

# Boston Bar Journal

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## Introducing the BBA Statewide Task Force to Expand Civil Legal Aid in Massachusetts

by J.D. Smeallie

### President's Page



At a dinner last March, I sat next to the Editor in Chief of *American Lawyer*. I told him that I would soon be the president of the Boston Bar Association and that one of the perks was the opportunity to create an initiative for my year as president. I then ran by him some of the initiatives I was considering. When I got to the topic of civil legal aid, he stopped me and said there is nothing more important that a bar association can do than to fight for civil legal aid for those in need. His passion on this point resonated with me, and I knew then that the advancement of civil legal aid would be my cause during my upcoming term as president.

Shortly thereafter, the Chief Judge of the State of New York gave a speech at Harvard. He spoke of a task force that he had created to expand civil legal aid. The task force was comprised of a statewide group of lawyers, judges, business leaders, academics, union leaders and legal aid attorneys. What struck me most about their effort was how they demonstrated that increased state funding for civil legal aid actually saved the state money, while bringing in increased federal aid. The New York task force's

report was so persuasive in this regard that the state legislature there agreed to increase legal aid funding from \$200 million to \$300 million over a four year period.

For the past several months, I have visited with state legislators, bar leaders, legal aid attorneys, business leaders and other stakeholders to discuss the creation of a similar statewide initiative in Massachusetts. Without exception, those with whom I met acknowledged the problem. With federal funding of the Legal Services Corporation constantly shrinking, and IOLTA funding all but drying up, overall funding for civil legal aid has been on the decline in Massachusetts for years. At the same time, the need for representation in matters involving basic human needs like housing, prevention of domestic violence, and health care has been on the rise. In 2012, fully half of the people eligible for civil legal aid in Massachusetts had to be turned away because staffing at legal aid agencies had been slashed. As a result, poor people have to navigate our judicial system without the benefit of counsel. The situations in our Housing Courts and Probate and Family Courts are particular bleak. 95% of those who appear in the Housing Court are unrepresented. The percentage is not much better in the Probate and Family Courts. There, 80% of the litigants do not have a lawyer. There, 80% of the litigants do not have a lawyer.

All of those with whom I have met agree that a statewide initiative to examine the unmet need for civil legal aid across the state and to determine the most cost effective way to meet that need is a good idea. We are lucky to have the benefit of the good work already undertaken by our Access to Justice Commission, and we do not intend to repeat their efforts to provide help to unrepresented litigants. We do expect to follow the lead of the New York task force and examine whether increased funding for civil legal aid can save the state money in the costs of homelessness, domestic violence prevention and various forms of aid which can be replaced by federal benefits, as was found to be the case there.

So, a BBA task force, named the Statewide Task Force to Expand Civil Legal Aid in Massachusetts, is now taking shape. Among those who have agreed to serve on the task force are the general counsels of five major Massachusetts based companies, a former president of one of our major universities, our Attorney General, the Governor's Chief Legal Counsel, the managing partner of one of our largest law firms, and the current President of the Massachusetts Bar Association. We anticipate adding leaders from the legal aid community, state Representatives and Senators, and a union representative. We expect to complete our work and present a report in the spring of 2014.

Our system of justice is measured by how we treat those most in need, but we are not measuring up at the moment. If the experience in New York is indicative of what we may find and recommend here, the hope is that we can to reverse the trend and to begin to expand civil legal aid for our state's poorest citizens, while saving the state money in the process.

# Reflections on My Rookie Year

by Judge Robert B. Foster

## Voice of the Judiciary



This past December 30th marked the first anniversary of my taking the oath as a Justice of the Land Court. Now that I'm no longer a rookie judge, it's a good time to reflect on my first year on the bench.

First, let me answer the two questions everyone asks. Yes, there is a gavel on the bench, but I've never used it. No, the court didn't give me a robe; I bought it myself, online. Very quickly, I learned to hike it up when I sit down so I don't get it caught under the wheel of my chair. It took me longer to learn the Court's internal procedures and to navigate the route to our courtrooms. The Land Court staff was enormously helpful and patient in guiding me through these equally difficult mazes. I especially appreciate their many subtle, face-saving hints, such as, "No, judge, that's the elevator for the prisoners!"

