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BUSINESS LAW

DIRECTORS' DUTIES TO ADDRESS CYBERSECURITY RISKS

BY DAVID A. PARKE

Cybersecurity threats are now one of the most significant risks affecting an organization. This is because of the scope of current cybersecurity threats and the magnitude of harm from a cybersecurity incident. According to the Ponemon Institute 2019 Cost of Data Breach Report,[1] the average cost of a data breach, among the more than 500 companies surveyed, was $3.92 million. According to statistics published by SCORE,[2] almost half of cyberattacks are directed at small businesses, which may not have the resources to sustain a significant cyberattack.

The evolving threats to an organization's information systems are increasingly malicious and widespread. Hackers use various means to gain access to an organization's information systems, to steal or misuse confidential information and protected personal information, to divert funds, and to create conditions that can cripple operations and cause other disastrous consequences.

In addition to ongoing threats from cyber-criminals, an organization must take account of the ever-changing, diverse and more restrictive regulation of the personal information handled by the organization. Organizations must comply with a myriad of state data privacy statutes, foreign regulations like the General Data Protection Regulation, and industry-specific regulations. These restrictions increasingly recognize an individual's right to control his or her personal information, impose strict responsibility on an organization to recognize such rights, and impose potentially harsh consequences for failure to comply. The restrictions include differing definitions of the types of personal information that must be protected. Even an inadvertent security breach that might expose protected personal information to loss can expose an organization to expensive forensic costs, costs of reporting to various enforcement agencies, corrective actions, fines and other compliance costs.

It is easy to see how, for some organizations, especially those handing large quantities of personal information, those in regulated industries, or those that do not have the resources to survive a significant security breach, proper management of cybersecurity risks can be mission-critical. A corporation's management of these risks begins with its board of directors. It requires a level of diligence unlike that devoted to many company risks. According to PwC's 2019 Annual Corporate Directors Survey, fewer than 40% of directors say that their board fully understands the cybersecurity risks facing their company.[3] In 2018, the Securities Exchange Commission released guidance on cybersecurity disclosures for public companies that recognizes the responsibilities of the board of directors to oversee this significant risk.[4] It seems inevitable, therefore, given the prevalence of cyber threats, and the significant harm, that there will be challenges to the measures that a board has taken to address its organization's cybersecurity risks.

What are the duties, then, of a board of directors of a Massachusetts corporation to address cybersecurity risks? The duties can be found in the applicable corporation statutes and caselaw. The Massachusetts Business Corporation Act, M.G.L. ch. 156D, § 8.30, requires that a director of a Massachusetts business corporation discharge his or her duties in good faith, with the care that a person in a like position would reasonably believe appropriate under similar circumstances, and in a manner that the director reasonably believes to be in the best interests of the corporation. These duties are often referred to as duties of good faith, care and loyalty. A similar standard governs the duties of directors of a Massachusetts nonprofit corporation.[5]

Commentary following M.G.L. ch. 156D, § 8.30, recognizes that in performing his or her duties, a director must become informed of the background facts before taking action. In discharging his or her duties, a director may, in appropriate cases, rely on others with appropriate expertise. The applicable corporation statute provides that a director of a Massachusetts business corporation or nonprofit corporation may, to the extent the director does not have information that makes reliance unwarranted, rely on information and opinions from: i) officers and employees whom the director reasonably believes to be reliable and competent as to the matter presented; ii) legal counsel or others retained by the corporation as to matters reasonably believed to be within such person's professional or expert competence; or iii) a board or committee that the director reasonably believes merits confidence.[6]

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If a director of a Massachusetts business corporation breaches his or her fiduciary duties, the director may be liable in a derivative suit initiated by a shareholder.[7] While there may be, in appropriate cases, director liability to shareholders or under other laws, a claim of breach of fiduciary duty by a director is often commenced as a derivative action. A director of a Massachusetts nonprofit corporation that is a public charity may be liable in an action by the attorney general, who has authority under M.G.L. ch. 12, § 8, to prevent breaches of trust in the administration of funds given to public charities.

In evaluating whether a director has satisfied his or her duty of care, courts are deferential to the business judgments made by the directors regarding business risks. In the leading Massachusetts decision involving the duty of care, *Harhen v. Brown*,[8] the Massachusetts Supreme Judicial Court (SJC) recognized that absent a conflict of interest, a director's compliance with the duty of care should be evaluated under the business judgment rule. According to the SJC in *Harhen v Brown*, the business decisions of disinterested directors are protected because directors are presumed to act in the best interests of the corporation.[9] An early Massachusetts decision, *Spiegel v. Beacon Partners*,[10] recognized that even if a director acts imprudently, but in good faith, the director is not ordinarily liable unless there is clear and gross negligence.[11]

The more extensive decisions of the Delaware courts, regarding the responsibilities of directors of Delaware corporations, may provide guidance as to how Massachusetts courts may react in an appropriate case. Like Massachusetts, the Delaware courts' application of the business judgment rule is deferential to a board's decisions. However, there are

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limits where the board does not adequately perform its oversight responsibilities.

In a leading decision involving Delaware law, *In re Caremark International Inc. Derivative Litigation*,[12] the court stated that "compliance with a director's duty of care can never appropriately be judicially determined by reference to the content of the board decision that leads to a corporate loss, apart from consideration of the good faith or rationality of the process employed." The court explained that exposing directors to second guessing by judges or juries would injure investor interests in the long run.

Recent Delaware decisions have revealed limits on the protections afforded by the business judgment rule. Those limits may be significant in determining how a board should address cybersecurity risks. These decisions have recognized that a failure of directors to provide sufficient oversight, which includes adequate reporting systems and monitoring systems, can constitute a breach of the director's duty of good faith or loyalty, exposing the director to liability in shareholder derivative suits. In *Caremark*, the court stated that a director's obligation includes a duty to attempt in good faith to ensure that an adequate information and reporting system exists, and that a sustained or systematic failure of the board to attempt to ensure reasonable information and reporting systems would establish the lack of good faith that can lead to director liability.[13]

Two 2019 Delaware decisions have emphasized the importance of active board oversight and monitoring where substantial risks are involved. The Delaware Supreme Court's decision in *Marchand v. Barnhill*[14] involved a recall and shutdown of operations by an ice cream manufacturer following a listeria outbreak. In this shareholder's derivative action, it was alleged that the directors breached their fiduciary duties. The Delaware Supreme Court found that for a significant risk, such as the contamination risk faced by this ice cream producer, an utter failure to attempt to ensure that a reasonable information and reporting system exists is an act of bad faith and breach of the directors' duty of loyalty. The court said that bad faith is established when the directors completely fail to implement reporting or information systems or controls, or, having done so, consciously fail to monitor their operations. The court said that *Caremark* requires that the board make a good-faith effort to put in place a reasonable system of monitoring and reporting about a corporation's central compliance risk.

