

Boston Bar Journal

A Peer Reviewed Publication of the Boston Bar Association

Volume 57

FALL 2013

Number 4

VOICE OF THE JUDICIARY

One Mission: Justice with Dignity and Speed

by Chief Justice of the Trial Court Paula Carey

ABOUT THE BBJ

SUBMITTING AN

VIEWPOINT

Mayor Menino and the Law as an Instrument of Change

by Corporation Counsel Bill Sinnott

ARTICLE

BOARD OF EDITORS

CASE FOCUS

Massachusetts Leads the Nation on the Attorney-Client Privilege for Law Firms

by Robert M. Buchanan, Jr.

CONTACT US

CITING THE BBJ

LETTERS TO THE

HEADS UP

Heads Up: Traps Associated with Hiring Unpaid Interns

by Paul Holtzman and Jill Brenner Meixel

EDITOR

ARCHIVES

CASE FOCUS

Workers' Rights Keep Pace with Corporate Practices: Recent SJC Decisions Expand Reach of Wage and Hour Laws

by Jocelyn B. Jones

LEGAL ANALYSIS

Student-Consumers: the Application of Chapter 93A to Higher Education in Massachusetts

by Robert E. Toone and Catherine C. Deneke

PRACTICE TIPS

Predictive Coding: Process and Protocol

by Andrew Gallo and Sarah Kim

One Mission: Justice with Dignity and Speed

by Chief Justice of the Trial Court Paula Carey

Voice of the Judiciary



I am deeply honored, excited and humbled to have been chosen as Chief Justice of the Trial Court. My appointment at this point in the history of the Trial Court is a unique opportunity to help define the new position of Chief Justice and to establish the framework for the future governance of the Trial Court by partnering with the Court Administrator and the Trial Court Chief Justices. I look forward to collaborating and working to develop policies and programs to support and maintain a vibrant, innovative system of justice that inspires public trust and confidence.

The new governance structure teams the Chief Justice with the Court Administrator, so that we can lead the Trial Court with one voice. Court Administrator Harry Spence and I are working in a spirit of collaboration, confidence, and teamwork to provide the system with strong and effective leadership.

These are exciting times for the Massachusetts judiciary. I believe we have the energy, enthusiasm and willingness to embrace the changes required for the delivery of justice in the 21st century. My foundation has always been energy, enthusiasm, passion and commitment. Since I was young I have wanted to make a difference – a human difference.

When I began practicing law, court employees often asked if I was from Belmont, and the question told me where the conversation was going. Lawyers and court employees regaled me with stories about my father, who taught at Belmont High School for many years. They described the long-lasting effect my dad had on their lives or the lives of their children. One Probation Officer described how he teaches my father's message to his children to this day — *you have got to work hard and have passion and desire for life in all that you do*. I am fortunate to have experienced that message from my dad throughout my life and it is the foundation for who I am and what I do.

We recently rolled out the Trial Court's Strategic Plan, which is the blueprint for our future. The success of this rollout depends on all of us, both inside and outside the system. This is a plan to be proud of and one to embrace, a plan to create a system that matches our quality decisions with quality in structure and operations — One Mission: Justice with Dignity and Speed.

The development of our Strategic Plan was spearheaded by a Process Steering Committee comprised of employees from all levels of the Trial Court. They were tremendously dedicated to their task and reached out extensively to other Trial Court employees, the bar, the legislature, the executive branch and other key constituencies who work and interact with the courts. The Process Steering Committee worked with the departmental Chief Justices, the Chief Justice of the Trial Court, and the Court Administrator to finalize the plan. We are actively on our way to making our Strategic Plan a reality. This new challenge is exciting and stands to push our Courts to heights we have never reached before. Expanded collaborations between court divisions, across departments and functions, and with external stakeholders will be fostered and encouraged. We will put systems in place to make that happen and we will celebrate successes and recognize accomplishments. Communication is key going forward. We need to have a transparent organization that is clear about what we are doing and why we are doing it. Innovation and excellence should be the norm. High performance will be encouraged and recognized as we set the standard for continuous improvement.

The past few years have presented significant challenges due to the economy and other factors. I firmly believe we have a talented work force that is truly dedicated to the delivery of justice and to addressing the plight of those who come to our courts seeking help. Although sometimes not considered as such, the Trial Court is often a last haven for those who have nowhere else to turn. We frequently must create order out of chaos in the lives of those who come to our courts.

Today, society expects more from us than simply adjudicating cases, although that function is certainly primary. As a court system we must do more to help address underlying problems that bring people to us in the first place. Recurring issues such as substance abuse, mental health and the residual effects of battle on veterans require that we collaborate with service providers to help break these cycles. Existing specialty courts are being examined for their efficacy and will be expanded, driven by evidence-based practices.

I consider the bar an integral partner in our delivery of justice. We could not have continued to deliver quality justice during the past few years as effectively as we have without the support and assistance of the bar. Consistent collaboration between the bar and the Trial Court gives Massachusetts its leadership status in bench/bar relations. I eagerly begin my role as Chief Justice in partnership with the bar, as we work together to help others.

We have much work ahead and I am confident that we will achieve greater recognition for Massachusetts – not only for the quality of our decision making, but also for the efficient delivery of justice with dignity and speed. It may already be clear, but I want to emphasize my passion for the work of the Trial Court and its importance to society. We have a noble purpose and a noble mission.

Hon. Paula M. Carey is Chief Justice of the Trial Court. She was appointed to that position on July 16, 2013. Prior to that, she was the Chief Justice of the Probate and Family Court, appointed on October 2, 2007. She was appointed an Associate Justice of the Norfolk Probate and Family Court in 2001.

Mayor Menino and the Law as an Instrument of Change

by Corporation Counsel Bill Sinnott

A reflection on the legal legacy of Boston's retiring chief executive

Viewpoint



As the City of Boston witnesses the final weeks of the Menino Administration, much has been and will be written about Mayor Menino's legacy. Many of these homages and critiques focus on the city's economic revitalization. Others describe the Mayor's ability to bring together diverse residents and neighborhoods in a city once defined by its fissures. Still others reference his commitment to public education or his outspoken support of LGBT rights. Perhaps even more noteworthy in a city that once prided itself on the rogue character of its leaders, many praise the Menino administration for steering free of scandals and corruption.

Having served as a member of Mayor Menino's administration for almost eight years as Corporation Counsel, I have observed a number of occasions in which Mayor Menino's seldom-recognized appreciation for the law and its ability to improve the lives of ordinary Bostonians has guided the formulation of City policies.

