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ANTICIPATED 2023 AMENDMENTS TO TITLE IX REGULATIONS AND PROPOSED ACTION STEPS FOR SCHOOL DISTRICTS

BY JUDY A. LEVENSON

These last three years have been and will continue to be particularly challenging for school districts, students, parents and guardians given the myriad issues presented by the pandemic and post-pandemic life. In the midst of these challenges, implementing the major changes required by the 2020 Title IX Regulations (2020 Regulations) and the anticipated 2023 amendments to those Regulations (2023 Regulations), notwithstanding their significance, has placed and will continue to place strains on school districts’ limited staff and resources. With this in mind, school counsel, labor counsel and other attorneys working with school districts, as well as school committee members and school administrators, would be well advised to help their schools prepare for upcoming changes in the Title IX area by informing them when to expect the final 2023 Regulations and identifying action steps that schools can undertake over the summer.¹

THE FEDERAL OFFICE FOR CIVIL RIGHTS ANNOUNCES FINAL REGULATIONS PUBLICATION DELAY UNTIL OCTOBER 2023

The U.S. Department of Education’s (Department’s) Office for Civil Rights (OCR) announced at the end of May 2023 a new anticipated date of October 2023 (rather than June 2023) for publication of the final 2023 Title IX Regulations.² As an explanation, the OCR noted that it had received an unprecedented number of public comments (240,000) on the newly proposed Title IX Regulations, which it needs more time to review and address.

As a result, the 2020 T.IX Regulations will remain in effect likely until sometime in December 2023, given that a 60-day implementation period typically is provided from the date new final regulations are published. This will place pressure on school districts to update their policies and procedures and train their staff in the midst of the busy school year. One way to ease that pressure is to use the summer months to begin planning for changes in areas that are likely to remain intact in the final 2023 Regulations.

ANTICIPATED CHANGES AND ACTIONS SCHOOL DISTRICTS CAN TAKE NOW

Overview of Anticipated Changes. The proposed amendments to the 2020 T.IX Regulations would broaden the existing Regulations in significant ways. They clarify that “sex discrimination” includes discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation and gender identity, thereby strengthening protections for LGBTQIA+ individuals. Additionally, “sex discrimination” is defined to include “sex-based harassment,” a newly proposed term that includes, but is not limited to, sexual harassment. “Sex-based harassment” also covers harassment based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation and gender identity. Further, the new term includes other conduct undertaken on the basis of sex, including quid pro quo harassment, hostile environment harassment (with a broadened definition), and the specific offenses of sexual assault, dating violence, domestic violence and stalking.

ACTIONS SCHOOL DISTRICTS CAN TAKE NOW

• Understand Changes the Proposed Regulations Will Require. The proposed amendments to the 2020 Regulations are about 50 pages long and are accompanied by approximately 650 pages of explanatory preamble (a link to the proposed Regulations is provided at the end of this article). Key issues to note are: (1) the prohibition on all forms of sex-based harassment; (2) new requirements concerning pregnancy or related conditions; and (3) required changes to school districts’ nondiscrimination policies and procedures relating to sex, including a broadened definition of “on the basis of sex.”

• Review the Process for Making Revisions to the School District’s Policies and Procedures. Given that there will be a short turnaround time once the final Regulations are published and that this will occur during the busy school year, schools will benefit from reviewing the process for making revisions to their policies and procedures now, including consideration of their governance structure and key stakeholders.

• Review Current Policies and Procedures, Make any Nonconflicting Revisions and

Plan to Make Future Changes. Many of the changes that school districts will need to make involve LGBTQIA+ protections, and pregnancy and related conditions. School districts should identify where their current nondiscrimination and sexual harassment policies and procedures are located (e.g., on websites and in student and employee handbooks), understand those policies and procedures and determine if any changes can be made now that will not conflict with the 2020 Regulations. Additionally, they should plan to expedite other policy revisions as soon as possible after the new Regulations are published in approximately October. The policies and procedures should be easily accessible to students, parents and guardians, school administrators and staff, as well as the general public. Stakeholders often find it helpful to have a simplified flow chart of the complaint grievance process to accompany the written policy and procedures.

• Understand and Plan for Protections from Pregnancy Discrimination

- Pregnancy or Related Conditions. The proposed Regulations reinforce that schools are prohibited from discrimi-

Continued on page 3
nating against pregnant and parenting students and employees. They would amend the definition of “pregnancy or related conditions” to include lactation and pregnancy-related medical conditions, in addition to pregnancy, childbirth, termination of pregnancy and recovery from those conditions. Thus, the proposed Regulations will protect against discrimination based on one or more of these conditions.

- Identify Lactation Spaces. The proposed Regulations would require schools to provide students with reasonable modifications of their policies, practices or procedures to accommodate pregnancy and related conditions. However, a student would have to undertake those modifications voluntarily. The proposed Regulations require explicitly that schools make available dedicated lactation spaces, other than bathrooms, that are clean, private and accessible and may be used for expressing breast milk or breast-feeding. Given that this provision is likely to remain in the final 2023 Regulations, school districts should begin identifying and planning for lactation spaces now.