The Oct. 1, 2019, Delaware Court of Chancery decision in *In Re Clovis Oncology Inc. Derivative Litigation*[15] involved claims that the board of directors ignored red flags indicating that a corporation was incorrectly reporting a drug's clinical trial results, which jeopardized the Food and Drug Administration's approval of the drug. The court noted that where a corporation operates in an environment where externally imposed regulations govern operations, like those involved with *Clovis*, which were mission-critical, the board's oversight function must be more vigorously exercised. The court found that the plaintiff properly pleaded a claim of breach of fiduciary duties sufficient to support a *Caremark* claim.

What does this all mean for directors' duties to oversee and monitor cybersecurity risks? It seems undisputed that a failure to properly manage cybersecurity risks or take account of or properly comply with various applicable data security regulations can be mission-critical to some organizations. This is especially true for an organization that handles large volumes of personal information, or does not have the resources to withstand a significant cybersecurity breach. In addition, management of these risks requires an organization-wide approach. In a situation where a board of directors has failed to oversee cybersecurity risks, or has taken a superficial approach to these risks, it is easy to see how a plaintiff might seek, in reliance on the principles expressed in the *Caremark*, *Marchand* and *Clovis* decisions, to hold the directors accountable for breaching their duties of good faith and loyalty.

A judicial finding that a director failed to exercise good faith or loyalty in the oversight of cybersecurity risks can have significant implications. Directors are often protected by exculpatory charter provisions that protect the director from liability for monetary damages from a breach of the director's duty of care — however, these protections may not be available if there is a lack of good faith or breach of a duty of loyalty. Likewise, protections under indemnification provisions in bylaws or under an agreement, or under directors' and officers' liability insurance, may not be available to a director who breaches his or her duty of good faith or loyalty.

A board of directors must take regular and well-informed measures to oversee the organization's protection against cybersecurity risks. Effective board oversight of cybersecurity risks requires technical knowledge of the specific ways in which an organization and its data are vulnerable, and the protections that are available. Because security breaches largely occur through employee actions, or actions by third parties with whom an organization contracts, addressing these risks also involves putting in place effective programs that affect employees and outside contractors. An organization's programs must be regularly tested and reviewed for adequacy against evolving risks. Finally, if there is a breach, an organization's incident response plan can have a significant effect on the consequences. If the organization handles large volumes of personal information in an industry where such information is heavily regulated, or where the organization has had significant prior breaches, the board may have heightened duties to oversee and monitor security measures.

Therefore, the measures taken by the board should include the following:

- Make adequate time available at board meetings for discussion of cybersecurity risks.
- Make sure that the board has available the proper technical resources and expertise. This could mean having a director or directors with expertise in information technologies and cybersecurity risks, appointing a special committee that has this expertise, or engaging third parties with proper expertise. The board should have advice regarding industry best practices.
- Understand the scope of the risk as it affects the organization, including where data is stored, the regulations that govern the data held by the organization, and where the organization is vulnerable to cyber threats.
- Make sure that management understands this risk and is handling it appropriately. The board should require management to keep the board regularly informed of management's assessment of cybersecurity risks, programs employed by the organization, compliance practices, and specific incidents. A third-party assessment or audit of how management is handling the risks may be appropriate in some circumstances.
- Make sure that the organization has tested

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its procedures, trained personnel and developed an effective incident response program.

- Consider if the cybersecurity risks are adequately insured.
- Revisit the cybersecurity program regularly, and whenever there are significant changes.
- Make sure the minutes reflect the discussions of the board.

These are just some of the measures that may be taken to protect a corporation's information assets. In today's world, a board cannot afford to leave to others full management of the organization's cybersecurity risks. General counsel to an organization can play a leadership role in making sure that these issues are escalated to the proper levels and managed appropriately. ■

1. *See* "IBM Security, Cost of a Data Breach Report 2019," by Ponemon Institute, p. 3.
2. *See* Oct. 11, 2018, Press Release at www.score.org.
3. PwC's 2019 Annual Corporate Directors Survey, p. 12.
4. S.E.C. Release No. 33-10459, 34-82746 2018 WL 993646 (Feb. 21, 2018).
5. M.G.L. ch. 180, § 6C.
6. M.G.L. ch. 156D, § 8.30; M.G.L. ch. 180, § 6C.
7. The Massachusetts Supreme Judicial Court has recognized that a director of a Massachusetts corporation that is not a close corporation owes fiduciary duties to the corporation, and not to the shareholders. *See International Brotherhood of Electrical Workers Local No. 129 Benefit Fund v. Tucci*, 476 Mass. 553 (2017).
8. 431 Mass. 838 (2000).
9. 431 Mass. at 845.
10. 297 Mass. 398 (1937).
11. 297 Mass. at 411.
12. 698 A.2d 959, 967 (Court of Chancery 1996).
13. 698 A.2d at 970, 971.
14. 2019 WL 2509617 (Supreme Court of Delaware 2019).
15. 2019 WL 4850188 (Del. Court of Chancery 2019).

NEW TITLE IX REGULATIONS: WHAT DO THEY MEAN FOR K-12 SCHOOLS?