This article will highlight some of the ways in which the Menino administration employed law and legal process in its pursuit of a better Boston.

Legislation. The thousands of orders, ordinances and statutes the Mayor filed or championed during his twenty-year tenure reflect his awareness of the power of the law to elevate the condition of city residents, workers and visitors. The Mayor:

- Sponsored environmental statutes that require large construction projects to comply with LEED standards and to monitor the consumption of energy.
- Enacted, by Executive Order in April, 2000, a Diversity Values Statement committing the City and its employees to diversity and inclusion and prohibiting discrimination on the basis of age, employment status, income, disability, educational background, gender, race, color, national origin, religion, sexual orientation, or veteran status.
- Led the movement for CORI reform at both the municipal and state level, thereby addressing issues faced by ex-offenders as they transition into the community upon release. For Mayor Menino, CORI reform was not about allowing those who commit serious crimes to escape the consequences of their actions, it was about ensuring that the law was not a permanent barrier to employment, housing, and other opportunities for people deserving of a second chance.
- Championed state education reform. In 2010, Mayor Menino filed legislation to create a new form of charter school. These in-district charters operate within the school district, reflect the diversity of students in the community, and have flexibility in staffing, budgeting, the ways teachers collaborate and the hours kids are in school.

Nor has Mayor Menino's legislative focus been limited to Boston and state laws, as his early and enthusiastic participation in the Amicus briefs in the *Massachusetts* and *Windsor* challenges to the Defense of Marriage Act (DOMA) attests. Among the first mayors to embrace gay marriage post-*Goodridge*, Mayor Menino maintained that DOMA prevented Boston from treating its employees equally and that federal law should be changed.

Similarly, in 2006, the Mayor co-founded a national organization called Mayors Against Illegal Guns (MAIG) to address the destructive impact of interstate gun trafficking on Boston. The group's goal is "making the public safer by getting the guns off the streets." MAIG has played a significant role in addressing the problem of illegal gun violence in American cities and has become a bi-partisan rallying point for cities seeking common-sense solutions to the firearms-fueled tragedies on their streets.

Legal Crisis Management. On many other occasions, the Mayor's reliance on the law moved from legislation to crisis management. The Mayor values the First Amendment because he empathizes with the disenfranchised. Consequently, he allowed Occupy Boston adherents to maintain an encampment long after most cities had shut down similar protests, often accompanied by great violence. He allowed Occupiers a forum for their beliefs so long as it did not threaten the public safety and welfare of themselves or other Bostonians. The Mayor was patient, respectful of the legal process and ultimately, when that process concluded, decisive. As a result, many Occupiers commended Boston's approach, especially in comparison to that employed by other municipal governments across the country.

Mayor Menino's deference to the First Amendment probably stems from his personal willingness to avail himself of its protections. Time and again, when confronted by what he views as disagreeable—but legal—behavior, he has chosen to state his feelings in an unvarnished and no-nonsense fashion. Notwithstanding his unhappiness with its founder's anti-gay bias, the Mayor recognized that he could not legally block *Chick Fil A* from opening a store in Boston. Similarly, he acknowledged that *Rolling Stone* magazine had the right to place a rock star-style photograph of an accused terrorist on its cover. That awareness, however, did not prevent the Mayor from contacting *Chick Fil A* and *Rolling Stone* and bluntly expressing the dissatisfaction and anger he and many in his city shared.

Effecting Change. Mayor Menino loves to say that government is about helping people. This outlook permeates every department in his administration. His legal offices are no exception. Typically, when advised that a specific initiative or program faced legal obstacles, the Mayor would redirect the conversation: "Then how are we going to do the right thing? Let's find a legal way to do the right thing."

Cognizant that Boston's troubled desegregation history and resultant federal court orders lingered in the background of any effort to alter the student assignment system, Mayor Menino sought to bring the city together on this issue by appointing a diverse External Advisory Committee (EAC) that included parents, students, advocates and academic professionals. A transparent and collaborative process resulted in a pioneering school assignment system that will commence in 2014.

Similarly, undeterred by daunting procurement and cost limitations, in 2011, the City of Boston launched New Balance Hubway, the innovative bicycle sharing system that has helped transform Boston into a world-class bicycling city. At the Mayor's insistence, Hubway uses no appropriated funds; instead, it is fully sustained by user fees, grants, donations, and sponsorships.

One of the ways that the Mayor helped people was by partnering his administration with the Boston Bar Association and the many community service programs that its staff and member attorneys make possible. He was especially appreciative of the Summer Jobs Program, which he launched each summer by meeting the students, telling them that they are Boston's future and charging them with taking advantage of the opportunity they've been given.

An enduring image of Mayor Menino will be that of April 18, 2013, when he rose from his wheelchair at the Cathedral of the Holy Cross to address his city and the world in the wake of the Marathon bombings: "We are One Boston. No adversity, no challenge, nothing can tear down the resilience and heart of its people." Mayor Menino leaves a unified and resilient city and he can rightly claim much of the credit. He also leaves a legal legacy combining both respect for the rule of law and an appreciation for the great good effective use of the law can bring to a city and its residents.

Bill Sinnott serves as the Corporation Counsel for the City of Boston. In representing the City, Bill's clients include the Mayor, all City Departments, including the Police and Fire Departments, and the Boston City

Council. He oversees the Law Department and a staff of approximately sixty attorneys, paralegals, and administrators.

Massachusetts Leads The Nation On The Attorney-Client Privilege For Law Firms

by Robert M. Buchanan, Jr.

Case Focus



The Supreme Judicial Court of Massachusetts has taken intellectual leadership on an issue of nationwide importance for the legal profession. *RFF v. Burns & Levinson*, 465 Mass. 702, 703 (July 2013) addressed “whether confidential communications between law firm attorneys and a law firm’s in-house counsel ... are protected from disclosure to the client by the attorney-client privilege.” The SJC ruled firmly that the privilege does apply – the first time this issue has been resolved by the highest court in any jurisdiction.

Examples Of The Issue In Practice

The Boston Bar Association filed an amicus brief in the *RFF* case. We provided several practical examples of how in-house counsel function in law firms.

Example 1: Law Firm represents Client A and also represents Client B. Client B calls Lawyer asking for urgent advice about an affiliate of Client A. Does Lawyer have a conflict of interest?

Example 2: Lawyer is preparing for a strategy discussion with Client, which is scheduled to begin in a few hours. Suddenly Lawyer realized that he may have made a technical or strategic mistake. What should he do? Does he need to disclose something to Client?

