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CIVIL LITIGATION

OUT-OF-STATE DISCOVERY AND THE UNIFORM INTERSTATE DEPOSITION AND DISCOVERY ACT

BY ROSEMARY MACERO

In today's society of high mobility, chances are that the need to secure witness discovery in a state other than Massachusetts will arise. With party witnesses, this is not an issue because the party can be made to come to Massachusetts, or acceptable alternative arrangements can be made for scheduling and location. The real problem arises with non-party, out-of-state witnesses.

To commence the process in Massachusetts courts, the party needing the discovery uses the process of securing what is called a letter rogatory. The letter rogatory is the process in which the Massachusetts courts request the assistance of the other state's courts, under rules of comity, to aid the Massachusetts courts and secure enforceability of the discovery via the subpoena power in the other state.

For the uninitiated, a letter rogatory is secured by filing a motion in the existing Massachusetts case. The motion contains a specific request to the court in which the case is pending to issue a letter rogatory. The letter rogatory, when issued, is an official request from the Massachusetts court to the court in the state in which the witness lives, resides or can be served. The letter rogatory requests the local court or witness court to assist the Massachusetts court in securing the attendance of the witness for deposition/discovery through the witness court's enforcement power over the witness located in its jurisdiction. The issued letter rogatory is then filed in a miscellaneous action in the witness state court (by counsel admitted in the other state), and a subpoena to the witness is then issued in the witness state court case (filed for the sole purpose of securing subpoena power) within the time and distance and other limitations of the local state law for witness subpoenas. Subpoena service is made and, if the witness does not show up, the power of the local court can be used to enforce the subpoena. This process, in New Hampshire, was known as securing a commission.

While Massachusetts procedure has not changed, many other states, including New Hampshire, Vermont, New York and 28 other states, have adopted some version of the Uniform Interstate Deposition and Discovery Act (UIDDA). (There can be slight differences between jurisdictions in the adoption of uniform laws.) The UIDDA is an effort to simplify and standardize the process of issuing subpoenas in the witness state court to secure compliance of the out-of-state, non-party witness with the needed discovery and deposition.

The UIDDA does not change the process in the trial court state for securing the permission of the court for the requested discovery. Even if Massachusetts had adopted the UIDDA, the motion for the letter rogatory is still required. The UIDDA does attempt to streamline the procedure in the witness state.

The UIDDA, where adopted by the witness state, generally requires that the Massachusetts letter rogatory (the document allowing the deposition or discovery to proceed) and Massachusetts subpoena be issued. The Massachusetts subpoena and letter rogatory are then sent to the witness state with a subpoena that conforms to the rules of that jurisdiction (witness jurisdiction). Under the UIDDA, the witness state subpoena (and other documents, namely the letter rogatory and Massachusetts subpoena) is then sent to the appropriate court in the witness state. The witness state subpoena is then issued (signed) by a clerk or a judge in the witness state. The lawyer then makes service of the witness state subpoena (and Massachusetts documents) under the service rules of the witness state.

While the process can still be complex, the adoption of the UIDDA appears to remove the need for out-of-state counsel to file an action in witness state court to get the witness state subpoena to issue. The court issuance of the subpoena in the UIDDA jurisdiction and proper service of the witness state subpoena with the Massachusetts documents would be sufficient to secure attendance. If attendance did not occur, only then would the filing of a specific enforcement action in the courts of the witness's state be necessary.

The UIDDA is not a complete fix for the issue of cross-border discovery, but it certainly appears to be a step in the right direction. ■

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LABOR & EMPLOYMENT LAW

FISHING ON FMLA LEAVE MAY OR MAY NOT BE PERMISSIBLE ACTIVITY

BY ANTHONY CALIFANO AND CHRIS KELLEHER

In a recent decision, *DaPrato v. Massachusetts Water Resources Authority,* the Massachusetts Supreme Judicial Court (SJC) provided guidance to employers and employees on the type of conduct that is and is not permissible during a Family and Medical Leave Act (FMLA) leave. As is often the case, the particular circumstances are important.

In January 2015, Richard DaPrato applied for FMLA leave to recover from his upcoming foot surgery scheduled for Feb. 6, 2015. DaPrato's doctor estimated that he would need about seven weeks of leave to recover. According to his FMLA application documents, DaPrato was required to stay off his right foot for four weeks, and then he could transition to weight-bearing activities over the next three weeks. The Massachusetts Water Resources Authority (MWRA) granted DaPrato's leave request and provided him with "salary continuation" pay during his leave.