BY JUDY LEVENSON

On May 6, 2020, the U.S. Department of Education ("Department") released long-awaited new regulations under the federal gender equity law, Title IX of the Education Amendments of 1972, 20 U.S.C, §§ 1681 *et seq.* ("Final Rule").[1] Title IX prohibits discrimination on the basis of sex in all education programs and activities that receive federal financial assistance, including K-12 schools ("Schools") and colleges and universities ("Colleges"). Discrimination on the basis of sex includes sexual harassment, which, in turn, includes sexual assault. The new regulations focus exclusively on sexual harassment and related misconduct. The effective date of the Final Rule, first proposed in November 2018, is Aug. 14, 2020.

The Department's past Title IX enforcement activities have focused on Colleges. Therefore, over the last decade, many of those institutions ramped up their hiring of officials dedicated to handling Title IX issues. Local school districts, which are structured differently and serve a different student body, largely did not do so. While the Final Rule will require major adjustments to how all education administrators handle sexual harassment and assault complaints, this will be especially so for K-12 Schools. In order to align with the Final Rule, Schools will need to make extensive changes to their policies, practices and procedures (which school committees must approve), to assign additional staff to handle Title IX responsibilities and to provide training of all their employees and students, all in the midst of a demanding health pandemic. This article highlights certain issues the Final Rule raises generally and particularly for K-12 Schools based on a preliminary review.[2]

DEPARTMENT'S INITIATIVE TO COMBAT SEXUAL ASSAULT IN K-12 SCHOOLS

On Feb. 26, 2020, U.S. Secretary of Education Betsy DeVos announced that the Department's Office for Civil Rights ("OCR") would lead a new Title IX enforcement initiative intended to combat a rise of reported sexual assaults in K-12 public schools. DeVos noted that Civil Rights Data Collection for 2015–16, the most recent available school year, revealed approximately 9,700 incidents of sexual assault, rape or attempted rape reported nationwide in public elementary and secondary schools. The initiative focuses on staff-on-student sexual assaults, although it also covers student-on-student assaults.

As DeVos described it, the initiative will be a multi-pronged effort that includes, among other things, compliance reviews in school districts in each of OCR's 12 regions examining how sexual assault cases are handled under Title IX. Additionally, OCR will review data of sexual assault and offenses that school districts submit through federal data collection. Further, the Department has proposed data collection of staff-on-student incidents by school (rather than by district).

NEW TITLE IX REGULATIONS

Slightly more than two months after announcing its new initiative, the Department released the Final Rule extensively amending the Title IX regulations for the first time since 1975. The amendments add a definition of sexual harassment, which includes sexual assault as well as other sexual offenses.

Under the Final Rule, sexual harassment means:

> Conduct on the basis of sex that satisfies one or more of the following: (1) A School or College employee conditioning education benefits on participation in unwelcome sexual conduct (i.e., *quid pro quo*); (2) Unwelcome conduct that a reasonable person would determine to be so severe, pervasive and objectively offensive that it effectively denies a person equal access to the School's or College's education program or activity; or (3) Sexual assault (as defined in the Clery Act), dating violence, domestic violence or stalking, each as defined in the Violence Against Women Act ("VAWA").

Notably, the second prong of the definition, previously referred to as a "hostile environment" claim, is narrower than the U.S. Supreme Court's Title VII workplace standard (severe or pervasive conduct creating a hostile work environment). The Department's rationale for its definition is that it tracks the Supreme Court's definition in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999) (severe and pervasive and objectively offensive conduct, effectively denying a person equal educational access). Further, the Department maintains that where unwelcome sex-based conduct consists of speech or expressive conduct, Schools and Colleges must balance Title IX enforcement with the rights of free speech and academic freedom.

Schools and Colleges will be found in violation of Title IX if they have "actual knowledge"[3] of a complaint of sexual harassment and if their response is "deliberately indifferent."[4] Significantly, a School (but not a College) will be found to have actual knowledge if a complaint of sexual harassment is made to any employee of the School, from a cafeteria worker, to a bus driver, to a teacher or guidance counselor. In contrast, Colleges are deemed to have actual knowledge only if a complaint is made to the College's Title IX coordinator (person designated to coordinate College's Title IX compliance efforts) or to a College official with authority to institute corrective measures on behalf of the College. The Department explains its rationale for the distinction in treatment as being that younger students are often unaware of their rights and may not know to whom they should make a report.

The consequences of the distinction for Schools are major. If a School employee, such as a cafeteria worker, receives a student complaint of sexual harassment but does not inform an appropriate School staff member, such as the Title IX coordinator, the School may not respond promptly in a manner that is not deliberately indifferent. For example, the School may fail to offer the "Complainant" (alleged victim) "supportive measures" (pre-

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viously known as interim measures), with or without the filing of a formal complaint, as the Final Rule requires. Accordingly, it will be important for Schools to train *all* staff, not just the Title IX team, about Title IX obligations on an ongoing and repeat basis given often high staff turnover.

"Deliberate indifference" is defined as a response that is "clearly unreasonable in light of the known circumstances." A School's failure to fulfill its mandatory response obligations could be deemed to be deliberately indifferent depending on the circumstances and could result in a finding of liability if a School is sued.

Schools must only respond to a complaint when the alleged conduct occurs in the School's "education program or activity," which includes "locations, events or circumstances over which the [School] exercised substantial control over both the 'Respondent' (alleged perpetrator) and the context in which sexual harassment occurs." While School activities such as field trips, athletic events or conferences would be covered, the definition leaves significant gray areas, such as whether a School must address online harassment of a student.

OTHER KEY PROVISIONS

Rights of Parents/Guardians. Parents/guardians of K-12 students may file complaints on their behalf, as may bystanders and friends. Schools must notify parents/guardians of complaints filed against their students.

Respondents and Emergency Removals. Schools must give Respondents written assurance that they are presumed innocent and may not impose disciplinary action on Respondents until a complaint is resolved. Schools retain the authority to remove students from School on an emergency basis if the School first undertakes an individualized safety and risk analysis, determines that an immediate threat is posed to the physical health or safety of any student or other person, and provides the Respondent with notice and an opportunity to challenge a removal decision.

Title IX Coordinator. The Final Rule enhances the role and responsibilities of the School's Title IX coordinator, the person who facilitates the complaint process, and allows Schools to appoint several staff members to the coordinator position or to deputy coordinator positions.