Example 3: A real estate developer Client sends a letter accusing Law Firm of malpractice, and at the same time insists that Law Firm continue performing work for the developer. Should Law Firm continue performing work for this Client?

In each of these three scenarios, the lawyer needs guidance; the law firm’s in-house counsel is in the best position to provide guidance; and the client will benefit if the lawyer obtains proper guidance promptly.

The Facts Of The *RFF* Case

The *RFF* case was similar to Example 3. Real estate lawyers received a demand letter from their client, a real estate developer. The lawyers faced a difficult set of questions. Should they argue with the client? Should they continue to represent the client? How could they do both at the same time? The lawyers sought advice from their partner who was “designated to respond to ethical questions and risk management issues.” *RFF*, 465 Mass. at 704.

The real estate developer later filed a malpractice action and sought to take depositions. The Business Litigation Session — in a well-reasoned opinion by Judge Billings, dated November 20, 2012— ruled that the attorney-client privilege protected the lawyers from interrogation about their discussion with in-house counsel.

The SJC’s Analysis

The SJC affirmed, stating a logical series of principles, as the BBA had advocated.

1. Lawyers in law firms often need advice.

Law firms, like corporations, face a vast and complicated array of regulatory legislation, where the line between permissible and prohibited conduct is not always an instinctive matter.

RFF, 465 Mass. at 708-09, quoting Chambliss, *The Scope of In-Firm Privilege*, 80 Notre Dame L.Rev. 1721, 1756 (2005).

2. The attorney-client privilege enables in-house counsel to give advice.

Where a law firm designates one or more attorneys to serve as its in-house counsel on ethical, regulatory, and risk management issues that are crucial to the firm’s reputation and financial success, the attorney-client privilege serves the same purpose as it does for corporations or governmental entities: it guarantees the confidentiality necessary to ensure that the firm’s partners, associates, and staff employees provide the information needed to obtain sound legal advice.

RFF, 465 Mass. at 704-10.

3. There is no principled reason to reject the privilege.

Lower courts in some other jurisdictions had ruled that the attorney-client privilege does not apply. These courts have held that the law firm is impaired by a conflict of interest when the firm represents itself adverse to a current client. The SJC ruled, to the contrary, that the law firm can’t avoid analyzing what to do, and its analysis should be protected by the attorney-client privilege. Justice Gants stated the critical distinction as follows:

. . .[A] client is entitled to full and fair disclosure of facts that are relevant to the representation, including any bad news, and to sound legal advice from its law firm. But a client is not entitled to revelation of the law firm's privileged communications with in-house or outside counsel where those facts were presented and the sound legal advice was formulated.

RFF, 465 Mass. at 716 (emphasis added).

The Privilege Applies If Four Requirements Are Met

The BBA's amicus brief proposed a three-part test for applying the attorney-client privilege to in-house counsel. These three requirements were adopted by the SJC in the passage below. The SJC also added a fourth requirement, confidentiality, which is consistent with them. The SJC held:

For the privilege to apply, four conditions must be met. First, the law firm must designate, either formally or informally, an attorney or attorneys within the firm to represent the firm as in-house or ethics counsel, so that there is an attorney-client relationship between the in-house counsel and the firm when the consultation occurs. Second, where a current outside client has threatened litigation against the law firm, the in-house counsel must not have performed any work on the particular client matter at issue or a substantially related matter.... Third, the time spent by the attorneys in these communications with in-house counsel may not be billed or charged to any outside client.... Fourth, as with all attorney-client communications, they must be made in confidence and kept confidential.

RFF, 465 Mass. at 723 (emphasis added).

Conclusion

All Massachusetts law firms should review these four requirements. Although the SJC's holding is not binding outside Massachusetts, its powerful reasoning should be persuasive in other states as well. In the long run, this analytical clarity should benefit all U.S. law firms and the clients that they serve.

Robert M. Buchanan, Jr. wrote the Boston Bar Association's amicus brief, pro bono, in the RFF case. Mr. Buchanan is Chair of the Ethics Committee at Choate Hall & Stewart, where he is a partner in the Litigation Department and leads the Antitrust practice.

Heads Up: Traps Associated with Hiring Unpaid Interns

by Paul Holtzman and Jill Brenner Meixel

Heads Up



With the economy's ebbs more frequent than its flows during the past decade, private sector employers have tightened their financial belts, leading to a chronically elevated unemployment rate. As an outgrowth of the tough market, job seekers are often willing to fill gaps between jobs by working as unpaid interns. Employers welcome the additional help without any corresponding expense. The interns covet the experience, networking and resume building.

This match between the interests of the private employer and the unpaid intern, however, has raised important legal issues which highlight the often blurred line between the "intern" and "employee" classifications. In fact, this rise in internships has spurred additional scrutiny by the Department of Labor (DOL) with respect to employers' compliance with the Fair Labor Standards Act (FLSA), and has resulted in increased litigation by interns against employers for failing to pay minimum wage. Given the serious consequences of violating federal law and the Massachusetts wage laws, the importance of employers' implementation of strict guidelines to ensure compliant intern programs is paramount.

Recent Case Law Relating to Unpaid Interns

The growing wave of intern lawsuits has led to some important decisions addressing whether interns must be treated as employees. A number of courts have held that employers have misclassified employees as interns and therefore violated wage laws by failing to pay minimum wage.

The success of intern plaintiffs was exemplified most recently in the June 11, 2013 decision from the Southern District of New York in Glatt v. Fox Searchlight Pictures, Inc., No. 11-cv-6784, 2013 WL 2495140 (S.D.N.Y. 2013). There, the court granted summary judgment for plaintiffs, finding that the production company defendant misclassified interns and failed to pay minimum wage. Plaintiffs were employees, and not interns, because they "worked as paid employees work, providing an immediate advantage to their employer and performing low-level tasks not requiring specialized training," and the benefits they obtained resulted from "simply having worked as any other employee works, not of internships designed to be uniquely educational to the interns and of little utility to the employer." Further,

the interns “received nothing approximating the education they would receive in an academic setting or vocational school.”

A well-designed intern program, however, can lead to a different outcome. Two instructive recent decisions have held that intern plaintiffs were not employees. In Demayo v. Palms West Hosp., Ltd. Partnership, No. 11-81211, 2013 WL 264691 (S.D. Fla. Jan. 23, 2013), the court determined that an unpaid extern working at defendant hospital was not an employee, as she was required to complete the externship and associated surgeries as a prerequisite to graduation, she understood that the externship would not result in employment, there was no corresponding staff reduction, and the employer monitored her work. Similarly, in Kaplan v. Code Blue Billing & Coding, Inc., 504 Fed. Appx. 831 (11th Cir. 2013), the court held that the intern plaintiffs were not employees, as they did not displace regular employees, they performed work towards a formal degree program, and defendant supervised and trained plaintiffs in a manner which required it to take time away from the business.