A few weeks after his surgery, DaPrato informed the MWRA that he hoped to return to work early because he could walk around with crutches. But DaPrato subsequently informed the MWRA that he would not be able to obtain his doctor's permission to return to work until March 26, 2015.

Less than five weeks into his leave, DaPrato went on vacation with his family to Mexico. Upon his return to work, the human resources (HR) department learned about his vacation and obtained video recordings depicting DaPrato walking, driving and lifting luggage out of his car before his flight. The HR director, who later testified that she "wouldn't think somebody who's seriously ill or disabled would be able to be on vacation," recommended DaPrato's termination.

After the MWRA terminated DaPrato's employment, litigation ensued. To prove his FMLA retaliation claim, DaPrato had to demonstrate that there was a but-for causal connection between his use of FMLA leave and his termination. The jury returned a verdict in DaPrato's favor, awarding nearly $2 million in damages and attorneys' fees.

On appeal, the MWRA claimed it was entitled to a new trial based on erroneous and prejudicial jury instructions. Notably, the MWRA argued that the trial judge improperly instructed the jury not to consider DaPrato's conduct while on vacation. The instruction read:

> DaPrato has not met [his burden of showing causation] if the MWRA discharged him for independent reasons, even if that discharge occurred during or after his taking of FMLA leave. A reason counts as an independent reason only if it does not include as a negative factor the fact that DaPrato took or requested leave or spent time recuperating in a particular location or in a particular manner.

The trial judge intended this instruction to be "curative" or to minimize the risk that the jury would be swayed by feelings of resentment toward DaPrato. That is because, during trial, the MWRA showed the jury pictures of DaPrato on vacation, standing on a boat and holding a large fish that he apparently just caught. The jury's exposure to these pictures, in the trial judge's opinion, was excessive. And the trial judge held that "you can't penalize someone for going on vacation during FMLA leave."

While the SJC found the above instruction to be "problematic," it held that it was not an abuse of discretion and not prejudicial to the MWRA under the circumstances. The SJC clarified that "an employer may validly consider an employee's conduct on vacation — or, for that matter, anywhere — that is inconsistent with his or her claimed reason for medical leave, when the employer has such information at the time the employer is evaluating whether leave has been properly or improperly used. … [V]acationing while on FMLA leave may take either permissible or impermissible forms."

The SJC stated that there should be "[c]areful consideration of the reasons for the medical leave and the activities undertaken" during the leave when deciding whether the employee has abused FMLA leave. By way of example, the SJC said: "An employee recovering from a leg injury may sit with his or her leg raised by the sea shore while fully complying with FMLA leave requirements but may not climb Machu Picchu without abusing the FMLA process."

According to the SJC, the fishing trip pictures raised "legitimate questions." The SJC observed, however, that the MWRA had not seen the photographs when making its termination decision. Likewise, the MWRA was not aware of DaPrato's activities while on vacation in Mexico. The MWRA, therefore, could not have considered these things when making the termination decision. Ultimately, under the particular circumstances, the SJC held that it could not say the instruction amounted to an abuse of discretion, at least not a prejudicial one in light of "the jury's unequivocal decision in favor of DaPrato."

The MWRA also argued that the trial judge erroneously declined to instruct the jury that an employer is not liable under the FMLA if it discharges an employee based on an "honest belief" that the employee misused FMLA leave, even if that belief is mistaken. The SJC held that the judge properly declined to give such an instruction. The SJC reasoned that "honest belief" and "good faith" are defenses to damages, but not to liability.

The *DaPrato* decision is important because of the guidance it offers to employees, employers and attorneys. The SJC has cautioned that an employee's vacation during an FMLA leave is not always a valid ground to take adverse employment action. That said, if an employee uses FMLA leave to engage in conduct that is inconsistent with his stated reason for medical leave, a Massachusetts employer with knowledge of the inconsistent conduct may take adverse action against the employee. ■

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IS LIMITED LIABILITY COMPANY OWNERSHIP A SOUND BUSINESS DECISION FOR LANDLORDS IN THE COMMONWEALTH?

BY JORDANA ROUBICEK GREENMAN AND MICHAEL LONZANA

Business planning can be tricky. One of the trickier parts is choice of entity, especially when advising entrepreneurs who may have unwarranted confidence in their knowledge of such subjects.