Investigation of Formal Complaints. Schools must investigate all "formal complaints," which are complaints filed by a complainant or by the Title IX coordinator alleging sexual harassment against a Respondent and requesting that the School investigate. The investigator of a formal complaint may not be the same person who decides whether the Respondent is responsible for a violation. In past practice, either a principal or assistant principal often investigated and decided harassment complaints in a relatively informal manner. Under the Final Rule, the investigator must ensure that the burden of proof and the burden of gathering evidence rests on the School and not on the parties, must create a written report summarizing relevant evidence and must send each party a copy of the report at least 10 days before a decision-maker determines responsibility, if any.

Decision-Maker and Relevant Written Questions. In one of the most controversial aspects of the Final Rule, after an investigative report is completed and shared with the parties, Colleges are required to conduct live hearings and to permit cross-examination.[5] The decision-maker (hearing officer) must be someone other than the investigator. Schools, in contrast, are not required to conduct live hearings and cross-examination, although they are permitted to do so. With or without a hearing, and before determining whether or not a Respondent is responsible, a School decision-maker must allow the parties to submit written, *relevant* questions to one another, to exchange answers and to allow limited follow-up questions. The decision-maker must decide the relevance of questions before they are presented to the parties. The decision-maker also must issue a written determination regarding responsibility that includes factual findings, conclusions, an explanation and any disciplinary sanctions.

Staffing and Training. Given the requirement for separate investigators and decision-makers and the much more formal expectations and responsibilities for each, Schools may need to assign and/or hire additional staff (admittedly challenging during a pandemic), or they can consider pooling resources/positions with other nearby schools and/or outsourcing certain positions, at least until training programs can be developed. The Final Rule specifies particularized training for these and other positions and requires that training materials be posted publicly.

Evidentiary Standard. In another controversial provision, Schools (and Colleges) are allowed to choose between two evidentiary standards for the decision-maker to determine if a student is responsible for a policy violation — either by a preponderance of the evidence (POE) (51 percent certainty that alleged facts are true) or by clear and convincing evidence (CCE). A School must, however, use the same standard for complaints against both students and employees. Collective bargaining agreements governing School employees often require using a CCE standard for proceedings concerning employees. In contrast, most administrative proceedings, including ones applicable to students, use a POE standard.

Informal Resolution. Under the Final Rule, incidents of alleged student-on-student harassment may be resolved through informal means, such as restorative justice and mediation. Cases involving alleged staff-on-student harassment may *not* be resolved informally. Many advocates and survivors question whether allegations of sexual misconduct are ever appropriate for informal resolution.

CONCLUSION

While much more is still to be learned about the new Title IX regulations, it is clear that they will require K-12 Schools to update their policies, practices and procedures; to handle complaints of sexual harassment and assault with more formality and procedural safeguards; to identify additional staff to process those complaints; and to provide prescribed training to Title IX and all other school staff. ■

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1. The official version of the Final Rule is published in the Federal Register and available at www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal.
2. The Civil Rights & Social Justice Section Council plans to provide a more in-depth discussion of the Final Rule at a later time, after further analysis of the 2,082-page document in which it is contained. This article is not intended to be comprehensive or definitive but rather to serve as a launching point for further discussion.
3. This and other terms in quotations are defined in the Final Rule.
4. In notable contrast, recent Massachusetts trial court decisions suggest an emerging trend concerning sexual harassment claims against school employees brought under M.G.L. ch. 151C, holding schools strictly vicariously liable for their employees' sexual misconduct regardless of whether the school had actual notice or was deliberately indifferent in responding.
5. The Final Rule provides that at either party's request, the College must provide for the live hearing, including cross-examination, to occur with the parties located in separate rooms with technology enabling the parties to see each other. Only advisers to the parties, which may include lawyers, may ask questions; the parties may not question each other directly.

COMPLEX COMMERCIAL LITIGATION

LAWYERS WITH JUDGES GETTING COFFEE: HON. KAREN F. GREEN

Massachusetts Superior Court Justice Karen F. Green sat down for coffee recently with Jonathan Plaut, a long-standing member of the Massachusetts Bar Association, to discuss her views from the bench after having spent many years at the bar. Prior to her judicial appointment, Judge Green was a senior partner at Wilmer Cutler Pickering Hale and Dorr LLP's Boston office, where she focused her practice on complex business litigation, including the defense of white-collar criminal and False Claims Act litigation. The following are excerpts from their 90-minute conversation.

PLAUT: *Thank you for sitting down with us.*

JUDGE GREEN: My pleasure.

PLAUT: *How is the perspective from the bench different from the perspective at the bar?*

JUDGE GREEN: The perspective of the courtroom is very different from the bench than from the bar. From the bench, you can see everyone in the courtroom — lawyers, litigants, jurors, court officers and witnesses. You also can see what kinds of behavior works, and what turns jurors off. Lawyers are trained to advocate, which often involves a lot of talking. As a judge, it's my job to observe and to listen, as opposed to speak. That's not to say that I never speak, but that my job primarily is to listen and then to decide. I also have to be careful not to think out loud.

The best lawyers understand and solve their clients' problems. Judges resolve disputes when the lawyers are unable to do so.

PLAUT: *Do you have any tips for the practitioner as to what works and what doesn't?*

JUDGE GREEN: When advocating for a client, be as reasonable as you possibly can. Lawyers who take unreasonable positions and/or overpromise risk losing credibility. Juries and judges are hyper-aware of everything lawyers do and say in the courtroom.

I don't have any pet peeves, but if I did, it would be lawyers who appear in court less than fully prepared, including by failing to confer in advance with counsel for the other parties.

PLAUT: *What made you want to leave the bar for the bench?*

JUDGE GREEN: First, I very much enjoyed practicing law. The longer I practiced, though, the more I came to appreciate that I've always been happiest when my work has been both challenging and socially useful. Surviving cancer and a one-year fellowship at Harvard's Advanced Leadership Initiative only strengthened my desire to be of more use. One of the things that attracted me to the bench is its mission: to do justice with dignity and speed. There's something pretty wonderful about having that as one's mission.