Structuring a Compliant Internship Program

The most critical factor addressed by courts and the DOL in creating a compliant program is whether the intern or the private sector employer obtains the primary benefit from the internship. If the intern primarily benefits, the non-payment of wages is proper. If the employer primarily benefits, the intern is an employee entitled to minimum wage. For an internship program to be compliant, the employer should be able to demonstrate that:

- Interns do not perform essential functions of the business which provide a benefit to the employer.
- Without the intern, the employer would not need to hire another employee to fulfill the functions served by the intern.
- The intern does not have the same or similar job responsibilities as those of a regular employee.
- The intern’s work is tied to an educational program where it is a requirement of graduation or where an intern receives academic credit. Put another way, the internship is similar to training provided in an educational setting.
- The training received during the internship is transferable to future employment at a broad range of employers.
- The employer does not derive an immediate advantage from the internship and, at times, its operations are impeded. For example, an employer spends time training or educating an intern in lieu of promoting its business objectives, thus benefiting the intern, and “impeding” the operation of the employer’s business.
- There is no promise to the intern of future employment.

Massachusetts-Specific Practice Points

In order to ensure compliance with the Massachusetts wage laws when classifying interns, Massachusetts employers should take into consideration specific practice points.

1. Beware of Treble Damages. The failure to pay the minimum wage triggers a mandatory recovery of treble damages and attorneys' fees under Massachusetts law. Thus, if an employee is misclassified as an unpaid intern, recovery against the employer will be significant, and the anticipated financial benefits of bringing on an unpaid intern are long lost.

2. Extraterritoriality: Out of State Interns Are Not Necessarily Out of Mind. Not only does the Wage Act apply to Massachusetts employers and its local employees, but in certain circumstances it also applies to employees of Massachusetts companies working outside Massachusetts. In the May 2013 case of Taylor v. Eastern Connection Operating, Inc., 465 Mass. 191 (2013), an out-of-state independent contractor sued his Massachusetts-based employer, claiming that he had been misclassified and that he was an employee within the meaning of the Wage Act. The SJC held that the Wage Act could apply to this employee so long as (a) there was a written contract between the parties providing that any legal action shall be brought in Massachusetts and shall apply Massachusetts law, and (b) Massachusetts law "is not contrary to a fundamental policy of the jurisdiction where the individuals live and work." The Massachusetts Appeals Court confirmed these principles in June 2013 in Dow v. Casale, 83 Mass. App. Ct. 751 (2013). There, the court held that a Florida-based employee of a Massachusetts company had sufficient Massachusetts contacts to pursue a claim under the Wage Act where Massachusetts had the most significant relationship to the employment relationship.

3. Parties Cannot Agree to A Deal that Violates Wage Laws. The Wage Act prohibits an employer from entering into a special contract with an employee exempting the employer's compliance with the Wage Act. The SJC's broad view of the prohibition on special contracts to evade Wage Act obligations was reiterated in the June 2013 decision in DePianti v. Jan-Pro Franchising Int'l Inc., 465 Mass. 607 (2013). Accordingly, where an individual misclassified as an intern is entitled to minimum wage, an agreement exempting compliance with the Wage Act is unenforceable.

CONCLUSION

Challenges to unpaid internships are on the rise nationwide. The consequences of failure to pay minimum wage to an "intern" who is determined to be an employee are particularly steep in Massachusetts. With careful attention to the developing law in this area, it is nonetheless possible to design a compliant internship program.

Paul Holtzman, a partner at Krokidas & Bluestein, LLP, focuses on employment and litigation matters, including discrimination, harassment, retaliation and whistleblower claims, and serves as a mediator.

Jill Brenner Meixel, an attorney in Krokidas & Bluestein LLP's litigation group, represents for-profit and non-profit entities and individuals in commercial, employment, real estate and general litigation matters.

Workers' Rights Keep Pace With Corporate Practices: Recent SJC Decisions Expand Reach of Wage & Hour Laws

by Jocelyn B. Jones

Case Focus



Only 20 years ago, criminal prosecution was the sole means of enforcing the Massachusetts wage and hour laws. But the enforcement landscape has changed dramatically since 1993, when enforcement authority was transferred to the Attorney General's Office from the former Department of Labor & Industries, and employees were authorized to initiate private lawsuits, in which those who prevailed were entitled to treble damages and attorneys' fees, among other remedial measures. A further transformation took place in 1998, when the Attorney General was granted civil citation authority and monetary penalties for violations were enhanced, and with them, greater deterrence was set into play. The Legislature's addition of these enforcement mechanisms in the 1990s increased the development of wage and hour related case law, particularly at the appellate level. This rather dramatic expansion of case law in the wage and hour arena has accompanied the crystallization of the viewpoint expressed by the Massachusetts Supreme Judicial Court ("SJC") that these legal protections are to be interpreted broadly, to ensure that the laws accomplish their underlying goal of guaranteeing that all workers receive their earned wages. Consistent with this view, two recent SJC decisions underscore the expansive reach of the wage and hour laws' protections.

LLC Managers & Wage Act Liability

In *Cook v. Patient Edu, LLC, et al.*, the SJC addressed an issue of first impression about whether managers of a Limited Liability Company ("LLC") may be held personally liable for violations of the Massachusetts Wage Act, M.G.L. c. 149, §148. A former employee brought suit in Superior Court against the LLC, as well as two of its managers, for unpaid wages. Relying on the statutory language and the

express legislative purpose of protecting employees from long-term wage detention, the SJC concluded that “[b]ecause a manager or other officer or agent of an LLC...” may be a “person having employees in his service,” if he “controls, directs, and participates to a substantial degree in formulating and determining policy” of the business entity, he may thus be civilly or criminally liable for violations of the Wage Act.

Originally enacted in 1879, the Wage Act has been amended over the years to apply to both private and public sector employers. Among other provisions, the law requires that “[e]very person having employees in his service” must pay employees within the time limits specified within the statute. In addition, the statute expressly imposes liability on corporate officers and agents, as well as certain public officers. Cook’s managers pointed to these references and argued that because managers of LLCs are not specifically identified as employers under the Wage Act, in contrast to corporate or public officers, they cannot be held individually liable. But the SJC disagreed. The Court found that personal responsibility for Wage Act violations is not limited only to these particular categories of individuals. The SJC reasoned that the Legislature has merely provided examples of situations in which an individual may be deemed to be an employer. With that, the SJC remanded the case back to the trial court for further proceedings to determine what role the managers played and whether they were sufficiently involved with the LLC’s financial decisions to render either of them liable as a “person having employees in his service.”