- Understand and Begin Planning for Training and Mandated Reporter Requirements. The new Regulations will require schools to train all employees about the schools' obligations to address sex discrimination, a requirement that goes beyond the mandates of the existing Title IX requirements. All training materials must be made publicly available. Additionally, under the proposed Regulations, school districts will be permitted to designate certain employees as confidential resources to provide services to individuals in connection with sex discrimination claims. Those confidential employees must still be trained but will not be required to report complaints of sex discrimination if they are functioning in their confidential role as opposed to an additional role not associated with providing confidential resource services. Schools should begin to identify which, if any, employees they would like to designate confidential.

CONCLUSION

By planning now for upcoming changes to the Title IX Regulations that are expected to remain intact in the final 2023 Regulations, school districts will best position themselves for successful implementation of the new Regulations and minimize stress and disruption for their students, parents, guardians and employees.

Access the Proposed Regulations:
The unofficial version of the July 2022 Notice of Proposed Rulemaking (NPRM) can be accessed here (the proposed Title IX Regulations are on pp. 650-700). The U.S. Department of Education’s Summary of Major Provisions of the July 2022 NPRM can be found here.

1. Although this article is directed primarily to K-12 school districts, the majority of principles discussed herein apply to postsecondary educational institutions as well. However, the details of particular regulations may differ for postsecondary schools as compared with elementary and secondary schools.

2. The department engaged in a separate rulemaking process to address Title IX's application in the context of athletics and, in particular, the criteria schools may use to establish students' eligibility to participate on a particular female or male team. That final regulation also is expected to be published in October 2023.
COMCOM HOSTS SUCCESSFUL EIGHTH ANNUAL COMMERCIAL LITIGATION CONFERENCE AT SUFFOLK LAW

BY NICHOLAS D. STELLAKIS AND ROBERT F. CALLAHAN JR.

The Massachusetts Bar Association’s Eighth Annual Complex Commercial Litigation Conference was held on April 25, 2023, at Suffolk Law School in Boston, sponsored by the Complex Commercial Litigation Section.

This year’s conference featured a thoughtful and personal keynote address from Supreme Judicial Court Justice Dalila Argaez Wendlandt, along with two panel discussions and a networking reception.

The first panel consisted of U.S. District Judge Allison Burroughs and Superior Court Justices Hélène Kazanjian and Peter Krupp, moderated Kelley Jordan-Price of Hinckley Allen. The lively discussion touched on many topics of interest to the bar, such as the enduring use of videoconferences in lieu of in-person hearings, enforcement of meet-and-confer obligations and the detail necessary in describing efforts to meet and confer, the utility of summary judgment motions and motions for partial summary judgment, the helpfulness of the statements of undisputed fact that accompany summary judgment motions, the use of motions to strike, when oral argument is allowed, the use of demonstratives at argument hearings, when and how alternative dispute resolution is raised in court, extensions of time for discovery, and the need to ensure that newer lawyers received courtroom experience.

The second panel discussed intellectual-property issues that arise in business litigation and bankruptcy. This panel featured Jennifer Furey of Goulston & Storrs, Krish Gupta of Dell Technologies and Justin Kesselman of ArentFox Schiff, moderated by Robert Callahan Jr. of Robins Kaplan. The panelists provided important insight into the contexts in which IP issues can arise and what business litigation practitioners need to be aware of in their practice: disputed ownership of IP when an inventor-employee leaves employment for a competitor, when a new employee seeks to carve out their existing IP from their employment contract when being onboarded, thorny issues surrounding open-source software and generative coding, and how IP issues intersect with bankruptcy and the need to be vigilant receiving notices regarding executory contracts and notices of potential assignments.

Wendlandt concluded the conference with a stirring and memorable keynote address on the importance of one’s identity and finding one’s life path, and our responsibility to use our professional training to stand up for justice and righteous causes. “The greatest honor of being a lawyer is being uniquely placed in a position where you can champion and advocate for change, especially for those who do not enjoy the same privileges as you.”

We thank ComCom Chair Jessica Kelly and Vice Chair Kenneth Thayer, the entire ComCom council, and of course the speakers and moderators for helping make this program successful.

Robert Callahan of Robins Kaplan and Nicholas Stellakis of Hunton Andrews Kurth chaired this year’s conference.

The conference is available via MBA On Demand.

NICHOLAS D. STELLAKIS is counsel in Hunton’s issues and appeals practice group. He represents clients in a wide variety of litigation matters, including corporate, small-business, contract, insurance-coverage, maritime, and general business litigation.

ROBERT F. CALLAHAN JR. is an associate in the Boston office of Robins Kaplan LLP. His national practice focuses on trial and appellate advocacy in the areas of intellectual property and complex commercial litigation. Callahan is also a graduate of the Massachusetts Bar Association’s Leadership Academy.

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RECAP OF EXAMINING DAMAGES EXPERTS PROGRAM

BY JESSICA GRAY KELLY

On Jan. 31, 2023, the Complex Commercial Litigation Section Council hosted a program on Examining Damages Experts, with esteemed panelists Michael P. Angelini, Esq., of Bowditch & Dewey LLP and Hon. Peter B. Krupp of the Business Litigation Session, and moderated by Jessica Gray Kelly, Esq., of Freeman Mathis & Gary LLP.