Common legal advice from attorneys to investment property owners seeking liability protection is to purchase and own the subject property in a limited liability company (LLC), a "flow-through" entity that provides most, if not all, of the same protections as a corporation. In this article we will explore how ownership rights and duties for landlords are affected by holding property in an LLC, as well as potential traps attendant to such ownership.

LIABILITY

As with any business, the owner of investment property in an LLC seeks protection from personal liability. The LLC is often used to protect against catastrophic exposure lying in premises liability, the type that often exceeds the coverage offered in a typical insurance policy. Many landlords convert their property ownership to an LLC out of fear of a catastrophic event that wipes out all or most of their exposed personal wealth, often accumulated after decades of sweat equity.

On the surface, the choice of an LLC is a sound business decision and an adequate vehicle to address such concerns. For the purposes of this article, we will assume the administrative record keeping requirements to maintain corporate protection are in compliance. However, once a real estate investor's portfolio expands to include many LLCs requiring a complicated structure, alternatives begin to look more and more attractive. For a few thousand dollars annually, one can purchase extensive umbrella insurance coverage. Umbrella coverage can address much of the catastrophic liability protection that served as the original motivation for the LLC. The major drawback to umbrella coverage is that there may be certain coverage exclusions that the client is not comfortable with. For example, damages arising out of lead and/or asbestos poisoning are typically excluded from coverage. Both lead paint and asbestos may lie within buildings in the commonwealth.

OTHER CONSIDERATIONS

The most common issue that clients seeking LLC protection are not aware of is that an LLC landlord must be represented in court by counsel and cannot proceed pro se. Similar to a corporation, with the exception of small claims matters, an LLC cannot be represented in court proceedings by an officer or manager unless the officer or manager is an attorney licensed to practice law in the commonwealth. *See Varney Enterprises v. WMF* Inc., 402 Mass. 79 (1988). The LLC must be represented by a licensed Massachusetts attorney. The same is true for all types of business ownership, including real estate trusts. This most often presents itself in summary process eviction proceedings, where parties routinely resolve their case through mediation rather than arguing the merits in front of a judge.

In a 2018 case in which a property manager brought a summary process eviction against a tenant on behalf of the owner, the case was dismissed by the Housing Court in light of the property manager's lack of standing, as the property management company was not the "owner or lessor" and was not an attorney licensed to practice law in the commonwealth of Massachusetts. The Supreme Judicial Court (SJC) upheld this decision, affirming that a property manager does not have standing to prosecute an eviction in its name on behalf of an owner. The SJC ordered that trial courts must dismiss any summary process action in which the plaintiff is not the property owner or lessor and confirmed that anyone who is not licensed as an attorney in Massachusetts, including a property manager or owner of an LLC, cannot sign documents to be filed in court on behalf of property owners or lessors or appear in court on their behalf without engaging in the "unauthorized practice of law." In the event that an LLC owner or lessor files documents in court without retaining counsel, however, the court may either dismiss the case without prejudice or order that the complaint be dismissed on a specified date unless such owner or lessor retains counsel prior to that date. *See Management Services et.al. v Loretta Hatcher,* 479 Mass. 542 (2018).

In the opinion of at least one practitioner, the *Hatcher* case did not affirmatively close the book on the aforementioned issue of representation. The SJC used the terms "owner or lessor" and, to a lesser extent, "true landlord" throughout the case as a condition precedent to standing. The protagonist in *Hatcher* was a non-lawyer property manager who was admittedly acting as an agent to the landlord in entering and prosecuting the case. Nowhere in the legal discussion does the SJC affirmatively define "owner or lessor" and/or discuss the role entities play in relation to individual ownership in determining who is the

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"owner or lessor" or "true landlord." A colorable, though likely losing, argument in this regard would be that the individual behind a single-member LLC is, in fact, the "true landlord." Nonetheless, the current state of the law in the commonwealth is that no individual who is not a licensed attorney in the commonwealth who is the beneficial owner of a single-member LLC would be engaging in the unauthorized practice of law by representing the entity in court.