This and other recent Massachusetts appellate decisions considering actions that may implicate workers’ rights under the wage and hour laws suggest that employers should consider that that courts are often likely to interpret statutory provisions in the light most favorable to workers. This reality, coupled with the prospect of individual liability, provides abundant motivation for business leaders to ensure that their employees are paid in full and on time.

Misclassification of Out-of-State Employees

Much has been made of the Massachusetts’ Employee Misclassification Law (or so-called Independent Contractor law), since its significant amendment in 2004. Today, the Massachusetts statute is arguably the most protective employment misclassification law in the country. The statute ensures that individuals who are properly classified as employees are afforded the protections intended for employees, including but not limited to timely payment of wages, minimum wage, overtime, as well as workers’ compensation, unemployment, the right to organize and nondiscrimination protections, i.e., statutory protections not available to independent contractors. Massachusetts has a history of leading the way in enacting laws that favor worker protections, and increasingly other states are following suit. Indeed, many state legislatures have either recently adopted misclassification laws very similar to ours or are currently considering doing so. A recent SJC decision highlights why all employers should be aware of this trend.

In *Taylor v. Eastern Connection Operating, Inc.*, the SJC ruled that the Massachusetts Independent Contractor law applied to couriers who both lived and worked in New York while employed by a

Massachusetts-based delivery company, Eastern Connection Operating. The SJC found that these individuals, who neither live nor work in Massachusetts, are nevertheless entitled to the protections of the Massachusetts Independent Contractor law. How, you may ask, can that be? The decision rests on the “choice-of-law doctrine,” which considers, among other things, the parties’ expressed intent as to which state’s law will govern legal disputes between them and which state has the most stake in the outcome of an lawsuit.

In considering these factors, the Court made two key findings in the case: 1) the employment contracts between the company and the couriers demonstrated that the parties intended to apply Massachusetts law, and 2) because the laws of New York and Massachusetts concerning employment misclassification are quite similar, applying Massachusetts law would not undermine New York public policy. As the Court wrote:

“Under both Massachusetts and New York law, a purported independent contractor who does not enjoy sufficient independence from the hiring party is deemed an employee. States seek to protect workers by classifying them as employees, and thereby grant them the benefits and rights of employment, where the circumstances indicate that they are, in fact, employees. *New York simply uses a different mechanism to effectuate this aim than does Massachusetts*” (emphasis supplied.)

Importantly, the Court also noted that “where no explicit limitation is placed on a statute’s geographic reach, there is no presumption against its extraterritorial application in appropriate circumstances.” And here, the SJC found that the Massachusetts Independent Contractor law contained no such limitation. For these reasons, the court held that the Massachusetts law applied to the plaintiffs’ claims and that because the plaintiffs could ultimately be found to be employees under Massachusetts law, the Superior Court erred by dismissing their wage claims on the basis that they were independent contractors.

As other states’ misclassification laws continue to evolve to more closely resemble those of Massachusetts, the *Taylor* case suggests that employers should take care to ensure that they understand the effect of contractual choice of law provisions and that their in-state and out-of-state workers are properly classified. Massachusetts’ more formidable wage protections may well be within their reach. And other states’ laws are helping them on their way.

The *Cook* and *Taylor* decision are but two of many important workers’ rights victories that have been handed down by the SJC over the past decade. As case law in the wage and hour arena continues to expand, we can expect that the SJC will continue to interpret the law with an eye towards ensuring the goal of protecting workers’ rights so clearly central to the state’s wage and hour laws.

Jocelyn B. Jones is Deputy Chief in the Massachusetts Attorney General’s Office (AGO), Fair Labor Division, a position she has held since 2007. She has served as an Assistant Attorney General in the Division since 2000, and as Special Counsel for Fair Labor Policy since early 2013.

** The Attorney General's Fair Labor Division filed an amicus curiae brief on the behalf of the Plaintiff in the Cook matter. This article represents the opinions and legal conclusions of its author and not necessarily those of the Office of the Attorney General. Opinions of the Attorney General are formal documents rendered pursuant to specific statutory authority; this article is not intended to be an official Opinion of the Attorney General rendered pursuant to statutory authority.*

Student-Consumers: the Application of Chapter 93A to Higher Education in Massachusetts

by Robert E. Toone and Catherine C. Deneke

Legal Analysis



While the value of a college education used to be (pardon the expression) a no-brainer, some have begun to question it. College graduates have generally fared better in the Great Recession than others, but unemployment remains high and many have had to take jobs that traditionally did not require a college degree. Student loan debt obligations now exceed \$1 trillion and continue to burden the economy by making it harder for Millennials to buy homes, start businesses, and invest for retirement.

Some students, dissatisfied with the financial value of their education, have turned to the courts for relief. Perhaps not surprisingly, law students have led the way, filing a variety of claims against their alma maters.^[1] Other students have sued colleges and universities for, among other things, making misleading claims about job placement or earned qualifications, program accreditation, failure to describe admission standards, and grade disputes. In many of these lawsuits, students have asserted consumer protection claims, on the theory that they are consumers of the institutions they are suing.

In addition to having a celebrated and diverse collection of colleges and universities, Massachusetts has one of the most powerful consumer protection laws in the nation, Chapter 93A.^[2] Enacted in 1967 and amended several times since, the statute gives the Attorney General broad authority to implement regulations, investigate potential violations, and file enforcement actions. It also establishes a cause of action for consumers who have been subjected to unfair or deceptive acts or practices. Prevailing

plaintiffs may obtain injunctive relief, and recover compensatory damages, multiple damages in the event of a willful and knowing violation, and reasonable attorneys' fees and costs.

Over the years, a variety of consumer-fraud lawsuits have been brought against Massachusetts colleges and universities. The resulting decisions show that even though liability under 93A is generally expansive, it has significant limits in higher education. It remains to be seen whether a shifting perception of consumerism in the college setting will change this area of the law.

Scope of Chapter 93A's Application

The most frequently litigated limitation on Chapter 93A's scope involves its requirement that challenged acts and practices occur in the conduct of "trade or commerce." In applying this requirement, courts ask whether a challenged act or practice occurred "in a business context," a fact-specific inquiry that involves the character, activities, and motivations of the parties involved. See *Kraft Power Corp. v. Merrill*, 464 Mass. 145, 155-56, 981 N.E.2d 671, 682-83 (2013). While considerable attention has been paid in recent years to the experience of students at "for profit" colleges,^[3] it is a mistake to assume that an institution's charitable status under the tax code will shield it from liability under Chapter 93A. In fact, a number of nonprofit colleges and universities have been successfully sued under this statute.

