risk that a Probate Court will punish weak claims or obstructionist tactics with an order to pay the opposing party’s fees. Two recent high-profile, high-fee cases examine the standards for awarding attorney’s fees in probate matters. The cases underscore the critical importance of not using the judicial system — or at least the Probate Court — to wage overly emotional or meritless family battles.

**The Estate of Bartley J. King**

In the matter of *The Estate of Bartley J. King,* the Supreme Judicial Court undertook a comprehensive analysis of the standard for the awards of fees under G.L. c. 215, §45. In *Bartley,* beneficiaries of an estate filed suit against the executor and primary beneficiary challenging the validity of the will and pre-death property transfers. After a nine-day trial, the Probate Court trial judge rejected the contestants’ claims, finding no credible evidence of the decedent’s lack of capacity or undue influence.

Post trial, the executor filed a motion that sought a whopping $710,321.50 in attorney’s fees and $95,868.47 in costs. The total estate was only $1.2 million. The executor alleged that the contestants “had engaged in a ‘two and half year campaign to punish … [the executor] for her father’s generosity,’ and should be ordered ‘to bear the financial burden that they willfully imposed on … [the executor] by persisting in their unsubstantiated and baseless claims.’” In addition to seeking fees under G.L. c. 215, §45, the executor also sought fees under G.L. c. 231, §6F, an often-pled but rarely invoked statute permitting the recovery of attorney’s fees when the opposing claims are “wholly insubstantial and frivolous.”

The executor’s motion for attorney’s fee was heard by a judge different from the trial judge. The motion judge indicated that the hearing was not so much concerned about whether the Probate Court would award fees, but about what amount of attorney’s fees was reasonable. The motion judge stated that she was familiar with the lengthy procedural history as well as the trial judge’s findings and conclusions and commented that the record implicitly entitled the executor to an award of fees.

After a two-day hearing, the motion judge rejected the executor’s claim under G.L. c. 231, §6F, finding that the contestants initially acted in good faith. However, the Probate Court motion judge found that fees were warranted under G.L. c. 215, §45 and awarded the executor $510,321.50 in fees and $64,000 in costs. The motion judge found that the contestants “unreasonably extended litigation” and “[a]fter two years of discovery, [they] should have realized that their claims were no longer reasonable.”

Upon appeal by the contestants, the SJC confirmed that under G.L. c. 215, §14 and as part of its general equity jurisdiction, the Probate Court has the authority to award costs in matters involving estate and trusts.3 The SJC stressed, however, that the statute does not contemplate an award of costs or fees as a matter of course. Yet, the SJC also stressed that an award of attorney’s fees is not only limited to “rare and egregious cases,” as the contestants argued.

Patricia L. Davidson is a partner at Mirick O’Connell in the Probate, Trust and Fiduciary Litigation Group and the Business and General Litigation Group. Her practice focuses on resolving issues involving wills, trusts and real estate, as well as disputes involving family and closely-held businesses. In addition, she represents individual and institutional fiduciaries. She also litigates complex business matters.
The SJC first analyzed whether fees under G.L. c. 215, §14 were limited to cases involving bad faith or wrongful conduct. The SJC noted that some “judges have used bad faith, or its absence, as a touchstone in determining whether to make an award under §45.” But the SJC concluded that the “bad faith” standard is not mandatory and delineated examples of conduct that has resulted in orders to pay fees, including: causing confusion by “equivocal conduct in relation to estate property;” a party who had “torpedoed the settlement to which he previously agreed;” and where the defendant improperly refused the administrator’s demand for release of estate funds. Another key fact for consideration is whether refusal to shift attorney’s fees and costs to the prevailing party ends up distorting the valid estate plan of the decedent. In other words, do the intended beneficiaries of an estate end up with far less than the decedent intended because they needed to pay so much in attorney’s fees as a result of misguided litigation?

After finding that the award of fees could be appropriate, the SJC in Bartley considered whether an evidentiary hearing on the fee issue was necessary. In the Probate Court, the motion judge held a hearing, but did not take evidence on whether to award fees. The SJC found that this procedure was error and concluded that prior to determining an amount of fees, the motion judge should have made specific findings on whether fees should be awarded rather than just referring generally to the contestants’ efforts to prolong and complicate the litigation.

The SJC next considered whether the record supported the motion judge’s award of $510,321.50 in attorney’s fees. Below, the motion judge determined that it was reasonable for the executor to expect and defend a will contest. The motion judge then arrived at the award of fees by subtracting what that litigation should have cost the executor from what the litigation actually cost the executor at the award of fees by subtracting what that litigation should have cost the executor. The case involved a rather sordid tale of a former mutual fund manager, Kenneth Simon, and his much younger wife, who had served jail time for running a prostitution ring. The thrust of the saga was the guardian’s apparent allegiance to Simon’s children, who disapproved of the wife, and the guardian’s apparently obsessive campaign to alienate and even imprison Simon’s wife.

Because Simon lacked legal capacity, attorney E. James Veara was appointed guardian. Simon’s assets at the commencement of the guardianship totaled about $4.5 million. Veara’s efforts to bilk the estate and conflicts of interest began immediately when Veara increased his customary rate of $100 to $300 per hour to $400 per hour and hired a significant referral source, attorney Gerald Nissenbaum, as his personal counsel.

The matter was brought before the Probate Court on Simon’s children’s challenge to Veara’s accounts. In the lengthy proceedings, Veara and Nissenbaum’s fees and tactics were scrutinized.

After trial, the Probate Court chastised Veara for billing in quarter-hour increments, for his poor recordkeeping and for not having a fee agreement with Nissenbaum. The Probate Court emphasized disapprovingly that Veara and Nissenbaum kept large retainers of $50,000 and $25,000 to $35,000 respectively.

The Probate Court also made many finding that suggested that Veara and Nissenbaum did not act objectively or in the ward’s best interests. The Probate Court stressed that Veara did not meet with Simon immediately after his appointment and questioned Veara’s motives in waiving Simon’s attorney-client privilege. The Probate Court found that Nissenbaum improperly represented both the guardian as well as Simon’s children. The Probate Court also lambasted Veara and Nissenbaum for putting pressure on Simon’s wife to leave Simon for money as well as tactics orchestrated to put her in jail, including paying $20,000 to hire a private investigator to follow her. Veara improperly tried to revoke Simon’s will, change his estate plan and even attempted to file for a divorce and an annulment.

The Probate Court criticized Veara and Nissenbaum for filing numerous frivolous pleadings and their general contentious conduct. Veara and Nissenbaum allegedly spent $80,000 just taking depositions. They also charged an extraordinary amount of money performing ministerial tasks and duplicating each other’s efforts.