The program started with Angelini reviewing federal and state rules, emphasizing the need to disclose all opinions in the expert reports. Angelini stressed, however, that once a report is disclosed, the information contained therein may be used by either side. Angelini also noted that expert depositions should only be taken when needed, as it is sometimes better not to give your opponent a roadmap to how you will conduct your cross-examination.

Next, Krupp spoke on expert motions in limine. Rule 702 sets out bases for which an individual can offer expert testimony, and each of these bases can also serve as grounds to move in limine to exclude the expert: (1) the individual has to be qualified as an expert; (2) the opinion must be helpful to the trier of fact; (3) the opinion must be based on sufficient facts or data; (4) the opinion must be sufficiently factual or data; and (5) the expert must have reliably applied the principles to the facts of the case. In Krupp's experience, challenges to an expert's qualifications and the reliability of the method employed by the expert are the two “most fruitful attacks” at the motion in limine stage. Challenges to an expert's method are known as Daubert challenges. Reliability means that the method used by the expert is replicable and accepted in the industry. Krupp does not believe challenges to the expert's assumptions are productive. For example, if the expert used a reliable method, but came up with outlandish assumptions or failed to consider certain facts, it is more effective if those gaps in the expert's opinion are brought out on cross-examination than through a motion in limine.

Krupp also discussed what to think about when bringing an expert motion in limine, especially if it is unlikely you will win. From a tactical perspective, you may want to educate the judge and/or the other side of the weaknesses in their case, but in doing so, you are also tipping your hand as to what your cross-examination of that expert will be. Sometimes it makes more sense to hold your cards and catch the expert off guard on cross-examination, instead of giving the expert the opportunity to prepare.

Angelini next discussed important points when presenting direct examinations of experts. He stressed the importance of presenting your expert as honest, rational and credible. If there are some weaknesses in your expert's opinion, disclose them and explain them in your direct. Let the expert talk and explain what s/he did, and “qualify and amplify” the expert's credentials and opinions. Krupp added that it is very important to make your expert appear reasonable and not overreaching. For example, you may want your damages expert to offer a range of numbers based on different assumptions, instead of sticking to one damages figure that is subject to attack.

Angelini then turned to cross-examinations of experts, citing Irving Younger's “10 Commandments of Cross-Examination.” Do not waste too much time on how much the expert is being paid; all experts are paid. You want to leave the jury with three to four points that they can take away from the cross-exam. All questions should be leading. Do not ask any questions that cannot be answered with yes or no. Moreover, if you can get the other side's expert to agree with certain parts of your expert's testimony, that can be very effective. Control the expert, but be respectful.

Krupp agreed that brevity is very important in cross-examinations. It is not effective to merely repeat the direct exam of the expert. You need to be very prepared and know the subject matter so you can ask the right questions. Consult your expert on how to cross-examine the opposing party's expert.

Finally, the panelists answered questions from the audience. Angelini and Krupp agreed that it is a waste of time to make a big distinction between in-state and out-of-state experts. This issue is something that lawyers care about more than lay people.

When asked about compelling ways to present complex economic testimony, Krupp recalled a recent case in which there were approximately 2,500 electronic exhibits. When it came to the expert testimony, the plaintiff used two to three graphic displays and had the damages expert explain in detail the theory of damages, which was effective in conveying to the jury what was really important. Angelini added that you need to take your time with the expert to convey its significance to your case.

The video of this program is available through MBA On Demand.
RECAP OF MASSACHUSETTS NONCOMPETITION AGREEMENT ACT PROGRAM

BY ANDREA KRAMER AND AIVI NGUYEN

With over four years having elapsed since the Massachusetts Noncompetition Agreement Act went into effect, the Complex Commercial Litigation Section decided it was time to look at how the law is working and not working, could be better, and is being interpreted by the courts. To that end, on March 30, 2023, moderators and program co-chairs AiVi Nguyen of Bowditch and Andrea Kramer of Kramer Law joined an esteemed and diverse panel of practitioners — employee-side employment attorney David Brody of Sherin & Lodgen, employer-side employment attorney Carla Reeves of Goulston & Storrs, and in-house attorney Asya Calixto of 3Play Media, Inc. — along with Hon. Ken Salinger of the Business Litigation Session in a lively, practical and thoughtful discussion of what they are seeing, how they are or should be advising clients, and what questions remain open. Though virtual, the program was run as a meeting rather than a webinar, which permitted participants to engage. Overall, there was a lively exchange and interplay among the panelists, with many participants reporting after the program that they wished the program could have gone on another half hour or so.

After a lightning-speed overview of the law by Kramer, Nguyen asked what the panelists are seeing in terms of litigation since the law went into effect. She noted that when the law was passed, the goal was to decrease disputes, though many people predicted that it would provide full employment for some attorneys. Salinger (who always has interesting Zoom backgrounds) reported that he has been seeing “far fewer” cases seeking to enforce noncompetition agreements — from multiple cases each month in the BLS Session four or five years ago, to only one or two during every six-month sitting for the past few years — though he acknowledged that the pandemic and business cycles could have contributed to the reduction. Brody hypothesized that the law played a large role in the reduction because now there are clear guidelines that make some agreements unenforceable, thereby cutting out many noncompliant agreements wholesale, even before employers seek to enforce them. Reeves added that she is seeing many employers putting more thought into whether they actually need noncompetition agreements or whether their goals can be accomplished with other types of agreements. She added that the fact that the law prohibits enforcement against certain types of employees, such as nonexempt employees and employees whose employment is involuntarily terminated, also cuts down on the number of lawsuits.