PLAUT: *Can you share with us some of the ways you approach your role on the bench?*

JUDGE GREEN: I strive to perform my role on the bench with equanimity and to treat every person who appears before me with respect. My sense is that when I do so, I inevitably learn more about the parties and their dispute and am in a better position to resolve it. My approach has been influenced by the examples of Judge W. Arthur Garrity Jr., for whom I clerked after law school, and of retired Judge Paul Chernoff, who is the epitome of equanimity.

PLAUT: *What are the key elements to making good judicial decisions?*

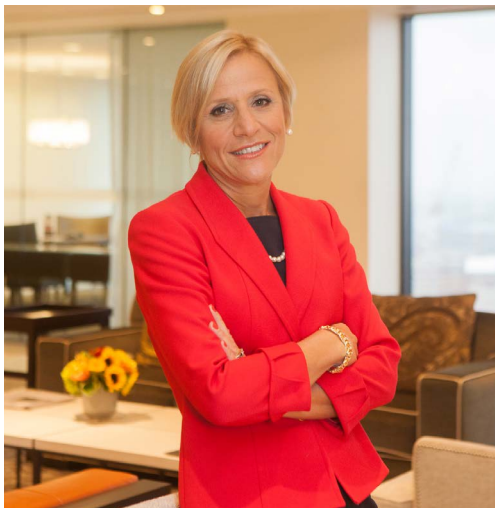
JUDGE GREEN: There's no question in my mind that the best decisions are made only after all parties have been given a full and fair opportunity to be heard. It's the genius of due process.

PLAUT: *You worked on numerous criminal cases while at the bar. Is dismissing a case on the basis of the exclusionary rule hard to do?*

JUDGE GREEN: No. I believe there's a huge public benefit to ensuring that the rule of law applies equally to everyone and that everyone plays by the same rules. And I say that as the daughter of a police officer, whom I suspect would tell you the same thing, if asked.

PLAUT: *Do you believe that judges should be elected or appointed?*

JUDGE GREEN: Generally, I believe that judges should be appointed and not elected to ensure judicial independence. The skills needed to be a good judge are not the same as those needed to run for public office. As an example, elected officials need to make political compromises to garner public support. Judges need to have the courage to apply the law equally regardless of the potential personal consequences.



Massachusetts Superior Court Justice Karen F. Green

PLAUT: *In moving from the bench to the bar, did you have to let go of some professional friendships?*

JUDGE GREEN: There is a bit of isolation as a judge. My close friends are still my friends, but I am very conscious of the canons of judicial ethics, including the one that requires impartiality in decision making.

PLAUT: *What kinds of interactions do you have with other members of the bench?*

JUDGE GREEN: The Superior Court bench is a very collegial bench and I enjoy and appreciate the friendship of my colleagues. Chief Justice Fabricant places a huge emphasis on judicial education, collaboration and peer observation, despite the fact that we work in different courtrooms. In some courthouses, judges meet over lunch — it's not fancy, and most of us bring our own lunches. While we consult with each other, we also understand that the presiding judge is ultimately responsible for deciding the cases before him or her. My husband is chief justice of the Appeals Court, so between us we have developed friendships with many other judges over the years. My husband is recused from all of my cases.

PLAUT: *Are you concerned when one of your decisions is appealed?*

JUDGE GREEN: Not really. As a judge, I know it's not about me, but about correctly deciding the parties' case. I'm glad they have

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a right of appeal. If I make a mistake, I hope the Appeals Court or the SJC will correct it — that's the reason we have appellate courts.

PLAUT: *Regarding caseload, how do you feel about the federal system where one judge keeps a case from inception to judgment?*

JUDGE GREEN: I think it's beneficial for one judge to keep a case from inception to conclusion, if only to ensure familiarity with its facts and consistency in its management over time. As a general matter, I'd also prefer to be responsible for a case from the time it is filed, but that may be because I practiced primarily within the federal courts before I became a judge.

PLAUT: *How do you balance your workload between hearing cases and writing opinions?*

JUDGE GREEN: There's a constant inflow of cases on a session's docket. On weekdays, I generally preside over trials in the morning and hear motions and prepare for the next day's hearings in the afternoon, which means I do most of my writing in the evening and on weekends. To keep up with the workload, I try to state the reasons for rulings as succinctly as I can.

PLAUT: *Can we expect to see e-filing become more widely adopted in Massachusetts courts?*

JUDGE GREEN: The Superior Court is certainly moving in that direction. E-filing will require more resources than the court currently has, but I am a big fan of it, based on experience in the federal system. I still remember that when the federal court switched to e-filing, some worried that it would be a disaster, but that's not what happened — lawyers, clients, judges and clerks made the transition and are now very accustomed to e-filing. It's faster, easier, less expensive and more efficient than paper filing. It obviously also decreases the amount of office space needed and is better for the environment.

PLAUT: *Do you have tips on discovery practice?*

JUDGE GREEN: First, be strategic. Think up front about what information you will actually need to prove your client's claim or defense at trial and then ask for that information in discovery. Avoid costly disputes over discovery that are unlikely to affect the case's outcome. Second, confer early with opposing counsel on electronic search terms. Third, if you claim a privilege for one or more documents, prepare and produce a privilege log. Lastly, confer with opposing counsel, as required by Superior Court Rule 9C, in a good-faith effort to resolve discovery disputes before filing any motion to compel.

PLAUT: *What advice would you have for a young lawyer who wants to become a judge?*

JUDGE GREEN: Look for opportunities to try cases and to make decisions. You will find them in a wide variety of settings.

PLAUT: Thank you for your time.