The Probate Court noted that a fiduciary should be allowed his reasonable expenses, costs and counsel fees incurred in the execution of his fiduciary duties. What is a reasonable fee is a question of fact for a trial judge. The facts that a Probate Court should take into account when approving fees under G.L. c. 206, §16 include the size of the estate, the marketable nature of the assets, the factual and legal questions involved in administering the estate, the time neces-
necessary to do the work, the skill and ability employed, the amounts usually paid to others for similar work and the results accomplished.11

The Probate Court concluded that tactics taken by Veara and Nissenbaum from the beginning of the case were improper and that many of their actions were unnecessary. The Probate Court seemed particularly offended by Veara’s altered high hourly rate and the witch hunt against Simon’s wife. The Probate Court noted that at trial, Veara and Nissenbaum did not present any evidence that Simon would have consented to these expenses had he been aware of them and that Veara and Nissenbaum were “far less concerned with the ward and his health than they were getting rid of Mrs. Simon and the ward’s money.”

In its judgment, the Probate Court reduced Veara’s hourly rate to $200 and cut his total time by 50 percent. The Probate Court likewise slashed Nissenbaum’s claimed fees in half. As part of the judgment, the Probate Court surcharged Veara and Nissenbaum for frivolous expenses, including fees paid to a private investigator and money paid to a research firm for research that the court deemed unnecessary.

**Key consideration in submitting applications for fees to the Probate Court**

Probate Courts adjudicate often contentious family disputes. As a result, lawyers representing fiduciaries or beneficiaries have to be particularly careful not to become embroiled in self-serving or even vindictive emotions that often engender legal family disputes. In probate litigation, because the American Rule does not necessarily apply, lawyers must be careful to advise clients that wrongful conduct, or even lack of reasonableness, could result in paying opposing parties’ legal fees. While the award of legal fees is still the exception, and while the lessons in Simon are extreme, Bartley clearly illustrates that the award of fees is within the Probate Court’s discretion and Simon illustrates how critically a court can scrutinize legal fees.

Legal efficiency is a goal in any legal representation, but the possibility of receiving or paying fees should be an incentive to pay particular attention in filling out a timesheet every day. Lawyers should take particular care to avoid duplication of efforts and to minimize charging for ministerial tasks. Lawyers also need to be cognizant when both the fiduciary’s and the lawyer’s meters are running at the same time.

As with all litigation, in probate cases lawyers need to ensure that the requested fees are a reasonable proportion of the amount in controversy. In both Bartley and Simon, the courts noted that the fees were extremely high in view of the total value of the estate. So much of litigation is reactionary and most litigators spend a fair amount of time explaining the costs of litigation are subject to many variables beyond the lawyer or litigant’s control, but in contested probate matters, lawyers need to take particular care that the cost of the fight does not supersede the economic reality of the controversy.

**Notes**

1. “In contested cases before a probate court or before the supreme judicial court on appeal, costs and expenses in the discretion of the court may be awarded to either party, to be paid by the other, or may be awarded to either or both parties to be paid out of the estate which is the subject of the controversy, as justice and equity may require. In any case wherein costs and expenses, or either, may be awarded hereunder to a party, they may be awarded to his counsel or may be apportioned between them. Execution may issue for costs awarded hereunder.” G.L. c. 215, §45
2. 455 Mass. 796 (2010).
A common perception is that all “probate litigation” is heard in the probate court, but a recent superior court decision reminds us of the importance of distinguishing lore from the law.

It is not true that any action involving a trust or an estate must be brought in the probate court. In fact, the exclusive jurisdiction of the probate court is somewhat limited. Many trust and estate disputes can be filed in either the probate court, the superior court, the Supreme Judicial Court, or even federal district court. There may be advantages and disadvantages in bringing a trust or estate action in each of the courts. When choosing the proper court, a practitioner should be mindful of these considerations and make an informed decision that maximizes the chances of success.

**Rutledge v. Chaprales**

In *Rutledge v. Chaprales*,1 the Middlesex Superior Court addressed the question of whether the superior court has jurisdiction to hear equitable claims concerning assets of an estate brought by the plaintiff, as the personal representative of the estate. The plaintiff sought equitable relief in the form of a declaration that certain real property is property of the estate, an accounting of funds collected in connection with the property, and an order that all funds identified in the accounting be paid over to the estate. The defendants filed a motion to dismiss, arguing that the probate court has exclusive subject matter jurisdiction over the action.

The superior court denied defendants’ motion. In so doing, the court issued a concise decision, reciting the codified principle that the superior court has concurrent subject matter jurisdiction with the probate court and the Supreme Judicial Court over matters of equity relative to the administration of estates of deceased persons. The court also noted that it has subject matter jurisdiction to issue declaratory judgments.

As the *Rutledge* decision makes clear, it is important for practitioners to know which types of trust and estate disputes can and cannot be heard in superior court. An awareness of these jurisdictional rules not only precludes the filing of an ill-fated motion to dismiss, but it also can serve as a strategic tool to maximize the client’s chances of success. Depending on the nature of the claim, certain actions must be brought in the probate court, while other actions may be commenced in either the probate court, the superior court, the Supreme Judicial Court, or even federal district court. Making a considered and strategic decision about where to file at the outset of a case can pay dividends down the road.

**Overlapping jurisdiction**

Despite its reputation as a clearinghouse for everything relating to trusts and estates, the probate court’s exclusive subject matter jurisdiction is actually limited. Under G.L. c. 215, § 3, only the following matters must be brought in the probate court: the probate of wills; administration of estates; will contests; appointment of guardians and conservators; petitions for the adoption of children; and name changes.

All actions over which the probate court does not have exclusive jurisdiction may be brought in other courts. Most notably, the probate court shares concurrent jurisdiction with the superior court and the Supreme Judicial Court. Under G.L. c. 215, § 6, the superior court and Supreme Judicial Court can hear all cases and matters of equity cognizable under the general principles of equity jurisprudence. As the superior court noted in *Rutledge*, this broad and inclusive language applies to all cases and matters in which equitable relief is sought relative to administration of estates. It also applies to actions seeking equitable relief in connection with wills and trusts, whether created by will, other written instrument, or parol. These general categories of equitable actions encompass many of the most fundamental trust and estate claims, such as complaints for instructions and trust reformation actions.

It is also common to assert claims for declaratory judgment in connection with a trust or other testamentary instrument. As with actions seeking equitable relief as defined in G.L. c. 215, § 6, the probate court, the superior court, and the Supreme Judicial Court have overlapping jurisdiction to make binding declarations of right, duty, status and other legal relations under G.L. c. 231A, § 1.