Both Reeves and Calixto commented that their experiences suggest that the law has prompted more transparent and open discussions about intentions. Calixto stated that she is seeing more employers have internal conversations about whether to have noncompetition agreements and earlier conversations with prospective and existing employees about the terms and practical ramifications of the agreements. She also added that the garden-leave provision leads to employers letting employees know nearly immediately whether they are going to enforce the agreement (because they either will or will not pay the garden-leave amount), which eliminates the uncertainty and risk for employees. Reeves stated that she is finding more employers not having noncompetition agreements in the first place, rather than choosing not to enforce them. And, she added, transparency and open communications have helped to provide clarification around expectations at the end of the employment.

Brody raised concerns about whether employers are using other methods to accomplish their goals, such as nonsolicit agreements, even when functionally the agreement acts as a noncompetition agreement. As another example, Kramer noted that she has seen purported nonsolicit agreements that prevent the employee from soliciting “prospective customers.” Salinger said that while he has not had to address the issues as a judge, he expects to hear arguments that nonsolicit agreements that include “prospective customers” are beyond the legislative carve-out for nonsolicit agreements, suggesting that he would consider such arguments in the right circumstances. He also reminded everyone that the carve-out does not mean all nonsolicit agreements are enforceable; they are still subject to the common-law rules that have developed.

The question of whether new employment is sufficient to satisfy the statutory requirement of garden leave or “mutually agreed upon consideration” was raised. While considering the issue “interesting” and noting the arguments on both sides, Salinger said he had not yet had a case on that issue. Kramer noted that U.S. District Court Judge Patti Saris has faced the question and answered it in the affirmative in Cynosure LLC v. Reveal Lasers LLC. Reeves stated that she has not found many employers treating new employment as consideration because there is ambiguity and, therefore, “sensitivity and hesitation,” around what is considered to be enough consideration generally.

There was then continued discussion around the question of what is adequate consideration. Calixto stated that many employers are giving a set amount or benefit rather than negotiating with each employee to ensure consistency and to limit other types of claims later. Reeves acknowledged the uncertainty, though she mentioned that one case held that “specialized training” is enough. Salinger noted that there is good reason to “proceed with caution” in determining what constitutes “mutually agreed upon consideration.” Calixto concurred, noting that there has been much discussion among employers about what they are offering and that it is a challenge to figure out what suffices. She added that it is a challenge to find the balance and “nobody wants to be the test case.” Salinger mused that it seems so far no one is seeing a “specifically identifiable peppercorn” be offered as consideration.

Continued on page 7
Brody added that while he “welcomes” the case of whether access to trade secrets or specialized knowledge is adequate consideration, many employees find the choice of getting more in advance, thereby strengthening the employer’s hand in the future, or taking less but having more options later a difficult one. Again, Calixto emphasized that open communications and transparency are important, noting that employers learn much about employees through the negotiations process and that employees should be cautious about pushing for too much consideration in the beginning or narrowing the definition of competitors.

The discussion then turned to a case in which Salinger decided that an indefinite furlough constituted the end of an employee’s employment for purposes of beginning the employee’s one-year restrictive period. Salinger cautioned that details matter and his decision did not create a blanket rule that all furloughs constitute end of employment. The one thing that is clear is that just as there is a question of whether a change in employment requires a new noncompetition agreement due to the material change doctrine, there is a question of whether certain furloughs would then require a new agreement — and then the new agreement would have to comply with the 2018 law. The discussion then turned to the material change doctrine, which, of course, predates and survives the 2018 law.

The panel then turned to choice-of-law provisions and the reality that many out-of-state employers have employees working in Massachusetts. Salinger explained that the statutory language regarding choice-of-law provisions is consistent, though in reverse, with the Supreme Judicial Court’s decision in Oxford Global Resource, LLC v. Hernandez.

Speaking of public policy, Brody raised the question of whether the statute’s statements about what is and is not enforceable constitute the public policy of Massachusetts such that judges may refuse to enforce agreements that do not comport with the reasonableness provisions of the statute even if those agreements predate the statute. He noted that Judge Denise Casper engaged on this issue in Nuvasive, Inc. v. Rival Medical, LLC. Calixto made the point that many employers who have employees in numerous states are now using a one-size-fits-all agreement that meets the most stringent requirements so that every employee is governed by the same agreement and the companies do not have to deal with choice of law or questions of enforceability in different states. Reeves stated that she has seen an uptick in inquiries from out-of-state employers, while Kramer noted that she has seen many small out-of-state employers not consider the Massachusetts statute and then find that their agreement is not enforceable.

Overall, the panelists offered different perspectives that greatly informed the discussion, and the MBA Complex Commercial Litigation Section is greatly appreciative of the time and energy they put into sharing their knowledge and experience.