JUDGE GREEN: You're very welcome. ■

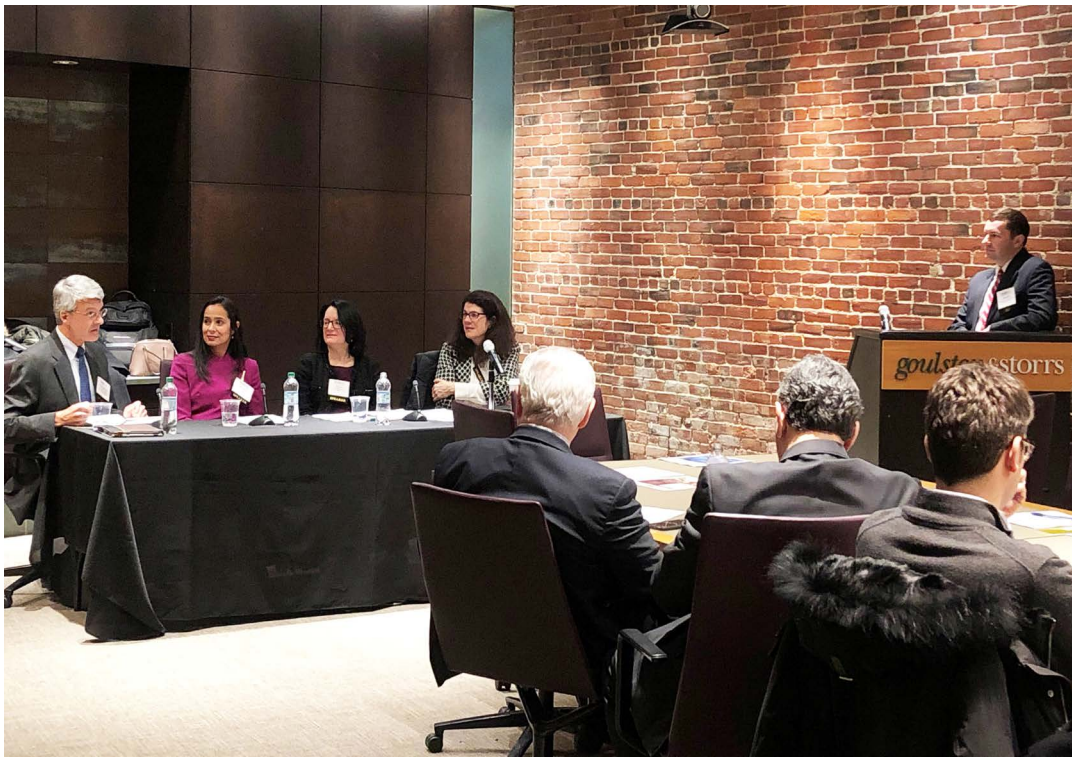
JONATHAN D. PLAUT drinks coffee and practices law at Cohan Rasnick Plaut LLP, www.crmllp.com. Contact Plaut here.

COMCOM AND DISPUTE RESOLUTION SECTIONS HOST 'NAVIGATING COMPLEX COMMERCIAL MEDIATIONS AND SETTLEMENTS' PANEL DISCUSSION

On Feb. 24, 2020, the Complex Commercial Litigation and Dispute Resolution section councils hosted a panel discussion at Goulston & Storrs PC on "Navigating Complex Commercial Mediations and Settlements."

The panel featured Judge Brian A. Davis of the Massachusetts Superior Court, who has served in the Business Litigation Session. Judge Davis was joined on the panel by Patricia R. Rich of Fresenius Medical Care, Manleen K. Singh of Robins Kaplan LLP and Conna A. Weiner of JAMS. The panel was moderated by Complex Commercial Litigation Section Council member Robert F. Callahan Jr. of Robins Kaplan LLP.

The discussion covered a number of issues arising from complex commercial mediations and offered practice tips for drafting and enforcing settlement agreements. Goulston & Storrs PC hosted a reception for the panelists and attendees following the discussion. ■



From left: Hon. Brian A. Davis, Manleen K. Singh, Conna A. Weiner, Patricia R. Rich and Robert F. Callahan Jr. (at podium).

SOLO/SMALL FIRM LAW PRACTICE MANAGEMENT

SMALL FIRMS AND SOLO PRACTITIONERS CAN HANDLE LARGE DOCUMENT DISCOVERY AND E-DISCOVERY

BY DAVID J. VOLKIN

The ability to handle large document cases by small firms and solo practitioners has been a reality for many years. As a solo or small-firm practitioner, you should not fear these cases. What has equaled the playing field has been technology. As you know, the production of electronic data, particularly email, has driven many commercial litigation cases into the need to use technology.

When working for a mid-sized firm, we had a license for Summation. These days, investing in Summation or a Concordance subscription may be out of your budget, or you simply don't have enough of these cases to justify the cost. And while these programs had an intense learning curve a decade ago, the newer versions are far more user-friendly. If you do have a lot of these types of cases, an investment in one of these programs or subscriptions may be a better value. For those where it is not, you don't have to send the case to someone else, as there are other solutions.

For those who just don't know where to start, I will lay out strategies that I have used over the years where one person can feasibly sort through over 100,000 documents to identify potentially responsive documents.

1. The first step normally involves reviewing the document production request or subpoena that was sent to your client. Try to identify what is the range of items that could be encapsulated by the requests. Sometimes the issue is narrow and clients will know exactly what documents are responsive, and other times they don't have the manpower to even begin to search through hard drives or emails. Depending on the sophistication of the client, oftentimes the first discussion is about what types of electronic storage they use or whether they have large repositories of paper documents. Also important is to discuss (oftentimes with their IT personnel) whether there are auto-archiving features or other electronic archives that may need to be searched. You can review the state guidelines and rules here.
2. **Contacting a third-party vendor:** Where you don't have the software or don't want to invest in getting the software (which often involves monthly fees or yearly maintenance plans), there are several e-discovery vendors, including some local in Boston. One of the key considerations for most clients is going to be cost. Understand that there are several options that vendors will offer — for example, whether you want the data hosted on the site (for review at a later time) long term. Some vendors use different software. It is important to ask what the options are and have an understanding about how many gigabytes or terabytes of data you are going to require to be sorted through.
3. **Discussing costs with the client:** Make sure you get detailed breakdowns on the costs and options so your client can determine the best course of action. While this process can seem very expensive, it is still a fraction of the cost of doing it the older way, potentially cheaper than having a larger firm handle it, and it complies with the discovery rules. If the costs are onerous, you can always look at narrowing the possible areas to be searched, seek relief from production of certain information if such information requires a significantly broader search of electronic data to the point where the costs are not reasonable in relation to the material being requested, or request that costs be shared or borne by the opposing party (which can be done as part of a request for a protective order).
4. **Document transfer:** Depending on the amount of data, you can get the data to the vendor in a couple of different ways. One way is a secure upload. Another approach, and one I often use, is to put the documents onto a secure thumb drive or secure hard drive. It is important to make sure that the data is sent with a high degree of data security. Since you have not reviewed it, you need to treat it as though it is highly confidential and contains personal identification data. Minimally, the drive or disk should have password protection with the password being sent to the vendor via a different transmission method. All vendors are trained in digital security, so it is advisable to discuss with them all protocols to follow. If they are not trained in digital security, then that is a red flag that this is not a vendor you should be entrusting these digital documents to.
5. **Culling the data:** The key reason why small firms can compete with large firms on document review comes down to this step. No matter which steps you follow, modify or ignore, this is the one that determines the success of your project. When figuring out how to cull the data, consider some of the following suggestions. First, and perhaps most obvious, is to avoid using common words, including words common in your client's industry, even if they are not common generally. Second, consider what permutations of the same word may need to be used to capture the information. Third, using the above two principles, create a list of keywords that can be used to significantly narrow the possible field of relevant documents.