What I never fully appreciated until I joined the bench, though, was the paradox at the heart of judging. I am constrained by the law—no matter what I think, I am legally, ethically, and morally bound to follow the law as stated in our statutes and interpreted by the SJC and Appeals Court, and to apply that law to the facts of the case to the best of my ability. At the same time, in every case I must make decisions, for the most part unreviewable, for which there is no other guide but my knowledge guided by my experience—for lack of a better word, my judgment. More often than not, these decisions test that judgment, and I am left to do my best, knowing that a decision is necessary, even if it is not the one that others might make or that even I might make with more experience.

It is with this paradox that I most need the lawyers' help. I always try to remember that lawyers are before me because they are helping clients who believe they have been wronged. At the same time, lawyers should know that they are my partners in our common pursuit of justice. I'm fully aware that how the law applies to the facts is not often self-evident. Like every judge, I rely on the lawyers for well-written, well-researched briefs that educate me about the case. I need the lawyers to bring to my attention all applicable law, including contrary cases, and all relevant facts, even the unfavorable ones. The lawyer's job is to show me the path through all the facts and the law, good and bad, to the result the lawyer is seeking.

Oral argument is as important to me as the briefs. On motions to dismiss or for summary judgment, I use the oral argument to test the limits of each side's position and to give one side the chance to respond to the other side's arguments. I look for where the parties agree so that I can identify what's really disputed. But where oral argument is especially important is in helping me with the "judgment" decisions, for which there are always considerations beyond a reading of the law. This is where the lawyer's advocacy skills really come into play. I need the lawyers to make sure that I'm taking into account all the considerations important to their clients when I make a decision.

To that end, allow me to provide some advice, based on my entire fourteen months on the bench. The lawyer's presence and behavior in court has a profound effect on the proceedings. This is especially true at trial, where counsel is, in effect, the surrogate for the party, and where the lawyers and I are interacting over the course of several days. It is important to remember that, like the Eye of Sauron, "I see you." I see every eye roll in response to an opponent's argument, every shrug in response to a sustained objection, every whisper to co-counsel in response to disbelieved testimony. I especially notice the demeanor and behavior of counsel towards the witness and towards opposing counsel. I'm happy to say that the vast majority of the lawyers before me show real courtesy and civility to each other and to witnesses. But the lawyer's demeanor goes deeper than civility.

Many lawyers, it seems to me, advocate from anger. This is natural—after all, the lawyer is here because her client, whether plaintiff or defendant, claims to have been wronged by the actions of the other side. The lawyer wants me to understand, even to feel the injustice done to her client. The most direct way to communicate this injustice, many lawyers believe, is to express the anger that their clients naturally feel at being in court.

This approach, while understandable, is ultimately self-defeating. Anger begets anger, and interferes with reaching a just outcome, either negotiated among the parties or issued by the judge. My experience has been that the most effective lawyers advocate from a position, dare I say it, of joy. They express joy at the opportunity to present their clients' stories and to convince me of the justice of their cause. This is not some new age inner bliss; it is the fierce joy of battle. These lawyers relish the give and take, and embrace the role of partner with the court in reaching the right outcome for their clients. Advocating from joy does not mean shying away from one's position; the most zealous and vigorous advocates in my court have been the joyous ones. In enjoying their advocacy, they give emotional support to their position. They invite, rather than insist, that the judge join them in looking favorably on their clients. They lead the judge to the conclusion that ruling for their clients is necessary to follow justice.

At my swearing in, I quoted those words of Moses: "Justice, justice shalt thou follow." My rookie year has convinced me more than ever that this is our task, to follow justice. It is the work of a lifetime, both for me as a judge and for the lawyers appearing before me. But it is one we all should pursue with joy. As the saying goes, it is not incumbent upon us to finish the task, but neither are we free to desist from doing it.

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# Are In-Firm Communications About A Current Client Privileged?

by David A. Barry and William L. Boesch

## The Profession

### Introduction



In the midst of a law firm's handling of a case, a client announces that he believes the firm may have mishandled the matter and that he has retained separate counsel to evaluate the firm's work. The client insists that the firm continue to handle the matter because withdrawing now would be prejudicial. He says that if the case turns out badly, he will seek indemnity from the firm for his losses.

The lawyers involved in the case turn to their colleagues for advice. They talk and exchange e-mails with the firm's managing partner, and with others in the firm who have experience in the subject-matter of the case and in professional-liability matters. The managing partner requests a detailed memorandum explaining how the case was handled and why the now-disputed decisions were made.