1. As background, Saris relied on a 2002 Massachusetts Superior Court case that has never otherwise been cited for that proposition by a Massachusetts court, Stone Legal Res. Group v. Glebus, which in turn relied on the 1968 case of Slade Gorton & Co. v. O’Neil, in which the court assumed, without deciding, that the start of employment was valid consideration. However, many courts found that continued employment constituted consideration before the new law dictated that continued employment is not consideration, suggesting that new employment likewise would be sufficient, as Saris held.
THE CURRENT STATE OF LIMITATION OF LIABILITY CLAUSES AFTER H1 LINCOLN, INC. V. S. WASHINGTON ST., LLC, 489 MASS. 1 (2022)

BY MANSOORUDDIN AHMED AND KAREN L. NOWICKI

Counsel for developers and contractors often incorporate “limitation of liability” clauses when drafting contracts for private development projects in Massachusetts. Recently, the Supreme Judicial Court provided further guidance concerning whether an advance release of such claims is a valid defense to an action brought pursuant to M.G.L. c. 93A § 11.

In H1 Lincoln, Inc., the court analyzed whether a waiver clause that generally immunized a landlord from “any speculative or consequential damages caused by the landlord’s failure to perform its obligations under [the] Lease” applied to an M.G.L. c. 93A claim filed by the landlord’s commercial tenant. Id. at 5. A long-term lease had been executed that allowed the tenant to develop a car dealership on the landlord’s property. The court ultimately found that where the landlord committed commercial extortion and made fraudulent misrepresentations, the lease’s limitation of liability clause did not bar recovery of the tenant’s claims for consequential damages under M.G.L. c. 93A, § 11 because such conduct was “willful and knowing.”

The court refocused on the policies underlying M.G.L. c. 93A, § 11, not on prior distinctions between whether the claims asserted sounded in tort or contract. The landlord’s limitation of liability clause was not enforceable because a defendant should not be allowed to “immunize itself in advance from liability for unfair or deceptive conduct that is done willfully or knowingly…. “ H1 Lincoln, Inc. v. S. Washington St., LLC, 489 Mass. 1, 26 (2022). These circumstances would “do violence” to the public policy protected by G.L. c. 93A. Id. This public policy consideration still applies even where the parties are sophisticated commercial entities familiar with the rough and tumble world of commerce. Id. at 26.

This “refocusing” on willful or knowing violations recognizes that M.G.L. c. 93A “ties liability for multiple damages to the degree of the defendant’s culpability by creating two classes of defendants.” H1 Lincoln, Inc. v. S. Washington St., LLC, 489 Mass. 1, 26 (2022) n. 16 quoting Int’l Fid. Ins. Co. v. Wilson, 387 Mass. 841, 853 (1983). Defendants who breach M.G.L. c. 93A through “relatively innocent violations” are not liable for multiple damages, but the parties who have committed “willful or knowing” violations should not be protected by waiver/release clauses. Id.

Therefore, while counsel for developers and contractors may still incorporate such waivers of liability into their contracts, these waivers will not limit liability for knowing and willful violations of M.G.L. c. 93A. ■

MBA HEALTH & WELL-BEING
A Health & Well-being page to support member wellness.

WWW.MASSBAR.ORG/WELLBEING
BULLETPROOF MARKETING BLUEPRINT

BY CHRISTOPHER D. EARLEY

As with any business, marketing is mission critical. Getting clients coming through your door should always be the first order of priority. No matter how good your lawyering skills are, you can’t practice law and make money without clients. Unless you operate strictly through word-of-mouth referrals to generate business, marketing is something that must be done, and done right. But far too often, attorney marketing misses the mark, resulting in significant lost money. Here are some ways your marketing can be made more potent and effective.

With any marketing you do, take the focus off you, and always make it about the potential client. Peter Drucker once said, “The aim of marketing is to know and understand the customer so well the product or service fits him and sells itself.” Get in the head of the potential client. What keeps them up at night? What are they scared about? What do they want? They probably don’t want to hire and deal with a lawyer, but they realize they have to. They have a problem and need the problem solved. That is where we come in. We are problem solvers. How are you going to solve the problem quicker and better than your competitors will? By shifting the focus away from you, and over to the client, you become an attractive problem solver in the eyes of the potential client. If you can effectively communicate and position yourself in that way through your marketing, your marketing will become infinitely more effective and magnetic in getting clients to your door.

Educate always, and never, ever sell in your marketing, in any media. People hate being sold to, they get turned off. People, though, like to learn how things work, so if you can educate potential clients with valuable information that will benefit them, you will attract their attention. When you have their attention, they will be more inclined to hire you. You can do this in countless ways. Answers to frequently asked questions, free reports, books, webinars and podcasts are just some of the ways you can educate and attract potential clients to your practice. The more you educate, and the less you sell, the more prospects you will convert into paying clients.

Show you can be trusted. This is so important. Imbue trust clues into your marketing. People generally neither trust nor like lawyers. That is a major problem we need to confront. You need to overcome that distrust by affirmatively demonstrating that you can be trusted. This is where reviews are critical. Amass as many online reviews as you possibly can, and perpetually continue that behavior so that potential clients will see you can be trusted. Don’t worry about negative reviews. We all get them. If all you have are perfect reviews, potential clients may look at that with suspicion. What you say about yourself is one thing, but what others say about you is golden. Put reviews on all pages of your website. Print them out and hang them on the walls in your office and reception area waiting room for all visitors to see. This is especially impactful not just on potential clients, but on existing clients as well, as it reinforces that you can be trusted, and that you are the right lawyer for the job.