   There are two theories to this approach. One is to be more inclusive and include words that will likely have a high percentage of irrelevant documents, and the other is to be very selective and use words that are likely to only produce relevant documents, but may also miss relevant documents. If choosing the second approach, it is recommended to have a discussion with opposing counsel to get "buy in" on the keywords being searched so there is a mutual understanding that some documents may escape detection. Give consideration to any requests by opposing counsel for adding some terms if they are relevant and not likely to create an overly burdensome production.
6. The next thing I normally do particularly

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DAVID J. VOLKIN is the owner of the Law Offices of David J. Volkin, where he represents businesses and individuals in all aspects of commercial, employment and environmental litigation. Volkin also serves as a member of the Massachusetts Bar Association's Solo/Small Firm Law Practice Management Section Council.

E-DISCOVERY
CONTINUED FROM PAGE 9

applies to document production sets that include email. Because of the tendency of spam mail (or agency newsletters or other things you know will not be relevant to your document production) to be caught up in archives, deleted folders, etc., I like to use vendors that allow me to sort by metadata and, in this case, sender. This is a technique that you can use where you will find certain addresses that you can block mark as "not responsive." The goal is to limit the amount of documents that need "eyes" on them. Also, any search for terms that might lead to excludable documents should be used. For example, I once used terms like "vacation" or "patriots" in a commercial litigation case (having nothing to do with vacations) and was able to exclude almost .5% of the total documents (which saved about five hours of billable time with 20 minutes of work). They may not be as easy to "bulk mark," but the "eyes on" time can be relatively short.

7. Most programs used by vendors allow you to create check boxes as you review documents. Some let you highlight key information, make a notation, or identify if it is privileged or needs redaction. It is important to create these boxes to assist you later in sorting the production or creating a privilege log in an orderly fashion. The goal is to review the documents quickly, but also flag those documents that will require more attention later. Particularly important is where you are having an attorney who may not be as familiar with the underlying issues in the case doing the initial review, or a paralegal who may or may not see the legal significance in a particular document. Where they are uncertain, these check boxes will make it easier for them to flag documents for your personal review, saving you the time of going through the entire set looking for the documents where they had questions.
8. Always talk to the vendor about methods to identify duplicate documents or drafts. Oftentimes, once one version is deemed by you as "to be produced," it is easier to create a category of "possible duplicates" and flag them all for review later. If it is an email and the conversations that follow are not relevant to the production requests, then it is easier to later mark those as "not being produced" or "irrelevant" once the initial document is flagged. However, it is better to not uncheck them as being "possible duplicates" in case you need to revisit the issue later on.
9. If, after culling, you still have a large amount of documents that require "eyes on," then consider removing some keywords to see if it reduces the size of the review, particularly after you have gone through several of the documents and not found relevant documents using that keyword.
10. If you just don't have the days it may take for eyes on review, consider hiring someone from a temporary staffing agency for a quick turnaround assignment. Whether you feel a lawyer or paralegal is needed for the task, there are ample "force multipliers" out there for hire on a temporary basis. ■

YOUNG LAWYERS DIVISION

THE PERSONAL INJURY LAWYER'S GUIDE TO EMBRACING CHANGE IN THE AGE OF COVID-19

BY ROBERT E. MAZOW AND ROBERT J. HARTIGAN

It was only a few months ago that we were ringing in the new decade and sharing our goals and plans for 2020. We were hosting Super Bowl parties and awaiting spring. It had barely snowed this winter, which meant personal injury firms were getting fewer calls for car accidents and slips and falls. What we didn't know was that our personal and professional lives were about to be turned upside down by a worldwide pandemic.

As we write this article, our firm (like many others) is working remotely from home. Our team has not been together at the office since March 16. Now, the only time we see each other is for 15 minutes during our daily Zoom videoconferences.

COVID-19's impact on the justice system is profound. The courts have been closed to the public (except for emergency purposes), and both civil and criminal jury trials are postponed until at least July 1. Some civil jury trials are being rescheduled well into 2021, and it remains to be seen how jury trials will even operate following social distancing guidelines.

Many physical therapy, chiropractic and other medical offices have shut down, and people are avoiding going to therapy for fear of contracting the virus. Those who are open have shifted the way that they conduct therapy to keep their patients and themselves safe.

In order for our firms to survive, we must learn how to adapt and embrace technology more than ever.

MANAGING THE "VIRTUAL" OPERATION

Massachusetts has slowly started to reopen. As we navigate through each phase of the reopening, it is expected that there will be apprehension among our colleagues and potential clients to meet in person. In the meantime, consider having daily meetings with your staff members and setting weekly goals on what you want everyone to accomplish. Invest in a laptop that allows you to have videoconferences. Also, the benefit of having dual monitors at home and a scanner cannot be overstated. And if your office is not paperless, now is the perfect time to look into making that transition.

Keep in mind that many insurance adjusters are also working remotely. Offers are being made and cases are settling. Be open to the idea of doing depositions, mediations and arbitrations via Zoom. Keep your cases moving as best you can.