It is not only state courts that have jurisdiction over trust and estate disputes. Federal district court is another possible forum for bringing a trust or estate action, assuming subject matter jurisdic-
tion exists, either by diversity of the parties or the existence of a federal question. In Marshall v. Marshall, a.k.a. the Anna Nicole Smith Case, the U.S. Supreme Court took the occasion to clarify the ability of federal district courts to hear trust and estate matters. Under the longstanding “probate exception,” federal district courts have no jurisdiction to probate a will or administer an estate, and cannot dispose of property that is in the custody of a state probate court. The Supreme Court noted, however, that some lower courts have used the probate exception to block federal jurisdiction over a range of matters well beyond probate of a will or administration of an estate. While upholding the probate exception, as properly defined, the Supreme Court ruled that a federal district court can adjudicate matters outside its confines, as long as they otherwise fall within the court’s subject matter jurisdiction.

In light of the foregoing principles, the inevitable question becomes which forum offers the greatest chance of success. Although success can never be guaranteed, some general guidelines are readily apparent.

Where to file

Probate court remains the default option for trust and estate disputes, and for good reason. Judges in the probate court have the most experience hearing these types of matters and possess expertise in trust and estate law. Accordingly, if a case involves esoteric questions of trust or estate law, filing in probate court increases the likelihood that the judge will more readily recognize the questions presented. In addition, filing in probate court may be the most efficient way to resolve the dispute. Consider, for example, when heirs at law wish to contest a will and to challenge a trust. The will contest must be brought in the probate court but the trust matter could be brought as an equity action in the probate court or elsewhere. By commencing both actions in the probate court, the actions can then be easily consolidated and the practitioner can avoid duplicative efforts and the attendant wasted time and expense.

Another possible advantage of filing in probate court is that an exception to the “American Rule” — pursuant to which each party bears its own fees and costs in litigation — exists in probate court. Under G.L. c. 215, § 45, the probate court has broad discretion to shift the reasonable fees and costs of the prevailing party to the losing party. As the Supreme Judicial Court recently held in Estate of King, the probate court has discretion to shift fees and costs pursuant to this statute even when the claims or defenses of the losing party were not wholly insubstantial and frivolous, as would be required under G.L. c. 231, § 6F.

Superior court — including the Business Litigation Session, which provides the advantage of having the same judge during the pendency of a case — may be desirable when the trust or estate questions are relatively straightforward, but other questions or the underlying facts implicate other areas of law or expertise. One recurring situation involves a closely-held family company and a trust in which the shares of the family company are held. Often times, family members will serve as both trustees of the trust and officers of the company. In these circumstances, the plaintiff may contend that the family members have breached their fiduciary obligations as trustees and as officers. To the extent that laws governing corporate governance and the fiduciary duties owed within a closely-held corporation (or partnership or limited liability company) will carry the day, filing the action in superior court could make good sense.

Notwithstanding the Supreme Court’s clarification of the probate exception in the Anna Nicole Smith case, practitioners ought to use caution when bringing trust and estate actions in federal district court. Even if doing so is technically proper — say, for example, because diversity jurisdiction exists — a plaintiff runs the risk that the federal judge will not be as familiar with the vagaries of the commonwealth’s trust and estate laws. There is also the perception that the action is better suited to state probate court. Hence, although the predictability and speed with which matters can move through federal district court can be attractive, including the mandatory disclosure rules that can streamline the discovery process, it is generally only when a matter also involves questions of federal law, such as alleged federal securities violations, that federal district court should be considered as a viable alternative to probate court or superior court.

Likewise, practitioners ought to avoid commencing actions in the Supreme Judicial Court under its original, general equity jurisdiction. This jurisdiction is not exclusive in the Supreme Judicial Court, but it is concurrent with that given to the probate and superior courts. Even if a trust or estate dispute properly invokes the original jurisdiction of the Supreme Judicial Court, as a practical matter, the Court may transfer the action to a lower court for trial or other action, and the court to which it is transferred will have jurisdiction over the action, subject to appeal, under G.L. c. 211, § 4A.

One exception is a trust reformation action seeking to give effect to a settlor’s tax planning objectives. For the Internal Revenue Service to recognize such a reformation, it must be allowed by the Supreme Judicial Court. If there are no factual disputes, these so-called Bosch actions perhaps should be filed in the single justice session of the Supreme Judicial Court. Doing so obviates the need to jump through several procedural hoops, including having the probate court reserve and report without decision and filing an application for direct appellate review.

Consider the options

A practitioner should use care when selecting a forum to bring a trust or estate action. Sometimes the decision will be easy — will contests, as noted, must be brought in probate court. Other times, however, an action may be filed in multiple courts with overlapping jurisdiction. Deciding where to file can be just as important as deciding what to file, and perhaps the former decision might influence the latter. The point is that there may be options and so the knee-jerk decision to file in probate court may not always be the best decision strategically.

Notes
A recent First Circuit decision, Schubert v. City of Springfield, provides a review of civil liability analysis under 42 U.S.C. § 1983 applicable to a “stop and frisk” situation under the Fourth Amendment and signals fertile ground for discussion of potential civil rights cases which may allege Second Amendment violations that municipalities may face in the future.

After a review of the factual and legal analysis of the Schubert opinion affirming summary judgment for the defendants, this article discusses the potential for future Second Amendment claims and potential standards for Section 1983 liability in light of the recent Supreme Court case District of Columbia v. Heller and the pending Supreme Court decision on McDonald v. City of Chicago, argued March 2, 2010. In McDonald, a city ordinance gun ban is at issue. The question presented in McDonald is whether the Second Amendment right to keep and bear arms is incorporated as against the states by the Fourteenth Amendment’s privileges or immunities or due process clauses.

I. Factual background

The factual background of the Schubert case is that a Springfield police officer observed an individual (later identified as attorney Greg Schubert), walking toward the courthouse, dressed in a suit and carrying a briefcase. The officer observed Schubert was carrying a handgun under his unbuttoned suit jacket.

The officer ordered Schubert to stay in the street in front of the police cruiser, and the officer took the gun, ammunition and licenses into his cruiser. The officer verified Schubert’s driver’s license and attempted to verify the validity of his gun license. In Schubert’s version, Schubert stayed in front of the cruiser for several minutes, and then moved to ask the officer if he could stand in the shade because it was a hot day. The officer denied the request, escorting Schubert into the back of the cruiser where Schubert was partially Mirandized and the possibility of a criminal charge was mentioned.

Because Massachusetts lacks a centralized database, the officer soon realized that the inquiry into the license could take a significant amount of time. Thus, about five minutes after moving Schubert into the cruiser, the officer told Schubert he was free to go, but Schubert would have to retrieve his gun and gun license from the Springfield Police Department. The entire stop took about 10 minutes.