If a malpractice lawsuit follows, are these in-firm communications privileged against discovery? The ongoing fiduciary obligation of a firm to a current client, and the potential for conflict between the firm's own interests and those of a client who threatens a malpractice claim, have prompted judges in a series of cases to hold that in-firm communications such as those described in the example above are not privileged, even if conducted with the express purpose of seeking and obtaining legal advice about the client's threatened claim. *E.g.*, *In re Sunrise Securities Litigation*, 130 F.R.D. 560 (E.D. Pa. 1989); *Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A.*, 220 F.Supp.2d 283 (S.D.N.Y. 2002); *Koen Book Distributors, Inc. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283 (E.D. Pa. 2002).

This view, sometimes referred to as the “fiduciary exception” to the attorney-client privilege, was adopted by Judge Gorton of the District of Massachusetts in a 2007 ruling in *Burns v. Hale & Dorr LLP*, 242 F.R.D. 170, and by Judge Stearns in a brief 2011 decision in *Cold Spring Harbor Laboratory v. Ropes & Gray LLP*, 2011 WL 2884893.

### **The RFF Family Partnership Case**

In a November 2012 decision, however, Massachusetts Superior Court Judge Thomas Billings joined what may now be a counter-trend in favor of recognizing a privilege for in-firm communications on current-client matters, at least under certain conditions. *RFF Family Partnership, LP v. Burns & Levinson, LLP*, 30 Mass. L. Rptr. 502 (Mass. Super. Ct. Nov. 20, 2012). See also, e.g., *TattleTale Alarm Systems, Inc. v. Calfee, Halter & Griswold, LLP*, 2011 WL 382627 (S.D. Ohio Feb. 3, 2011); *Hunter, MacLean, Exley & Dunn, P.C. v. St. Simons Waterfront, LLC*, 730 S.E.2d 608 (Ga. App. 2012).

Judge Billings’s decision produced an interlocutory appeal which the Supreme Judicial Court has taken for itself to decide (the case is SJC-11371) which as of this writing has been briefed and argued, and is under advisement. As we discuss below, Massachusetts lawyers will watch with interest to see whether the SJC uses this occasion to announce general rules on the subject of in-firm communications. Whether or not the Court does so, lawyers and firms may want to examine their procedures for responding to client disputes.

In *RFF Family Partnership*, the law firm handled a real estate loan foreclosure that produced a dispute over lienholder priority. The client retained a second lawyer, who sent a malpractice claim letter and draft complaint to the law firm, and demanded indemnification from any loss the client might suffer due to the firm’s alleged failure to detect, report and address the competing liens. The letter prompted an internal meeting at the firm between the lawyers involved in the matter and the firm’s managing partner.

When a malpractice suit was filed more than a year later, the firm took the position in discovery that the in-firm meeting was for the purpose of seeking the managing partner’s legal advice on how to respond to the potential malpractice claim. The plaintiff-client argued that even if this was so, the meeting occurred at a time when the law firm owed the client a fiduciary duty of disclosure as to facts material to the client’s interests, and that this fiduciary duty precluded the firm’s invocation of the attorney-client privilege.

### **Judge Billings’s Decision**

In his November decision, however, Judge Billings observed that the fiduciary exception was originally developed to address situations in which a trustee sought legal advice, at the expense of trust beneficiaries, to guide the administration of a trust. Here, by contrast, the lawyers obtained legal advice at the firm’s own expense and solely for the firm’s protection.

Further, Judge Billings did not see any inherent inconsistency between a lawyer’s ongoing duty to disclose facts affecting the client’s interests—a duty that exists regardless of the lawyer’s decision as to

whom, if anyone, to consult—and the reasons for encouraging a lawyer faced with a malpractice claim to seek the advice of another lawyer about how to evaluate and respond to the claim. Judge Billings reasoned that unless facilitating such advice-seeking is somehow perceived as likely to result in the involved lawyer's deciding to conceal something from the client that he has a duty to disclose, there is no good reason to deny protection to the advice-seeking communications. Indeed, he suggested, it may be in the interests of the client as well as the lawyer that the latter be free to explore issues freely with competent ethics or professional-liability counsel, without the cloud of potential future disclosure.

Thus, the judge upheld in principle the law firm's invocation of the privilege as to the in-firm communications to the extent they sought or gave legal or ethical advice. However, he found the firm's discovery responses inadequately detailed and ultimately held that the firm had partially waived the privilege.