While the holding of the *Hatcher* case should not have come as a surprise, many landlords and property managers were frustrated in light of the fact that many had, in reality, prosecuted eviction cases without legal representation by going through the mediation process with the housing specialists and entering into agreements with tenants in lieu of appearing before a judge. The requirement of retaining counsel, of course, adds an additional expense to a process in which the property owner may already have lost a good deal of money in lost rent. Had he or she retained ownership individually, pro se representation would have remained possible, making this expense possible to avoid.

Whether retaining a lawyer is an expense that can be avoided, it is best practice for landlords to have legal representation for summary process proceedings. Some of the reasons for seeking representation include the attorney's knowledge of the law and procedure, and the attorney's familiarity with court staff and customs unique to individual courts. One role of an attorney is to be knowledgeable of the law and court rules, easing the job of the judges and clerks, thereby rendering the process more efficient.

CONCLUSION

There are many reasons for an investor to choose to own an income-producing property in any number of entities. However, when choosing the appropriate entity, the investor should consider that any ownership structure outside of ownership as an individual carries with it the requirement of an attorney licensed to practice in the commonwealth of Massachusetts for any court proceedings. ■

YOUNG LAWYERS DIVISION

FIVE PRACTICAL TIPS FOR NEW PRACTITIONERS

BY NICOLE PAQUIN

So, you have received your license to practice law and have been set free to zealously represent clients within the commonwealth. While there is endless advice that could be given, here are five basic tips to help new practitioners as they navigate the practice of law.

First, act with civility. The legal community may seem vast at the outset of your career, but do not be fooled: it is much smaller than it seems. Therefore, it is important to establish a good reputation from the start. An easy way to do this is to treat others as you would like, and reasonably expect, to be treated. This includes the many times when attorneys will ask you to extend professional courtesy.

A common example of a professional courtesy is a request for an extension to a deadline. A wise attorney once told me to remember that today I may be the one being asked to extend the favor, but tomorrow I would be the one asking. Despite your best efforts, there will be times when you cannot meet a deadline. Perhaps an assignment took longer than you expected. Perhaps your client was unable to immediately provide you with necessary information. Or perhaps something in your personal life distracted you from the task. Whatever the cause, there will come a time when you need an extension. Remember this when someone else asks you for one, and grant that person the professional courtesy you would like to be extended. You can be sure that if you refuse to grant the extension, counsel will return in kind when you ask for one.

That said, professional courtesy is a balancing act; you cannot grant every favor. You have a client's interests to protect. Ask yourself whether you would reasonably expect counsel to grant you the favor that has been asked of you. Moreover, do not let counsel thwart your legal position with kindness. It is easy for counsel to agree to something (for example, to supplement a discovery response), but unless counsel actually does it, the agreement is worthless.

Also, whenever a courtesy or extension is granted, or an agreement is reached, be sure to confirm in writing. A brief email stating the new deadline will save you a headache in the event that opposing counsel fails to respond by the extended date.

Second, write well. You will be judged by your written work product, which is often your first impression on counsel and the court. Sophisticated clients who require written status reports will also judge you on your writing. Always proofread. For written communications with counsel (including email), always consider what a judge might think of your writing (both substance and grammar) if it were to be filed with the court as an exhibit.

Third, check your citations. Legal documents are often written using prior versions or templates. Always remember to check the status of ("Shepardize") all cited legal authority. What might have been binding precedent last year may not be solid grounds this year.

Fourth, know what cited cases actually say. Do not rely on case summaries. Be familiar with the facts and holdings of cases you cite, or else risk making a flimsy argument or being unprepared at hearing.

Fifth, do not forget the basics as you progress in your career and face new tasks. Know the applicable rules (such as Massachusetts Rules of Civil Procedure, Superior Court Rules, and Superior Court Standing Orders), and the Massachusetts Guide to Evidence. Drafting or answering a complaint? Know the elements of the claims. Drafting or answering discovery? Know the scope of discovery, applicable objections, and rules pertaining to electronic discovery and privilege logs. Conducting or defending a deposition? Know the scope and procedure of the deposition. Being prepared and armed with knowledge of the applicable rules will assist you as you encounter more experienced counsel throughout litigation.

Hopefully, these tips will help you avoid common pitfalls of inexperienced attorneys, and become an effective, zealous advocate for your client. ■

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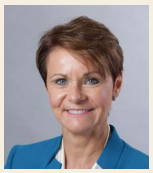

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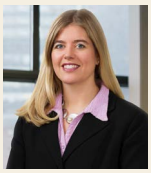

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