II. Legal claims

Schubert’s complaint in the U.S. District Court against the officer and city asserted civil rights claims pursuant to 42 U.S.C. § 1983 under the Fourth and Fourteenth Amendments, accompanied by state civil rights and tort claims. The district court granted summary judgment as to all claims against the defendants and dismissed the state claims.

A. Fourth Amendment claim

The Fourth Amendment protects against unreasonable search and seizures. When police conduct rises to the level of an arrest, it is a seizure that requires probable cause under the Warrant Clause of the Fourth Amendment. However, Terry stops fall short of the intrusiveness of a full arrest. Such encounters require “necessarily swift action predicated upon the on-the-spot observations of the officer on the beat ....” When conducting a Terry stop, a police officer may briefly detain an individual for questioning if the officer has “reasonable suspicion supported by articulable facts that criminal activity ‘may be afoot ....”

The initial stop

In determining whether a Terry stop is justified, the inquiry involves two steps: “whether the officer’s action was justified at its inception” and “whether it was reasonably related in scope to the circumstances which justified the interference in the first place.” The initial stop requires reasonable suspicion, which must be rooted in “a particularized and objective basis” for suspecting illegal conduct on the part of the person stopped. The particularity requirement is satisfied by a finding “grounded in specific and articulable facts.” The objective component requires courts to “focus not on what the officer himself believed, but rather, on what a reasonable officer in his position would have thought.”

Schubert argued the officer was unjustified in stopping him because the officer did not have an articulable suspicion, based on the totality of the circumstances. The First Circuit disagreed, stating the officer had an articulable, objective basis for his reasonable suspicion that Schubert may have been engaged in criminal activity:

[T]he officer observed Schubert walking toward the Springfield courthouse carrying a gun. This simple, undisputed fact provided a sufficient basis for [the officer’s] concern that Schubert may have been about to commit a serious criminal act, or, at the very least, was openly carrying a firearm without a license to do so.
The fact that the officer saw a man carrying a gun in a high-crime area, walking toward an important public building, was sufficient to justify the initial stop.

Schubert contended that his clothing, age and fact that he was carrying a briefcase were factors that should undercut the reasonableness of the officer’s suspicion, but the court was not persuaded. The court said: “[a] Terry stop is intended for just such a situation, where the officer has a reasonable concern about potential criminal activity based on his ‘on-the-spot observations,’ and where immediate action is required to ensure that any criminal activity is stopped or prevented.” The court referred generally to the “obvious and potentially horrific events that could have transpired had an officer noted a man walking toward the courthouse with a gun and chosen not to intervene.”

In addition, “[u]nder Terry, the test is whether the circumstances give rise to a reasonable suspicion of criminal activity; not whether the defendant’s actions are subject to no reasonable innocent explanation.” While “clear in this case that, in hindsight, Schubert in fact posed no threat to public safety,” the officer certainly had reasonable suspicion to stop the unknown armed man in order to ascertain his identity, his authority to possess the gun, and his intentions.

2. The scope of the search

Schubert also contended the manner and length of the stop exceeded circumstances which justified the stop in the first place. Schubert claimed that once he produced his license to carry, the officer should have released him. Schubert also challenged the manner in which the officer suddenly emerged from the police cruiser with his weapon drawn and the subsequent five-minute detention of Schubert in the rear of the cruiser and “unreasonably” confiscated his weapon.

However, the court said, once the officer “had reasonable suspicion justifying a stop, he was permitted to take actions to ensure his own safety” and concluded the officer took “reasonable steps” related in scope to the circumstances that justified the initial stop. The court quoted Terry: “[i]t would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.”

B. Second Amendment claim

Schubert also argued that the officer’s stop violated the Second Amendment right to bear arms, citing to the Supreme Court’s recent decision in Heller, because the right to bear arms is a “fundamental individual right.” However, because a Second Amendment claim was not sufficiently raised in the court below, the court declined to entertain appellate argument on this issue even though the issue was briefly addressed in a short footnote to the District Court summary judgment decision.

III. Potential future of Second Amendment claims

While the Second Amendment claim was unsuccessful in the Schubert case, if (or when) a case is properly before the court, how would District of Columbia v. Heller apply? It is an open issue as to whether the ruling in District of Columbia v. Heller and the Second Amendment, generally, is applicable to the states through the Fourteenth Amendment. This issue is pending before the U.S. Supreme Court in McDonald v. City of Chicago.

In National Rifle Ass’n of America v. City of Chicago, the Seventh Circuit held that, because the Supreme Court has not ruled in Heller as to the applicability of the Second Amendment to the states, it must follow binding precedent and rule that said amendment was not applicable to the states. The Seventh Circuit criticized the Ninth Circuit ruling in Nordyke v. King and the Second Amendment, as a fundamental right, should be applied to the states. The Seventh Circuit opinion concluded that, even if the Second Amendment was construed as a fundamental right, there were still more important values at stake: “Federalism is an older and more deeply rooted tradition than is a right to carry any particular kind of weapon. How arguments of this kind will affect proposals to ‘incorporate’ the second amendment are for the Justices rather than a court of appeals.”

Whether or not the Second Amendment was meant to be applied to the states, there is no indication that the Court’s ruling in Heller was meant to abrogate Terry. Nor is there any evidence that the Court’s ruling in that case should affect the “reasonable suspicion” analysis by an officer conducting a Terry stop.

Also, the McDonald case will answer the question as to whether the fundamental rights under the Second Amendment apply only within the home. In the Heller opinion, Justice Scalia referred to “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” Heller noted that the “prohibition extends … to the home, where the need for defense of self, family, and property is most acute.” For the Supreme Court, this meant that, no matter the intensity of constitutional scrutiny, the district’s law could not survive.

This view was affirmed by the Court of Appeals for the Ninth Circuit’s ruling in Nordyke v. King. Recognizing the Second Amendment as fundamental and applying it to the states, Nordyke holds that the right protected in Heller was the right to armed self-defense in the home. The Seventh Circuit, in Nordyke, continued: Heller tells us that the Second Amendment’s guarantee revolves around armed self-defense. If laws make such self-defense impossible in the most crucial place — the home — by rendering firearms useless, then they violate the Constitution. But the Ordinance before us is not of that ilk. It does not directly impede the efficacy of self-defense or limit self-defense in the home. Rather, it regulates gun possession in public places that are County property.

As such, while light will be shed on whether local ordinances aimed at gun control issues are valid, many other issues will remain unanswered other than the constitutionality of ordinances. For example, the court in Nordyke upheld a law banning possession of firearms on county property. In the Schubert case, the City of Springfield had not sought to enforce any such far reaching ordinance — or any ordinance at all. Rather, the city police officer only sought to effectuate a Terry stop.