### **The Outside-Counsel Option**

If the SJC decides to explore the boundaries of the in-firm privilege in the *RFF Family Partnership* case, the Court might, of course, adopt the absolutist view exemplified by the two federal decisions cited above, and hold that a firm's obligations to its client simply bar any potential in-firm privilege. In that event, it will become critical for a firm faced with a potential malpractice lawsuit by a current client to consult with a specialist lawyer *outside* the firm, and to ensure that the firm's lawyers understand when such consultation should supplant internal communications among colleagues. Engaging an outside lawyer provides a basis for clearly distinguishing between actually seeking legal advice about the threatened claim and merely discussing the matter as part of the business of running the firm. And since the outside specialist clearly owes no direct or imputed duty to the client, a claim of privilege will not be in tension with such competing obligations.

### **Establishing an In-House Counsel Role**

If the SJC were to uphold Judge Billings's decision, there may still be many situations in which, for the reasons given above, consultation with outside counsel is the more sensible response to a malpractice threat from a client. But assuming this is not an option for a firm, either in general or in a particular matter, then it will be critically important (under a regime in which in-firm communications may be protected) that the role of the in-house advisor or advisors be clearly pre-established and defined. The firm's goal should be to give itself a solid basis for arguing that any potential conflict of interests for the lawyers involved in representing the client alleging malpractice should not automatically be imputed to the in-house lawyer or lawyers from whom the involved lawyers seek advice. Rather, the in-house lawyer should be treated as the functional equivalent of an outside attorney for the firm, with whom confidential communications would undoubtedly be privileged.

Large firms may have the ability to create a full-time in-house counsel position and to appoint in that role a lawyer who has no involvement whatsoever in representing the firm's clients. Smaller firms may be able

to establish the role only on a part-time basis, but should do so with similar formality, so that when the in-house lawyer is consulted about the threat of a malpractice claim, it is clear in what capacity her advice is being sought. Choosing a lawyer with particular experience and expertise in professional-liability or ethics matters, and/or providing opportunities for the lawyer to seek special training on such issues, may help to distinguish the role. Referring to the position on the firm's website will also help to establish it as a matter of record.

### **Further Issues and Options**

It may be useful, if it can be done gracefully, to refer to the in-house counsel role in a firm's standard engagement letter, and to explain that lawyers in the firm may from time to time seek internal legal or ethical advice on a confidential basis. The in-house lawyer should have a designated matter number for recording her time spent on consultations and investigations, and no such activity should be recorded or billed by anyone to the client's matter. Likewise, e-mail and other documents should, when created, clearly signal that they relate to the internal consultation or investigation rather than to the client's matter itself, and strict segregation between the files should be maintained.

Mere creation of an in-house counsel position will not prevent practical difficulties; they are inevitable. For example, in the part-time arrangement likely to be suitable to smaller firms, since the in-house lawyer cannot be consulted as such where she herself is involved in representing the client alleging malpractice, one or more backup lawyers may need to be designated for such contingencies. And judgments will still have to be made as to when a particular issue leaves the realm of everyday conversation between colleagues, and graduates to the actual seeking of legal advice from in-house counsel.

Finally, whether consultation about a potential malpractice claim occurs within a firm or with outside counsel, the lawyer or lawyers involved in the ongoing representation of the client have an ongoing duty—one not altered by the fact of the consultation, or by whether or not it may ultimately be deemed privileged—to provide the client with information known by the involved lawyers that affects the client's interests. The involved lawyers must also fairly assess and communicate with the client about whether and how they can continue with the representation given the threatened malpractice claim. Here again, this obligation is unaffected by whether or with whom the involved lawyers have consulted about the potential claim.

### **Conclusion**

Yet despite these complications, and while Massachusetts lawyers will watch with interest to see whether the SJC uses the *RFF Family Partnership* case to provide guidance on this topic, it seems likely that attention to the concepts and formalities described in this article will continue to be important in ensuring that a lawyer threatened with a malpractice claim has an opportunity to seek advice about the threat, and to do so on a confidential and protected basis.

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# Government Professionals as False Claims Act Whistleblowers, and What Massachusetts Agencies and Municipalities Can Do About It

by Chris Barry-Smith

## Heads Up



Spurred by federal monetary incentives, the Massachusetts legislature in 2012 amended the Massachusetts False Claims Act, G.L. c. 12, §§ 5A-5O (“MFCA”) to allow government professionals not only to blow the whistle, but potentially profit handsomely for doing so. This article suggests some measures by which state agencies and municipalities may be able to avoid a financial windfall to senior employees who bring whistleblower claims.