Trust can also be established by creating affinity. In your website bio (this is a critical part of a website that is often neglected), take the lawyer hat off and get personal. Talk about the things you like to do in your spare time, or things you feel passionately about. This is a great way to relate to people, and that can establish affinity and trust. The more you can focus your bio on you as a person, and not just an attorney, the better that potential clients will relate to you.

CHRISTOPHER D. EARLEY

is a Boston personal injury attorney who enjoys spending time with his wife and kids, exercising and meditating, and he is a terrible drummer.

The fortune is in the follow-up. Far too many lawyers fail to do any type of follow-up marketing once a potential client raises their hand and demonstrates interest. Whenever a potential client reaches out, their contact information must be collected. This enables you to nurture the lead through email, direct mail and the telephone. Follow-up marketing can be and should be automated as much possible. This provides a further way not only to stay top-of-mind to the prospect, but also to further educate the prospect. At my office, we follow up with leads we want to convert until they either sign with us or tell us to stop marketing to them.

There are so many ways to market a law firm effectively. Take a look at your existing marketing strategy and constantly tweak and test new tactics. This will result in not only more cases, but more of the cases you want to attract. As with anything, small hinges open big doors.

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HOW TO SUBMIT ARTICLES

To inquire about submitting an article to SECTION REVIEW, contact Cameron Woodcock (CWoodcock@MassBar.org).
ON THE LEGAL PROTECTIONS AFFORDED TO ANIMALS

BY TIMOTHY BROWN

As humanity has struggled with its own species’ access to fundamental rights, legal protections for animals have regrettably been something of an afterthought in both politics and law. Whether anything is entitled to legal rights revolves around what status society attributes to that subject, and the reality is that the status of animals is not one of great concern to many. As such, the laws established to protect animals have had a complicated history, and in modern times, the concept struggles to even find relevant consideration in the minds of ordinary people.

Among the many challenges pertaining to drafting laws protecting animals is the requisite philosophical motivation to do so. For example, why should we even make laws to protect animals? Do other species even deserve legal protections? The more practical thinking may even suggest legislative resources should not be allocated to animal rights when lawmakers should focus instead on humans’ basic access to fundamental legal rights, both domestically and abroad. Assuming we do make laws protecting animals, what might they protect? Freedom from unnecessary harm or death? Freedom from being held in unsanitary and crowded enclosures? Should only certain wild endangered animal species be protected? Should we also regulate and control the habitat where these endangered animals naturally live? These are all valid concerns that need to be addressed before drafting meaningful laws protecting animals. Concerns such as these, and many more, have understandably inhibited progress in this area of law.

Varying philosophical theories over the course of human history have helped protect animals in law and society. One of these early theories is that animals’ very existence provides the basis to protect animal species. Later thinkers have entertained the theory that animals are capable of having emotional experiences, and their ability to feel pain might make them worthy of moral or legal consideration. In contemporary times, a theory gaining more popularity is that qualities like introspection, memory, language and empathy — much like humans. Therefore, these species are potentially due more encompassing moral and legal protections.

More practical reasons for the legal protection of animals exist simply out of necessity. For example, animals are at times the property of people. Therefore, society holds an interest in regulating the way this unique kind of property is treated, sold, dispensed with, or utilized for profit. For this reason, even animal owners devoid of an ethical conscience have an interest in the laws and policies surrounding animals. Although in an indirect way, this at least entitles animals owned as property to certain legal protections.

Regardless of which theories have guided lawmakers and society at large, the above considerations have been at least remarkable enough to shape the laws and protections for animals that exist today. In the United States, animals have historically received very few legal protections, and their mistreatment has been at times commonplace. After several centuries, animals have developed some amount of legal protections in various ways, including but not limited to animal ownership, damages for harms to pets, anti-cruelty laws, caring laws, laws protecting agricultural animals, state regulation of ownership, and laws protecting endangered and threatened species and their habitats. But this was not always the case.

The earliest laws in the United States protecting animals began during the first half of the 19th century in several states such as Vermont, Maine, New York and others. Early criminal laws protected animals from being harmed by others. These laws mostly protected commercially viable animals such as horses, oxen, and occasionally other forms of cattle. However, these protections fell short of including dogs and other pets. In 1866, New York was the first state to charter a committee known as the American Society for the Prevention of Cruelty to Animals (ASPCA). Thereafter, legislation was enacted to protect abandonment of “any living creature,” which was a massive step forward in providing basic protections for animals that were not considered commercially viable, such as common pets. The law further provided a duty of owners to provide care for their animals and allowed the ASPCA to seize animals being treated cruelly. New York’s act had a nationwide ripple effect, and many states across the country began to enact criminal laws for the protection of animals while simultaneously adopting state-chartered societies with authority to prosecute and take ownership of animals that were not adequately cared for.