In 1997, for example, the Supreme Judicial Court upheld the finding of a 93A violation against Boston University in a dispute involving the provision of education and training programs at a satellite facility owned by the university. The court found that the university's contractual relationship with the plaintiff corporation was not merely for services "incidental to [its] educational mission," but rather was driven by a strong desire to increase the university's revenues and expand its reach to the corporate market. *Linkage Corp. v. Trustees of Boston Univ.*, 425 Mass. 1, 23-25, 679 N.E.2d 191, 207-08 (1997).

Colleges and universities are less likely to be found to have engaged in "trade or commerce" for activities undertaken in furtherance of their core educational mission. In one case, for example, the U.S. District Court ruled that a student could not proceed with a misleading advertisement claim concerning Harvard Law School's administration of student financial aid. *Thornton v. Harvard Univ.*, 2 F. Supp. 2d 89, 95 (D. Mass. 1998). Chapter 93A lawsuits have also been dismissed against MIT, Salem State University, and the New England School of Law on the ground that the challenged activities were part of or incidental to their educational missions and, therefore, not in "trade or commerce." See *Thomas v. Salem State Univ. Found., Inc.*, No. 11-10748-DJC, 2011 U.S. Dist. LEXIS 121036, at *23-25 (D. Mass. Oct. 18, 2011) (dismissing 93A claim alleging racial discrimination because university was carrying out its statutory mandate to deliver educational services); *Brodsky v. New England Sch. of Law*, 617 F. Supp. 2d 1, 7 (D. Mass. 2009) (law school's alleged refusal to allow student to retake courses he failed or readmit him after expulsion implicated setting and enforcement of academic standards – "part of any university's core mission"); see also *Shin v. Mass. Inst. of Tech.*, No. 020403, 2005 Mass. Super. LEXIS 333, at *22-23

(Mass. Super. Ct. June 27, 2005) (university's provision of medical care was "purely incidental to the university's educational mission").

Even for those acts and practices that implicate "trade or commerce," one university system remains out of Chapter 93A's reach. In 2011, U.S. District Judge Patti Saris ruled that the Commonwealth's sovereign immunity shields the University of Massachusetts from suit under Chapter 93A. *Max-Planck-Gesellschaft Zur Foerderung Der Wissenschaften E.V. v. Whitehead Inst. for Biomedical Research*, 850 F. Supp. 2d 317, 331 (D. Mass. 2011). Although the statute provides broadly that "legal entities" may be sued as defendants, Judge Saris ruled that the Commonwealth's sovereign immunity must be waived explicitly, not merely by implication. This ruling involved a patent dispute, but its reasoning appears to apply to all disputes in which the University of Massachusetts is involved. It remains to be decided whether the Commonwealth's public community colleges are also immune to suit.^[4]

Unfairness in the University Setting

A different hurdle for college students filing 93A claims is proving that the act or practice they challenge is "unfair" or "deceptive."

The concept of unfairness under 93A is notoriously hard to pin down and can only be discerned from the circumstances of each case. Courts used to ask whether the challenged conduct entailed "a level of rascality" or the "rancid flavor of unfairness," but the SJC has since described these standards as "uninstructive." *Mass. Emp'rs Ins. Exch. v. Propac-Mass. Inc.*, 420 Mass. 39, 43, 648 N.E.2d 435, 438 (1995). Instead, it advises courts to "focus on the nature of challenged conduct and on the purpose and effect of that conduct as the crucial factors in making a [Chapter 93A] fairness determination." *Id.*

In the context of higher education, courts applying 93A have been reluctant to find unfairness in institutions' generally applicable rules and practices. In one case, the Court of Appeals affirmed the denial of relief to a student whose cumulative GPA fell below the requirement for a law degree. It was "neither arbitrary nor unfair," the court observed, for the law school to include failing course grades in its GPA calculations, even when a student repeated the course and obtain a passing grade on the second attempt. *Essigmann v. W. New England Coll.*, 11 Mass. App. Ct. 1013, 1013-14, 419 N.E.2d 1047, 1048-49 (1981). In another case, the court dismissed a claim challenging the fairness of an admission system that favorably considered recommendations from the school's "alumni, students and friends" because "such a policy, if proved, would not constitute an unfair or deceptive practice." *Donnelly v. Suffolk Univ.*, 3 Mass. App. Ct. 788, 788, 337 N.E.2d 920, 921 (1975).

Deception

Given courts' general unwillingness to interfere in university-student disputes involving grades, curricula, and discipline, the strongest 93A claims against colleges and universities may involve allegations of deceptive marketing. In an enforcement action filed in April 2013 against Sullivan & Cogliano Training

Centers, a for-profit school based in Brockton, the Massachusetts Attorney General alleged that the school misrepresented, among other things, the employment opportunities available in students' field of study and percentages of students successfully placed in those fields.^[5]

In general, conduct is regarded as deceptive under 93A if it has a tendency or capacity to deceive; a plaintiff need not show her reliance on the representation or the defendant's intent to deceive. *See Aspinall v. Philip Morris Cos., Inc.*, 442 Mass. 381, 394, 813 N.E.2d 476, 486-87 (2004), *abrogated in part on other grounds by Tyler v. Michaels Stores, Inc.*, 464 Mass. 492, 502 n.15, 984 N.E.2d 737, 745 n.15 (2013). A plaintiff bringing an action for damages, however, must allege and ultimately prove that she suffered a distinct injury or harm as a result of the claimed unfair or deceptive act. *Tyler v. Michaels Stores, Inc.*, 464 Mass. 492, 503, 984 N.E.2d 737, 745-46 (2013).