Additionally, even if the right did extend beyond the home, Scalia notes that it is not unlimited in scope. “Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” For example, the Court continues, “the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns. That accords with the historical under-
standing of the scope of the right.”31 Rather, the decision in *Heller* found that, under the Second Amendment, an “absolute prohibition of handguns held and used for self-defense in the home” was beyond the limits of constitutionality. It is a vast leap from the law at issue in *Heller* to the *Terry* stop effectuated in this case.

While the Second Amendment may not affect a *Terry* stop, how will it affect the denial of a gun license or other situations where the rights of a gun owner are at issue? Much will depend on what standard is adopted as applicable to a Second Amendment violation. While a “strict scrutiny” standard may be urged by plaintiffs, defendants may advocate for a standard where the Second Amendment is not violated unless the acts of the officer are deliberately indifferent or reckless to the civil rights of a municipality’s inhabitants, or are “shocking to the conscience.”

In his dissent in *District of Columbia v. Heller*, Justice Breyer recommends a balancing standard to weigh governmental interest with the burden on right protected:

> I shall ask how the statute seeks to further the governmental interests that it serves, how the statute burdens the interests that the Second Amendment seeks to protect, and whether there are practical less burdensome ways of furthering those interests. The ultimate question is whether the statute imposes burdens that, when viewed in light of the statute’s legitimate objectives, are disproportionate.32

Under such an analysis, municipalities would have a strong interest in enforcing laws and protecting citizens from illegal guns on the streets. In *Schubert*, the officer was fully within his rights under *Terry* to make a threshold inquiry. If a court uses a balancing test, the weight of the government interest far outweighs any intrusion of the *Terry* stop. “Any right to bear arms Plaintiff may have had does not signify that police are without power to stop and inquire, in these circumstances, or must do so only at peril of being sued for a civil rights violation.”33 It is hard to imagine that the “right to bear arms” for protection of persons in the home will provide a person who is stopped under *Terry* greater rights than provided by the Fourth Amendment, or somehow “balance” Fourth Amendment versus Second Amendment rights.

In *Heller*, Scalia dismisses the balancing test suggested by Breyer, but does not appear to suggest a standard of culpability in its place.34 He does, however, mention the historical standards of constitutional analysis: strict scrutiny, intermediate scrutiny and rational basis.35

A rational basis analysis presumes validity so long as there is a legitimate government purpose.36 This analysis, like a balancing test, would take into account the legitimate government interest of conducting *Terry* stops as validating validate this stop under the Second Amendment.

Under an intermediate scrutiny test, if a regulation involves important governmental interests that are furthered by substantially related means, the governmental intrusion is valid.37 In the *Shubert* case, and under any *Terry* stop, again the need to prevent illegal and unlawful gun possession and use is furthered by the officer’s use of the *Terry* stop as defined and approved by the Supreme Court.

The standard for municipal liability under section 1983 was set forth in *City of Canton v. Harris*38 as “recklessness” or deliberate indifference. Where evaluating a pretrial detainee claim under section 1983, courts have sometimes applied a substantive due process standard of whether the conduct is “shocking to the conscience.”39 In *Graham v. Connor*,40 the Supreme Court decided that the standard governing a free citizen’s claim of excessive force in the course of making an arrest, investigatory stop, or other “seizure” is properly analyzed under the Fourth Amendment’s “objective reasonableness” standard, rather than under a substantive due process standard. The *Shubert* case is probably the first of many cases to give municipalities a chance to test whether any of these standards should be applied under the Second Amendment.

Notes
1. 589 F.3d 496 (1st Cir. 2009).
3. McDonald v. City of Chicago, No. 08-1521 (S.Ct. 2010).
5. See U.S. Const. amend. IV.
7. Id.
10. *Wright*, 582 F.3d at 205 (quoting *Ornelas* v. United States, 517 U.S. 690, 696 (1996)).
11. United States v. Espinoza, 490 F.3d 41, 47 (1st Cir. 2007) (quoting United States v. Hensley, 469 U.S. 221, 229 (1985) (internal quotation marks omitted)).
12. Id.
21. 567 F.3d 856, 857 (7th Cir. 2009).
22. 563 F.3d 439 (9th Cir. 2009).
23. *National Rifle Ass’n*, 567 F.3d at 860.
25. Id. at 2817.
26. Id. at 2821-22.
27. 563 F.3d 439 (9th Cir. 2009).
28. Id. at 458.
30. Id. at 2816.
31. Id. at 2815-16.
32. Id. at 2854.
34. District of Columbia v. Heller, 128 S.Ct. at 2821.
35. Id.
37. See e.g., Craig v. Boren, 429 U.S. 190 (1976).
Many baby boomers and other business owners who are hoping to retire soon are exploring options to sell their company. They have worked hard all of their lives and now want to enjoy the fruits of their labor. These business owners are stymied, however, by the lack of liquidity in the credit market and the resulting decrease in potential buyers for their company. Even if a buyer were found, they may feel a sense of guilt when they plan to leave their company and valued employees in the hands of strangers.

What is the solution? One may be to establish an employee stock ownership plan, or ESOP. In addition to incentivizing employee performance and providing employees with a retirement benefit, an ESOP can provide a buyer for these companies and be used to promote management succession.

What is an ESOP?

From a distance, an ESOP looks like a traditional defined contribution retirement plan, like a 401(k) or profit-sharing plan. The difference is that an ESOP is designed to invest primarily in the stock of the company that established it, instead of in the securities of other entities.

Here is how it works: The ESOP would be the buyer of the company and purchase the exiting owner’s company stock for fair market value as determined by an independent appraiser. Employer contributions, or the equivalent amount of employer stock, are allocated to individual employee accounts in the ESOP based on the proportion of an employee’s salary to the total of all employee salaries.

Employee eligibility to receive an allocation can be dependent on working a specified number of hours during the year and/or employment at the end of the year. An employee generally will vest in the stock allocated to his or her account over a set time frame of up to six years of service. At a specified time after termination of employment, or immediately after retirement or death, an employee or his or her beneficiary is entitled to receive the fair market value of the vested balance in the employee’s account.

ESOP popularity

Establishing ESOPs has steadily increased in New England and in other parts of the country. The ESOP Association (www.esopassociation.org) estimates that there are about 10,000 ESOPs in the United States today and about 1,500 created each year as business owners view the ESOP as a win-win for themselves, their business and their employees. An ESOP will increase a company’s cash flow by reducing its taxes. If your company is taxed as an “S” corporation and the ESOP owns 100 percent of the shares of the company, corporate income may be exempt from federal taxation. This reduction in taxes will result in an increase in the value of the company’s stock.