Nowadays, all 50 states have felony provisions for the most serious forms of animal cruelty. The federal government of the United States has mostly relied on the states to effectively pass widespread anti-cruelty laws, but some federal legislation does exist. The Animal Welfare Act of 1966 (AWA) and its various amendments are one such body of federal law. The AWA was created due to serious concern in Congress over issues involving the use of animals in science, research and testing. Today, the AWA provides protections for the treatment of warm-blooded mammals in research facilities, zoos and exhibitions, breeding, wholesale distribution, and auctions, and also provides protections for stolen pets. It also makes it a crime to knowingly sponsor, participate in, provide transport for, or promote fights between live birds, dogs and other mammals. Other forms of federal law include federal regulations on the humane slaughter of livestock, which can only be done with minimum discomfort to the animals. These regulations require that the slaughter of livestock be done through the use of carbon dioxide gas, captive bolt stunners and projectiles,
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gunshots and electrical currents. Although these federal laws regulate how animals are ultimately harmed and killed, they nonetheless provide a requirement that the mass killings of animals in research and agricultural farming be done in a “humane” way.

Other federal protections such as the Endangered Species Act of 1973 are designed to protect certain animal species that are determined to be threatened, endangered or nearly extinct. This law prevents certain defined species from being harassed, harmed, pursued, hunted, shot, wounded, killed, trapped, captured or collected unless approved for conservation and/or scientific purposes. States have similarly followed suit, and 46 states currently have laws protecting endangered species. Additionally, laws enacted for land conservation, such as the National Park Service Organic Act of 1916, preserve habitat and allow the National Park Service to regulate activities such as hunting and fishing on these lands. Laws like these have saved species such as the iconic bald eagle from extinction and preserved natural habitat for formerly endangered species like the American alligator.

An alternative way animals receive protections in the United States is through the property rights of their owners. These property rights include the right to convey, the right to consume, the right to use as collateral, the right to obtain natural dividends from the animals, and the right to exclude others. Through the tort system, an animal owner can seek damages for the injury of their animals under theories of trespass, negligence and gross negligence. In such a way, a property owner of an animal can receive compensation for an animal that has been wrongfully injured or killed by another. Although under this legal theory animals are not given direct rights, they are still nonetheless indirectly protected from the wrongful acts of others.

One of the biggest issues regarding animal rights in the United States is the problem of standing. Courts are largely concerned with expanding the ability to allow anyone to sue on behalf of animals. This is not an issue when an animal is owned by a plaintiff, but if someone seeks to address issues pertaining to animals they do not personally own, many issues arise. In a situation where someone is only remotely concerned about an animal’s well-being, standing cannot usually be established because the plaintiff cannot show they have a property interest, a financial stake in the events, or any injury-in-fact. More recently, courts have begun entertaining alternative theories to overcome the issue of standing, which has been effective in furthering legal protections for animals.

Although lawmakers are in many ways reluctant to pass new laws protecting animals, a growing social reform for the legal rights of animals has gained intellectual traction in modern America. The movement became popular in the 1980s. Since then, annual conferences have been held nationwide by organizations such as the Animal Legal Defense Fund (ALDF) and the People for the Ethical Treatment of Animals (PETA), which spread awareness of animal cruelty and are dedicated to establishing and defending the rights of all animals. Additionally, there are now animal rights law review journals published by premier law schools across the country, and animal rights courses have been taught at world-renowned educational institutions such as Harvard Law School.

As the legal community has made strides in the last few decades in this area of law, the pathway for greater legal recognition for the protection of animal interests is beginning to develop. Over the last few decades, violations of state animal protection laws that were once misdemeanors have now become felonies, federal regulations have been passed protecting domestic and wild animal species, and courts have begun to allow animal rights groups the standing they need to litigate on behalf of animals. If changes in the past regarding animal rights laws are any indication of the future, it shows that more positive change is hopefully on the horizon.

YOU’VE GOT MAIL! (AND UNNECESSARY STRESS): A CALL FOR RELAXED EMAIL EXPECTATIONS IN LEGAL PRACTICE

BY MICHAEL P. DICKMAN

Life in the 21st century places ever-increasing demands on us. A main contributing factor is the sense (and reality) of a constant barrage of information at our fingertips and in front of our eyeballs. The 24-hour news cycle, social media, podcasts, and the center of this universe — our smartphones — guarantees we always have something to capture our attention and distract us from the task at hand. Even a relaxing diversion such as finding a new show or movie is overwhelming and intimidating. A new streaming service is released every week with its own set of original programming. I'm not sure whether Netflix, Hulu, Disney Plus, AppleTV, Amazon Video, Paramount+, or the icon recently known as HBOMax has rights to the latest Minions release. How am I supposed to unwind?!

For lawyers, the information overload manifests sharply with the centrality of email communications in our practice.

This information overload, and email’s primary role in ensuring our plates are always full, increases stress and reduces productivity. Studies show that mere awareness of an unread email in your inbox reduces one’s IQ by 10 points. Even more striking is the concept of “Email Apnea,” which is an individual’s shift in breathing when responding to an email or text. This phenomenon is exacerbated when in front of a screen and reading/responding to messages for extended periods. Essentially, we are choking when receiving and responding to email correspondence. Surely, this detracts from the quality of work and the physical and emotional experience in undertaking it.