One issue that has arisen in other jurisdictions is the extent to which the relative sophistication of students or graduates should be considered in assessing deceptive marketing claims. In one "law school scam" case, the trial court in New York held that publicized employment figures were not materially misleading in part because "reasonable consumers – college graduates – seriously considering law schools are a sophisticated subset of education consumers, capable of sifting through data and weighing alternatives before making a decision regarding their post-college options, such as applying for professional school." *Gomez-Jimenez v New York Law Sch.*, 943 N.Y.S.2d 834, 843 (N.Y. Sup. Ct. 2012). On appeal, the Appellate Division agreed that the law school's "statistical gamesmanship" did not give rise to a claim under New York's consumer protection statute; it was not a violation to "simply publish[] truthful information and allow[] consumers to make their own assumptions about the nature of the information." *Gomez-Jimenez v New York Law Sch.*, 956 N.Y.S.2d 54, 59 (N.Y. App. Div. 2012). Nevertheless, the court noted its disagreement with the view that "college graduates are particularly sophisticated in making career or business decisions"; to the contrary, it observed, "they sometimes make decisions to yoke themselves and their spouses and/or their children to a crushing burden because the schools have made misleading representations that give the impression that a full time job is easily obtainable when in fact it is not." *Id.* at 60. Recently, the Sixth Circuit affirmed the district court's dismissal of a similar suit, holding in part that Michigan's consumer protection law did not apply because the graduates' reliance on the law school's employment statistics was unreasonable. *MacDonald v. Thomas M. Cooley Law Sch.*, No. 12-2006/2130, 2013 U.S. App. LEXIS 15444, *2 (July 30, 2013).

In addition to contesting misrepresentation claims on their merits, schools accused of deceptive marketing may have a defense under section 3 of Chapter 93A, if the representations at issue were authorized by regulation. Institutions of higher education in the Commonwealth are subject to extensive regulations by both the U.S. Department of Education and the Massachusetts Department of Elementary and Secondary Education, and this regulation includes dozens of consumer-related disclosure and reporting requirements on such topics as textbook prices, graduation rates, and credit transfer policies. Liability

under 93A does not override the complex and nuanced judgments of regulators charged with overseeing the work of higher education.

Similarly, Chapter 93A does not supplant traditional principles of contract and tort law. Many aspects of the student-college relationship are contractual in nature, involving admission agreements, student manuals, and other materials. Even though Chapter 93A is “not subject to the traditional limitations of preexisting causes of action,” *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 704, 322 N.E.2d 768, 779 (1975), there is no indication that it was intended to serve as a gap-filling cause of action for students who cannot prove that the university breached its contractual obligations. See, e.g., *Showell v. Trs. of Boston Univ.*, No. 935815, 1994 Mass. Super. LEXIS 594, at *3 (Mass. Super. Ct. June 30, 1994) (summarily dismissing 93A claim after concluding that student alleging that university failed to inform her about prerequisite for professional classes failed to state claim for breach of contract). Nor does 93A change the general rule that university officials do not owe a fiduciary duty of disclosure to current or prospective students. See *Morris v. Brandeis Univ.*, 60 Mass. App. Ct. 1119, 2004 WL 369106, at *4 (Mass. App. Ct. Feb. 27, 2004) (citing *Sullivan v. Boston Architectural Ctr., Inc.*, 57 Mass. App. Ct. 71, 774, 786 N.E.2d 419, 421 (2003)).

Conclusion

Under existing law, substantial barriers stand in the way of students who file Chapter 93A and other consumer-protection claims against colleges and universities. Courts have traditionally deferred to the good-faith judgments of college and university administrators and declined to find that acts involving normal university operations either occurred in “trade or commerce” or constituted unfair or deceptive conduct. This reluctance reflects both limitations imposed by the statute and a general skepticism about the idea that students are consumers. Higher education has long been perceived as a long-term process of discovery and human development – far more complex than the satisfaction of a consumer’s immediate needs and desires.

This perception, however, may be changing. College ranking guides published by *U.S. News & World Report* and others have revolutionized how high school students select institutions of higher learning. New federal initiatives allow prospective students to research those institutions where, in President Obama’s words, “you can get the most bang for your educational buck.”^[6] In their competition for applicants and tuition dollars, colleges and universities have implemented sophisticated marketing and branding campaigns. Some have invested in “consumption amenities” like climbing walls, pools, and luxury dormitories. Many institutions, often partnering with private companies, have begun to implement “massively open online courses,” or MOOCs, as a less expensive, though less intimate, way of delivering knowledge to students.

These developments have the potential to transform American higher education. They may also end up fundamentally changing the student-university relationship. If that happens, courts may be inclined to

reexamine their traditional deference to institutions of higher learning. At least for now, however, institutions that do not abuse their trust or lose sight of their primary responsibility as educators will have strong defenses to claims under 93A.

Robert Toone is a partner at Foley Hoag focusing on financial and commercial litigation, education, and government investigations. He can be reached at rtoone@foleyhoag.com.

Catherine Deneke is an associate at Foley Hoag with a practice focus in education and complex commercial litigation. She can be reached at cdeneke@foleyhoag.com.

[1] So far, all but one of these “law school scam” suits has been dismissed. In March 2013, a federal judge in New Jersey allowed a suit against Widener University School of Law to proceed based on allegations that the school published misleading and incomplete post-graduate employment data. See *Harnish v. Widener Univ. Sch. of Law*, No. 2:12-cv-00608, 2013 U.S. Dist. LEXIS 38514 (D.N.J. Mar. 20, 2013).

[2] A survey by the National Consumer Law Center found that Chapter 93A is one of the strongest consumer protection laws in the nation, with its only perceived weakness being its requirement that consumers submit a demand letter to a defendant 30 days before suit.

[3] In 2010, Tom Harkin, chairman of the U.S. Senate Committee on Health Education Labor & Pensions, launched a two-year investigation into for-profit colleges. The following year, a number of state attorneys general, including Massachusetts’s Martha Coakley, initiated their own investigations into the industry.

[4] Courts in other jurisdictions have grappled with whether community colleges are immune for suit under consumer protection statutes. See, e.g., *Meyer v. Cmty. Coll. of Beaver Cnty.*, 30 A.3d 587 (Pa. Commw. Ct. 2011) (holding that immunity does not apply to consumer fraud claims sounding in contract against community college), *appeal granted in part*, 51 A.3d 177 (Pa. 2012).

[5] This enforcement action is pending. Although there are important procedural differences between 93A actions brought the Attorney General and by private plaintiffs, the same substantive standards for determining whether an act or practice is unfair or deceptive apply.

[6] In his 2013 State of the Union, the President Obama announced a “college scorecard” web site designed to inform students about different colleges’ cost, value and quality. In an effort to promote “transparency in college tuition for consumers,” Congress also requires that each college and university receiving federal student aid post a “net price calculator” that compares the costs of attendance and the average aid received.