ESOP as buyer

An ESOP is a natural buyer for an owner’s stock in his or her company. The question is where does the ESOP get the money to pay for it? One way the purchase may be financed is for the company to borrow money from a bank and then loan the money to the ESOP. In these still tough economic times, however, bank financing may not be that easy to come by.

Another financing option to consider is for the selling owner to loan the money to the ESOP in exchange for a promissory note. By taking the loan from the selling shareholder instead of a bank, the ESOP and the company will avoid paying loan-related bank fees and increased lawyer fees incurred in negotiating a third-party loan.

If loaning money from the selling shareholder is not an option, banks may be more willing to lend in connection with an ESOP transaction, as there is greater security in knowing that the loan will be repaid with pre-tax dollars, as discussed below.

As a condition to making the loan, the lender or selling owner typically takes a security interest in the company’s assets, a loan guaranty from the company and a pledge of the ESOP stock. The employer makes annual contributions to the ESOP to enable the
ESOP to repay the loan. A valuation firm should be retained to perform a “feasibility study” to determine if the company’s ongoing cash flow will be sufficient to enable it to make contributions to the ESOP which, in turn, would make the required loan payments.

**ESOP as employee incentive**

An ESOP also can help ensure a company’s success by helping it retain its most dedicated employees; ESOP benefits will provide them with an additional financial incentive to remain with the company, as the benefits can only be realized after the employee completes a specified number of years of service. Thus, an ESOP-owned company is likely to suffer lower employee turnover and a concomitant reduction in related expenses and inefficiencies.

Finally, an ESOP provides a powerful incentive for employees to become more productive in order to drive up the value of the company’s stock. Although employees own the company’s stock, a selling shareholder can still maintain control over the ESOP stock by becoming one of the ESOP trustees (officers of the company can also serve as ESOP trustees). For all but a few specified matters, such as a sale of substantially all of the employer’s assets, the ESOP trustees have the right to vote all shares of stock in the ESOP and thus still control the company.

**Tax benefits of an ESOP**

An ESOP provides federal tax benefits to the company, the employees and the selling shareholder. Contributions the employer makes to an ESOP to pay down an ESOP loan may be tax deductible, and thus the ESOP may be able to repay the entire loan with pre-tax dollars. Because the ESOP is a qualified retirement plan, however, the employer’s ability to deduct contributions to the ESOP in certain cases is limited based on the amount of employee compensation.

Employees will have their ESOP retirement benefits grow tax free and will only be taxed on their ESOP accounts at the time benefits are distributed to them. They can defer this tax by rolling over their ESOP payments to an IRA.

Since it appears possible that the capital gains rate will increase in the near future, if business owners are contemplating retirement, they may want to sell their shares soon in order to lock in the 15 percent capital gains rate. Even if the owner sold his or her stock in the company for a promissory note from the ESOP, resulting in installment treatment for the purchase price, the owner could elect out of this installment treatment and pay tax on the gain from the stock sale at the current 15 percent capital gains rate.

An owner of a “C” corporation, however, who has owned his or her company shares for at least three years can sell at least 30 percent of his or her shares in the company to the ESOP and elect to defer capital gain on the sale so long as he or she invests an amount equal to the sale proceeds in “qualified replacement securities” within three months before, or 12 months after, the sale. This obviously presents a significant tax benefit to the company’s owner who may effectively be able to sell his or her company tax-free.

**How to get started?**

Implementing an ESOP should be a winning solution for business owners, their companies and their employees as it will provide tax benefits, improved cash flow and, hopefully, lower employee turnover and increased employee commitment. The tax rules and regulations governing ESOPs, however, are complex, and there are many “traps” for the unwary. A company should seek out the expertise of an experienced valuation firm to value the company’s stock and perform a feasibility study, as well as attorneys to assist in the design of the transaction and draft the necessary documents.
2009 was a significant year for state taxation issues. As states grappled with unprecedented economic problems, their legislatures and, in some cases, their judicial systems, searched for additional revenue from residents and companies doing business within their jurisdictions. With Congress and the U.S. Supreme Court continuing their “hands-off” approach to state taxation, states expanded their efforts to tax companies with minimal nexus, and reached into other states to tax sales made to their residents. Here are some of the highlights in Massachusetts.

### 1. Combined reporting

Forty-six states and the District of Columbia impose some sort of corporate income, franchise or excise tax based on income (only Nevada, South Dakota, Washington and Wyoming do not). Historically, Massachusetts has been a separate filing state — every company with nexus in Massachusetts has filed a state tax return and apportioned its income among its activities in all states where it does business.

In 2008 (effective in 2009), Massachusetts adopted “combined reporting,” which is designed to address questionable income shifting, abusive tax shelters and other intercompany transactions among members of a corporate group. With combined reporting, the income of a unitary group of affiliates is combined and then apportioned among the members of the entire group. This includes all members of the unitary group, whether or not they have nexus in the taxing state (although some states do exclude members without nexus).

In general, combined reporting under certain circumstances apportions to Massachusetts the multistate income of a unitary business (whether conducted through several divisions or affiliated corporations), not just the multistate income of a single corporate entity. All activities constituting a single business are viewed as a whole, rather than as separate activities conducted in the state.

Combined reporting was developed in the late 1800s as Western states sought to impose property taxes on railroad companies. The general idea is to fairly tax a company’s entire unitary business.

For some companies, their overall tax burden will decrease, but for most, it will increase, as each state has different rules. Massachusetts expects to bring in as much as $400 million in new revenue.

Combined reporting differs from consolidated return filings in several ways (50 percent versus 80 percent ownership, apportionment methodology, unitary business requirement, worldwide/water’s-edge combinations, etc.) and has generated much more litigation in other states than disputes involving consolidated returns, primarily in California.

So far, about 20 states have mandatory combined reporting; 15 other states generally allow separate filing, but also require or permit a combined unitary report if certain conditions are satisfied. In 2009, 10 states considered and then rejected mandatory combined reporting.

The issues involved are complex. They range from defining the unitary group, understanding and applying the various tests used by courts to define the group, deciding whether to report on a worldwide basis or on a “water’s-edge” basis, understanding the difference between business and non-business income, analyzing nexus issues, etc. As other states have experienced, we can expect much litigation involving these issues.

### 2. Geoffrey and Capital One cases — Nexus without a physical presence

For many years, taxpayers have argued, mostly without success, that the “physical presence” test of Commerce Clause nexus that was mandated by the Supreme Court in its Quill decision should apply to all taxes, not just sales and use taxes. Congress and the Supreme Court have consistently refused to address this issue (see #3 below discussing HR 1083, which has been sitting in the House for over a year). The Supreme Court insists that Congress should address this issue, since it has broad power under the Commerce Clause to do so. Congress’ failure to act has resulted in litigation in many states, including Massachusetts.