The COVID-19 pandemic spawned seemingly permanent shifts in work culture, including employers’ willingness to adopt a hybrid work model for the foreseeable future. Most would agree that this increased flexibility is a positive development. Nonetheless, there are concerns that greater access to remote work will lead some employers (along with opposing counsel, clients and other stakeholders) to demand rapid responses at all hours of the day and night. That is, if you are
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not spending time commuting to and from the office, get in front of your computer and respond to my message! Let’s avoid undermining these recent gains.

The Massachusetts bar has demonstrated a commitment to increasing lawyer well-being through a variety of initiatives, organizations and panels. The publication of the NORC report on Lawyer Well-Being in Massachusetts earlier this year highlighted some unfortunate, if unsurprising, findings. Most notable from the report is that 77% of Massachusetts lawyers reported burnout from their work (together with heightened anxiety, depression and alcohol/substance abuse). In that context, a culture shift is warranted.

If the bar is truly concerned about work-life balance and lawyer well-being, the community should envision a more respectful and relaxed way of communicating, via email and otherwise. To better achieve these ends, I offer some preliminary proposals.

1. Schedule messages to be sent during “normal” working hours. Understanding that the realities and complexities of personal and professional life render it impossible for lawyers to only send emails on Monday through Friday, between 8 a.m. and 6 p.m., many folks must churn through their inboxes during “off” hours. That said, unless a statute or court rule obligates a response by a specific date, lawyers should consider scheduling a message to be sent the following morning or next business day. Every platform has this scheduling ability. Lawyers, in accordance with their ethical obligations to exercise technical competence, should learn how to utilize it.

2. Emphasize telephonic/videoconference communications. We have all received threatening or discourteous written communications from opposing counsel, shortly followed by a cordial phone call. Oftentimes, emails fail to capture the appropriate or intended tone of the sender. We also have been included on painstaking email threads with several participants going back and forth with no end in sight and furthering no goal. To avoid misinterpreting tone, disarm keyboard warriors, promote collegiality and maximize efficiency, hop on the phone.

3. Reset response expectations. We should strive not to construe any “delayed” response as a sign of disrespect or misconduct on the other side’s part. To downplay this possible effect, however, we can communicate that senders can neither expect nor demand an immediate response. Via an out-of-office message or blur in a signature block, lawyers can inform others that they may be unable to respond in a rapid amount of time for a variety of understandable reasons. In the era of email access on smartphones, lawyers feel increasingly obligated to respond during off hours, even when away on personal leave or vacation. Let’s do away with that notion.

* * *

Of course, counselor, Saturday at 4 p.m. is a terrific time to inquire about supplementing discovery responses I served seven months ago with an URGENT tag line. Allow me to pause the backyard barbecue and get those over right away. I must respond to this email with haste. Otherwise, I am not fulfilling my lawyerly duties.

* * *

A retort to a recommended relaxation of email communications is — well, how can I effectively represent my clients, company, constituency, etc., if I am not responding to emails promptly and substantively? Sure, everyone must meet certain demands and obligations. Lawyers may feel they will lose clients if they do not drop everything on a family vacation and respond to the latest missive. Or they may feel they are not advancing their interests in a case or matter if they take their eye off the proverbial ball for a brief period.

I am not advocating for lawyers to feel emboldened to disregard responding to written communications in a relatively prompt manner. And of course, there are always exceptions to my recommended, relaxed approach to email responsiveness — a true emergency (not a subjective one conceived by an unreasonable client), an unavoidable deadline, among others. In the absence of these circumstances, however, lawyers are doing themselves and the practice a disservice by adhering to a strict and unsustainable email response expectation.

While our culture takes pride in one’s ability to multitask, the consensus from brain science is that a truly effective multitasker is a myth. By constantly task-switching, people drain energy that was devoted to the original task to adjust to the newest thought that popped into their head (or inbox). Lawyers can undertake their duties more effectively by remaining focused on discrete tasks instead of keeping one eye/ear always fixed on their email. Singular focus will breed better work product and clarity of thinking. I know that I feel more empowered as a lawyer when I choose to proactively engage in an assignment and turn off notifications, as opposed to playing Outlook Whac-A-Mole (trademark pending). For more insights into how the human brain works in today’s world, especially pertaining to these issues, I highly recommend The Organized Mind: Thinking Straight in the Age of Information Overload, by Daniel J. Levitin, Ph.D.

* * *

In conclusion, there is an undeniable benefit to email communications, especially compared with old ways of doing things — confirmation of submission/receipt of message, avoiding the cost and uncertainty of relying on the post office or other parcel service, reducing environmental impact by going paperless, etc. I am not advocating that we all declare “email bankruptcy.”

That said, we should acknowledge the impact that the substance, tone, length and timing of a message may have on the recipient.

These issues are not restricted solely to email as text messages and other forms of digital communications become ubiquitous in legal practice. The bar should strive to achieve the same sense of civility and understanding when sending texts or other communications.

Greater intentionality and courtesy regarding these communications should support ongoing efforts to enhance lawyer well-being and reduce the stress of being a lawyer. Even if some aspects of legal practice have high stakes, that does not mean our community should not strive at every chance to improve collegiality, promote healthier work environments, and avoid needless barbs exchanged with opposing counsel, a disapproving client, or an underappreciated court clerk. ■
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