Predictive Coding: Process and Protocol

by Andrew Gallo and Sarah Kim

Practice Tips



Introduction

Electronic discovery is a fact of life in most business litigation. As use of email and text messaging increases, so has the burden of reviewing electronically stored information (“ESI”). The tried and true method for reviewing voluminous ESI is for attorneys to examine on a document-by-document basis ESI identified through search terms. However, in large cases a document-by-document manual review – even after search term culling – may be extremely expensive and time consuming. Recently, courts have begun to embrace predictive coding as an acceptable method of technology assisted review (“TAR”), which may alleviate these burdens. See, e.g., *Da Silva Moore v. Publicis Groupe & MSL Group*, 287 F.R.D. 182, 192 (S.D.N.Y. 2012) (Peck, Mag. J.), *aff’d*, No. 11 Civ. 1279, 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012) (Carter, J.). In *Cambridge Place Investment Management Inc. v. Morgan Stanley & Co., Inc.*, SUCV2010-2741-BLS1 and SUCV0211-0555-BLS1 (Billings, J.), a Massachusetts court recently approved the use of predictive coding.

As courts accept predictive coding, most (including the *Cambridge Place* court) will require parties to negotiate protocols for its use. This article provides an overview of predictive coding and highlights issues likely to arise when negotiating such a protocol.

Process

Predictive coding is a process by which a computer is “trained” through the use of an algorithm to rank documents by the likelihood of their responsiveness to discovery requests. The technology is similar to that used by internet search engines, like Google, to recommend relevant web pages based upon the search terms identified by the user.

The first step in the predictive coding process is to choose a “Review Set” of ESI for review. In larger cases, this means identifying custodians likely to have responsive documents and agreeing on a date range for the collected ESI. Because of efficiencies (discussed below), predictive coding allows for a broader review set than a traditional document-by-document review of ESI. Parties may also agree that only documents that contain certain search terms will be included in the Review Set.

Once the Review Set is collected and the documents aggregated, a subset of documents from the Review Set is randomly selected to form a “Seed Set.” Attorneys familiar with the case will look at each document in the Seed Set and code them as either responsive or non-responsive to the case’s document requests.

Using an algorithm, the computer then analyzes the coded documents in the Seed Set. The computer “learns” by identifying the characteristics that distinguish responsive documents from non-responsive ones, such as the frequency of particular words and phrases and their proximity to one another.

Once “trained,” the computer analyzes the remaining documents in the Review Set to rank and group them into “tiers” based upon the likelihood that they are responsive to the requests used to code the Seed Set. The uppermost tiers contain the documents most likely to be responsive and the lowest tiers contain those least likely to be responsive. By placing documents in tiers, predictive coding enables parties to prioritize the review of the documents most likely to be responsive. A party may decide to produce all ESI in the uppermost tier with minimal additional review and to discard ESI in the lowest tier without additional review. Thus, predictive coding can eliminate a significant amount of document-by-document review.

Further, studies show that predictive coding can find responsive documents more accurately than a manual review. Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, XVII Rich. J.L. Tech. 11, 4-5, 48 (2011); Herbert L. Roitblat, Anne Kershaw & Patrick Oot, *Document Categorization in Legal Electronic Discovery: Computer Classification vs. Manual Review*, 61 J. Am. Soc’y for Info. Sci. & Tech. 70, 79 (2010).

Protocol

The courts that have sanctioned predictive coding, including the BLS in *Cambridge Place*, have done so only after approving a (typically agreed-upon) protocol for its use. Some or all of the following issues are likely to arise when negotiating a protocol with an opposing party:

1. **Search Terms.** Using search terms to select documents for the Review Set can aid the process by creating a Review Set that is “richer” with responsive documents. The computer can then be trained more easily and accurately. At least one recent case has sanctioned using search terms in this manner. *In re Biomet M2a Magnum Hip Implant Prod. Liab. Litig.*, No. 3:12-MD-2391, 2013 WL 1729682, *2 (N.D. Ind. Apr. 18, 2013). Search terms can also be used when negotiating how to review the various

document tiers. One way to review the lower tiers is to agree to review only documents from those tiers that “hit” on agreed search terms.

2. **Non-Responsive Documents.** Some protocols allow the producing party’s responsiveness decisions to be “double checked” by permitting the opponent to review the documents marked as non-responsive in the Seed Set. Litigants have legitimate concerns about exposing non-responsive documents to an opponent and the right to such secondary review is far from settled (such a review is a foreign concept in a standard manual review). If review of non-responsive documents cannot be avoided, a compromise may be to agree to share a small, but statistically significant, subset of non-responsive documents. If there are concerns about sensitive material, parties can use a log (similar to a privilege log) to identify rather than produce non-responsive documents.

3. **The Tiers.** How the various tiers of documents are treated is key to the predictive coding process. Issues likely to arise are whether and to what extent documents in the uppermost tiers need to be manually reviewed prior to production and whether the lowest tiers can be disregarded without additional review. If lower tiers are to be disregarded, then the requesting party will want to ensure that the predicted number of responsive documents in those tiers is below some statistical threshold. Parties may agree upon a method to manually review a statistically significant sample from the lower tiers to test the computer’s predicted responsiveness rate. Most e-discovery vendors employ statisticians who should be used to assist with the formation and negotiation of these technical aspects of a predictive coding protocol.

4. **Statistical Data.** The amount of statistical data provided to an opponent may be an area of negotiation. Common metrics include the amount of ESI in each tier and a comparison of the computer predicted and the actual responsiveness rate (after manual review) of the ESI in tiers that are manually reviewed.

5. **Key Unique Terms.** Parties can agree that any ESI in the Review Set that “hits” on terms that are unique to a case (i.e., a party’s name) be automatically elevated to the highest tier. These should be terms that are highly likely to be found only in responsive documents; otherwise, their use will undermine the predictive coding process.

6. **Enrichment Documents.** In addition to using the Seed Set, parties often pick “Enrichment Documents” central to the case (such as a contract) to train the computer. Resolving disagreements about the identity and number of such documents may involve each side identifying an equal number of such documents. Parties should consult with e-discovery experts as to whether the use of such documents may statistically impact the review results.

The use of predictive coding is increasing as more courts accept the technology. While it offers efficiencies for reviewing documents, the overall cost and time savings will depend upon how easily the technology is accepted in the case and the burdens associated with negotiating and implementing the

protocol. The costs of implementation should decrease as the technology becomes more widely accepted and protocols are standardized.

Andrew J. Gallo is a partner with the firm Bingham McCutchen LLP, where his practice focuses on complex commercial litigation and creditor representation in bankruptcy with an emphasis on the representation of financial institutions.

Sarah G. Kim is counsel with the firm Bingham McCutchen LLP, where her practice focuses on securities enforcement, securities litigation, and broker-dealer defense.