Following the precedents set by several other states, the Massachusetts Supreme Judicial Court in its Geoffrey decision upheld the imposition of income tax on an out-of-state intangible holding company that received royalty income from affiliates in Massachusetts but had no physical presence in the state.

Following its holding in the Capital One case, the Court held that physical presence is not required for an entity to be subject to a state tax based on income. Instead, a taxpayer must only have established substantial nexus with the state. In the Capital One case, the Court noted that significant, purposeful economic activity in a state is enough to establish significant nexus required by prior Supreme Court decisions. In the Geoffrey case, the Court noted that substantial nexus can be established through the licensing of intangible property to a Massachusetts business that generates income for the licensing company.

An analysis of Geoffrey might be helpful. Geoffrey was a Delaware company wholly owned by Toys “R” Us, Inc. Geoffrey did...
not own any real or tangible personal property in Massachusetts, nor did it have any employees or offices located in Massachusetts. Geoffrey had never used state or federal courts in Massachusetts. Geoffrey held all trademarks, trade names and service marks associated with Toys “R” Us and its related companies, and licensed the intangible property to various Toys “R” Us affiliates throughout the United States, including Massachusetts. These affiliates made market-rate royalty payments to Geoffrey.

The DOR assessed Geoffrey with unpaid corporate taxes, interest and penalties. Geoffrey protested the assessment, but the Appellate Tax Board upheld the department’s findings.

The Supreme Judicial Court, saying basically that “everyone else is doing it,” disagreed with Geoffrey’s argument that physical presence was required for a state to impose an income-based tax on an out-of-state taxpayer. The Court maintained that Geoffrey engaged in business activities having a substantial nexus with Massachusetts, including entering into contractual relationships with Toys “R” Us in Massachusetts and marketing to consumers in Massachusetts. These activities generated substantial income for Geoffrey, and the Court concluded that they established a substantial nexus with Massachusetts.

The effect of these cases on future tax litigation in Massachusetts is unclear, since the new combined reporting requirements certainly will affect the issues involved in nexus determinations and tax reporting. However, their effect on pre-2009 tax years is significant.

3. Limits on states’ taxation powers

50th anniversary of Northwestern States Portland Cement case and 50th anniversary of Public Law 86-272

Northwestern States Portland Cement Co. v. Minnesota upheld a state’s power to tax income generated from interstate activities. This case held, arguably for the first time, that the Commerce Clause does not prohibit a state from imposing a “fairly apportioned” direct corporate income tax on an out-of-state business carrying on an exclusively interstate business within the state.

In 1959, seven months after the Northwestern States decision, P.L. 86-272 was adopted by a panicked Congress as a “temporary stopgap measure,” designed to address several issues that were raised by that decision and its broad opinion. It offers a very limited safe harbor from the imposition of state income taxes by preventing state income taxation of out-of-state corporations if their only in-state activity is the solicitation of orders for sales of tangible personal property that are sent outside the state for approval or rejection and are filled from outside the state.

This safe harbor applies only to income taxes (not sales taxes or franchise taxes based on net worth or capital), protects only the sale of tangible personal property (not leasing, not services, not intangibles and not real estate), and offers no protection if the soliciting employees do anything other than solicit orders (make repairs, approve orders, provide customer training, etc.). This “temporary” measure was designed to last until Congress addressed the overall power of states’ taxation rights. Despite many failed attempts to expand or limit its reach, P.L. 86-272 remains intact 50 years later, and is the major federal statutory limit to state corporate income taxation.

HR 1083 (introduced Feb. 13, 2009, and still in committee), the “Business Activity Tax Simplification Act of 2009,” would expand the federal prohibition against state taxation of interstate commerce to: (1) include within the protection of P.L. 86-272 all transactions involving services and all forms of property, including intangible personal property (currently, only sales of tangible personal property are protected); and (2) prohibit state taxation of an out-of-state entity unless that entity has a physical presence in the taxing state. It also sets forth criteria for determining whether a business has a physical presence in a state.

4. State transfer pricing case

This case is one of the country’s few state tax transfer pricing cases (almost all these cases are from New York), so it’s had much national attention. IDC Research charged its out-of-state affiliates for concentrated services such as accounting and marketing. The charges to its affiliates were deemed to be “not at arms-length” (i.e. too low) by the Department of Revenue. However, this ruling by the Appellate Tax Board determined that the prices IDC charged its affiliates were at arms-length, although it did apply the “sham transaction” doctrine to certain royalty payments.

Although the case’s significance is limited in Massachusetts by the new combined reporting rules, it is still relevant for years prior to 2009, and for all related party transactions that are not eliminated by combined reporting because the parties are not in the same unitary group. Also, the IRS and federal courts may take note of it, since it addresses issues raised by Massachusetts’ version of IRC Section 482.

This case is a reminder that intercompany arrangements can no longer be expected to escape the attention of state taxing authorities, and that the “sham transaction” doctrine will be used aggressively by the DOR.

5. Economic nexus legislation in other states

Several states (California, Wisconsin, Connecticut, Ohio and Michigan) have adopted economic nexus legislation basing their power to impose income taxes on companies simply because they have a threshold level of sales in the state. These states’ goal is to broadly tax out-of-state companies that derive any income from their state. Obviously, these statutes are heading to federal court, where there is no clear precedent for whether a physical presence in a state is required to impose an income tax (see #2 above). Despite much case law, the Supreme Court has only required a physical presence for the imposition of a sales tax but has not ruled on this requirement for income taxes. See also the H.R. 1083 discussion in #3 above.

6. New York City case involving post-9/11 rent on World Trade Center buildings

After 9/11, the master entities controlling the World Trade Center buildings were obligated to continue to make payments to their landlord, the Port Authority, even though the buildings were destroyed. These payments were funded primarily by insurance proceeds. New York City attempted to collect $35 million of NYC commercial rent tax, penalties and interest for the years after 9/11, but the NYC Tax Appeals Tribunal decided that those payments did not constitute “base rent” because New York City (and later, the Port Authority) had taken over the site, the master lesseses had no right to rebuild on the same site, and no one else had the right to occupy any space on the site.

This was a bold and obviously controversial attempt by NYC to tax some of the insurance proceeds, but it does raise interesting
questions about rent and other payments made after a building’s destruction, whether by fire, storm or otherwise, if the destroyed building cannot be rebuilt on the same site.