REACHING OUT TO CLIENTS

Most people have felt isolated for the past six weeks — some of them are your clients. Now is the time that you should be reaching out to your clients (former and current) just to say hello. Some of them might be alone in their homes and looking for someone to chat with for a few minutes. Send a card in the mail to let them know that you are there if they need you. Remember, they came to you looking for help during a difficult time in their lives and trust that you will be there for them. Let your clients know that you are still working on their case.

KEEPING TRACK OF YOUR CLIENT'S TREATMENT

There is no doubt that in the coming months, there will be insurance adjusters evaluating claims and pointing out to you that your client "stopped treating" during the shutdown. To minimize that as best you can, consider having your clients complete a daily log that describes their pain level, difficulty with tasks, and any home exercises they completed at home as part of their treatment plan. One of our paralegals, Lisbette Santos, created a form that helps keep track of how our clients are dealing with their injuries while isolated at home. Similar to a journal, a daily log can help rebut the adjuster's "gap in treatment" argument.

RETURNING TO THE OFFICE

As we leave our makeshift home offices and return to work, there will be plenty of questions regarding day-to-day operations: Should everyone wear masks and gloves while at work? Should desks be moved farther apart? Should staff work in shifts? For some of us, the transition might be easy. But for others, it could be more challenging to adjust. Be sure to reach out to your brothers and sisters and see if they need a hand. Give back to the older generation lawyers (who might not be tech savvy) by offering them some guidance on technological resources to help them keep their practices going.

The world has changed and our profession must adapt. Hopefully we will soon see one another in the halls of the courthouses and at opposite sides of tables for depositions. But until then, we must work together to help our firms survive and keep the wheels of justice moving. ■

ROBERT E. MAZOW is a principal in the law firm of Mazow & McCullough PC in Salem, which was established in 2003. He practices exclusively personal injury and class action law on behalf of plaintiffs. Prior to that, he was an assistant district attorney in Essex County. He received his Juris Doctorate from New England School of Law in 1994 and his Bachelor of Science from Union College in 1990.

ROBERT J. HARTIGAN has been litigating personal injury matters since being admitted to the Massachusetts bar in 2016. He is a graduate of Suffolk University Law School and has been an associate at Mazow | McCullough in Salem since 2018, where his practice focuses on personal injury litigation and trials. He represents individuals and their families in a variety of cases involving motor vehicle collisions, premises liability and wrongful death.

OPINION: FAILURE TO APPRECIATE AND PROPERLY APPLY HIPAA POSES PUBLIC HEALTH RISK

BY MALLARIE CHARBONNEAU

The Health Insurance Portability and Accountability Act of 1996, better known as HIPAA, was enacted in an effort to limit dissemination of personal health information. Additionally, it is widely cited as justification for refusal to disclose specific and general health care information. However, various misconceptions as to what entities HIPAA applies to and what information is covered may create public health issues.

Essentially, HIPAA prevents covered entities from using or disclosing personal health information in any form. Even when privacy rules permit disclosure, such covered entities are obligated to only disclose the minimum necessary information in order to accomplish the purpose behind said disclosure. What many may not realize is that covered entities are also not permitted to share information with patients or their representatives unless the information relates to treatment, payment or health care operations.

Notably, covered entities include health care providers, public health entities, health plans and health care clearinghouses. Institutions including schools, property managers, businesses, etc., are not covered entities with obligations to maintain confidentiality under HIPAA. While other privacy rules may limit disclosure of medical information, entities outside the realm of health care are not bound by the minimum necessary information standard.

In recent media and communications, non-covered entities frequently cite to HIPAA as a reason for their refusal to disseminate more specific information pertaining to the location and recent whereabouts of those who have confirmed cases of COVID-19 or potentially may have been exposed to the disease. While respect of privacy is a valid concern, this approach is short-sighted as it limits the ability of uninfected individuals to safeguard against the spread of the virus.

Limited disclosure of the whereabouts of an infected or exposed individual is vital to contact tracing and spread prevention, and multitudes of institutions are not barred by HIPAA from such disclosure. For example, sharing the building in which an infected person lives may help other residents of a housing complex avoid areas where contact is more likely and practice increased vigilance if avoidance is not possible. Ideally, all individuals would be engaged in perfect social distancing measures by keeping appropriate distance, washing hands as often as recommended and seriously limiting travel. However, recent events have made it clear that such efforts are aspirational and not what is practiced across the board. Knowledge of where positive cases of COVID-19 have been documented gives others more notice as to what areas should be avoided if possible and allows those traveling to a location within proximity of an individual with COVID-19 to take all necessary precautions.

However, such efforts will not be possible so long as schools, property managers, shopping centers, etc., improperly cite HIPAA as a basis for withholding even the most general information. While HIPAA is designed to protect information, it is tailored to health care professionals, suggesting that the intent is not to place a complete barrier to knowledge of present public health concerns.

Notably, institutions should not completely disregard the privacy of individuals with known and potential exposure. However, a great deal of general information concerning the presence and/or whereabouts of the coronavirus can be shared without specifying the affected individual. Doing so would give others the ability to make certain that they take proper precautions, either by avoiding locations where the affected person has been or resides, or by being as careful and vigilant as possible if avoidance is not an option.

HIPAA does not bar any person or entity, apart from covered entities, which include health care providers, public health entities, health plans and health care clearinghouses, from disclosing medical information. Without encouraging others to abandon all sense of privacy, it is worth noting that a greater amount of information can be shared in an effort to slow and halt the spread of coronavirus. An appropriate spread of information will most likely be useful in the practice of social distancing. Therefore, the notion that HIPAA bars non-covered entities from disclosing information in a socially responsible manner presents unnecessary risks and challenges as we continue to press through these uncertain times. ■

MALLARIE CHARBONNEAU is a 2019 graduate of Northeastern University School of Law. Charbonneau has a background in various areas of civil litigation, including products liability, toxic tort and commercial litigation. Her most recent legal experience focused on civil litigation, specifically in the areas of personal injury, construction and premises liability. Prior to attending Northeastern, Charbonneau graduated from Simmons University (formerly Simmons College) summa cum laude as a history and philosophy double major.

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To inquire about submitting an article to *SECTION REVIEW*, contact Kelsey Sadoff (KSadoff@MassBar.org).

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