7. W.R. Grace Appellate Tax Board case

W.R. Grace continued its ongoing battles with the DOR about payments to its out-of-state affiliates. This case involved dividend and interest payments that Grace made to an affiliate that Grace contended was not part of its “unitary” business. This case applies pre-2009 law that deals with the issues of unitary businesses and applicable constitutional principles such as functional integration, centralization of management, economies of scale, and an investment/operational analysis. The board held in favor of Grace, but this case’s relevance for future combined reporting unitary issues is unclear.

8. Work product doctrine

U.S. v. Textron, Inc. held that certain tax work papers prepared by Textron’s Tax Department were not protected from IRS scrutiny by the work product doctrine, which protects documents prepared in anticipation of litigation. The opinion seems to create a troubling new standard dealing with whether documents were prepared “because of” litigation or with the “primary purpose” of litigation.

In Commissioner of Revenue v. Comcast Corporation, the court held that tax accrual papers shared between in-house counsel and outside tax consultants were protected because they were prepared in anticipation of litigation, but were not protected by the attorney-client privilege.

These two cases may be in conflict, and Textron is seeking Supreme Court review, although any effect of that Court’s ruling on Rule 26(b)(3) of the Massachusetts Rules of Civil Procedure is unclear. At least the Supreme Court could resolve the conflicting decisions among the circuits. At this point, many tax litigators worry that providing work papers in one jurisdiction might result in a waiver of protection in other jurisdictions.

9. Sales tax increase

On Aug. 1, 2009, the sales tax rate in Massachusetts increased to 6.25 percent from 5 percent. The state’s alcohol, satellite television, meals and hotel taxes also were increased.

10. State income tax credit for donated conservation land

Effective in 2011, this is an effort to “encourage private landowners to make lasting contributions to our natural and cultural heritage.” Eligible lands include those that protect drinking water supplies, wildlife habitat and scenic vistas, and those that boost the tourism, agricultural and forest product industries. The incentive requires that gifts of land be permanently protected. The credit (up to $50,000) is valued at 50 percent of the appraised fair market value of the land, and the credit cannot exceed the donor’s tax liability, although it can be carried forward.

11. Streamlined sales tax project

Massachusetts is not yet a full member of the project (Massachusetts is an “advisor state”), which seeks to simplify interstate sales tax collection by participating retailers in the member states. In February 2009, the project’s governing board amended its “essential clothing” rules to make it possible for Massachusetts, New York and Connecticut to join. If these states don’t join, the board has announced that it “may” repeal its amendment in April 2010, which probably would end any near-term full participation by Massachusetts.

12. New Hampshire update

New Hampshire’s reaction to Town Fair Tire case

The Massachusetts DOR’s failed attempt to assess sales/use tax collection duty on a New Hampshire retailer’s sales in New Hampshire to Massachusetts customers generated an angry legislative response from New Hampshire.

Town Fair Tire Centers, Inc. v. Commissioner of Revenue, was a narrow decision testing whether Massachusetts has the right to compel the tire company, which also has stores in Massachusetts and has nexus in Massachusetts, to collect Massachusetts use tax on tires sold and installed in New Hampshire on vehicles bearing Massachusetts license plates and registrations. Instead of applying constitutional principles, as the Appellate Tax Board had done, the Supreme Judicial Court decided this case on narrow grounds, prohibiting the DOR from making a presumption that an out-of-state purchase is for use in Massachusetts, and stated that:

“There is no Massachusetts statutory presumption of use in the Commonwealth where personal property is sold to a Massachusetts resident outside the Commonwealth, even where the goods purchased out of State may be affixed to property registered in Massachusetts. We will not recognize a presumption that the Legislature has not established.”

The Court went on to say that Massachusetts could create a statutory presumption, but that it had not done so, and therefore it did not exist. Since there was no other proof that the tires were used in Massachusetts, the Court reversed the Appellate Tax Board’s decision in favor of the commissioner.

In response, the commissioner of revenue has recently (Feb. 11, 2010) issued Sales and Use Tax TIR 10-2, which makes clear that:

“Absent evidence of actual storage or use in the Commonwealth, the Commissioner will not assess a use tax against an out of state registered vendor on sales to a Massachusetts resident where a Massachusetts resident purchases and takes possession of tangible personal property entirely outside the Commonwealth.”

The TIR also reminds taxpayers that a use tax return must be filed and the tax must be paid by a purchaser storing, using or consuming tangible personal property in the state:

“The Town Fair Tire decision does not exempt purchasers who purchase property elsewhere and bring it into Massachusetts from their use tax filing or payment obligation.”

The TIR leaves open two approaches by the DOR. First, the DOR could seek evidence of actual use in Massachusetts. Second, the DOR could ask the Legislature to adopt a statutory presumption of use.
attack on constitutional grounds, but New Hampshire argues that its retailers may cooperate as long as other states adopt appropriate legislation and the New Hampshire Department of Justice approves. As a practical matter, no state’s laws are appropriate, so everyone is waiting for Massachusetts to take the next shot — either litigation or legislation. This law has attracted much national attention, since it could be the start of a free-for-all among neighboring states that can’t behave themselves.

**Distributions from New Hampshire LLCs and partnerships**

The other big news in New Hampshire has been the state’s efforts to tax distributions from LLCs and partnerships. Effective Jan. 1, 2009, New Hampshire’s tax law was amended to tax certain distributions from limited liability companies and partnerships to New Hampshire owners. The law requires the recipient of the distribution to report it as a dividend under the New Hampshire Interest and Dividends Tax, which imposes a tax on interest and dividend income at the rate of 5 percent.

The law is not a new tax; rather, the change is intended to subject “distribution income” that resembles dividend income to an existing tax, New Hampshire’s Interest and Dividends Tax.

The tax is intended to place businesses that operate as corporations on a par with businesses that operate as limited liability companies or partnerships. More precisely, the objective of the law was to tax distributions made by limited liability companies and partnerships to their owners to the same degree — and only to the same degree — that dividends paid by corporations to shareholders are taxed as dividends.

The tax will apply to recipients of LLC or partnership distributions who are New Hampshire residents, regardless of where the LLCs or partnerships making the distributions are located or under which state’s laws they are formed. Payments made to owner-employees of LLCs and partnerships that constitute compensation for the services of the owner-employees of the business are not intended to be taxed, any more than compensation paid to shareholder-owners is taxed.

**Notes**

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5. IDC Research, Inc. v. Commissioner of Revenue; (MA Appellate Tax Board Findings of Fact and Report, 2009-399).
7. In the Matter of the Petition of 1 World Trade Center LLC, TAT(H) 07-34(CR), et al. (New York City Tax Appeals Tribunal 12/03/09).
9. 577 F.3d 21 (1st Cir. 2009).