### I. Background

When Massachusetts enacted the MFCA in 2000, the legislature excluded senior government professionals from the universe of potential relators who could file false claims lawsuits seeking treble damages and civil penalties on behalf of the government. G.L. c. 12, § 5G(4) (prior to amendment) (excluding any “auditor, investigator, attorney, financial officer, or contracting officer”). The exemption reflected a line of federal cases that had prevented certain government employees from acting as relators. Federal courts typically permitted relator suits by government employees who had no explicit obligation to disclose information to their employer, notwithstanding a “legitimate argument that every government employee has a fiduciary obligation to report fraud,” but restricted suits by those whose job responsibilities included detecting fraud. Boese, *Civil False Claims and Qui Tam Actions*, § 4.01[b](8), at pp. 4-26 to 4-27. See, e.g. *U.S. ex rel LeBlanc v. Raytheon Co.*, 913 F.2d 17, 20 (1<sup>st</sup> Cir. 1990) ; *U.S. ex rel. Fine v. Chevron, U.S.A.*, 72 F.3d 740, 743-44 (9<sup>th</sup> Cir. 1995) ; *U.S. ex rel Biddle v Stanford Univ.*, 147 F.3d 821, 829 (9<sup>th</sup> Cir. 1998) .

In 2012, the Massachusetts Legislature struck this exemption from the MFCA. The impetus of this Beacon Hill amendment was Senator Charles Grassley (R-Iowa), a champion of relator rights. Since 2006, the Social Security Act has provided a financial incentive to states that enact false claims acts (“FCA”) to combat Medicaid fraud “that are *at least as effective in rewarding and facilitating qui tam actions* for false claims as . . . the federal FCA.” 42 U.S.C. §1396(h). The HHS Inspector General in consultation with DOJ determines if a State FCA is sufficiently favorable to relators, and Senator Grassley monitors to ensure their task reflects relator-friendly rigor. States that pass the test obtain a 10% increase in the state “share” of Medicaid fraud recoveries (for Massachusetts roughly 60% of recoveries instead of 50%). Because the Attorney General’s Office’s Medicaid Fraud recoveries can exceed \$85 million annually (in 2012, reflecting state and federal shares of recovery), failing this test stood to cost the Commonwealth millions of dollars. After the HHS Inspector General informed the Massachusetts Attorney General’s Office (“AGO”) in 2010 that the MFCA was not compliant, the AGO worked with the Legislature to enact a small package of MFCA amendments. With millions of dollars at stake, the State Legislature deleted the exemption.

As a result, government managers, and perhaps even outside professionals hired by the government, may now stand to reap the benefits of acting as relators (ranging from 15 to 30 percent of any ultimate recovery, plus costs and fees). MFCA, § 5F(1) & (4). This incentive contrasts sharply with the traditional expectations for government professionals: to avoid fraud, waste or abuse, or if contracting abuses are detected, to fix the problem — directly and internally rather than through a relator suit. State and municipal managers can hope and expect that government professionals will report and remedy contracting fraud internally, but — in light of the 2012 amendments permitting their employees to act as relators — they would be wise to consider some more affirmative options.

## **II. Potential Options For Government Employers**

Any discussion of the tools government employers might employ to avoid or minimize the risk of their employees acting as relators must take into account section 5J of the MFCA, which prohibits agencies from restricting their employees from bringing actions or reporting violations under the MFCA. G.L. c.12, § 5J(1). Although this provision almost certainly was not drafted with government employers in mind, no explicit distinction between public and private employers is made. Therefore, section 5J may well preclude some, but probably not all, tools available to municipal and agency managers.

There is no reason to think that § 5J eliminates existing ethical and conflicts of interest laws that apply to government employees. These remain the most effective tools available to government employers seeking to address the implications of relator suits by employees. Massachusetts law demands of government employees, among other things, undivided loyalty, service free from conflict of interest, and prohibits profiting from one’s government service.

See G. L. c. 268A, §§ 4, 6, & 17-19 (similar restrictions for municipal employees); Ethics Commission, Summary of the Conflict of Interest Law, at IV.d. Given these laws, government employers may wish to consider the following requirements directed to senior employees and others with an obligation to report or detect fraud.

*Contractual Prohibition on Government Professionals Serving as Relator?* As a threshold matter, a complete bar on government professionals as relators may run afoul of Section 5J(1) and certainly invites litigation concerning its validity. Though conflict of interest law might justify a ban on government manager relators, section 5J(1) counsels toward a less onerous approach that still may protect the government's interests.

*Restricting Relator Recoveries or Requiring Relators to Share their Recovery with the Employing Agency or Municipality.* An agency or municipality could require that a relator's recovery be directed — in whole or in part — to the government employer. An employment contract — grounded in ethics laws that prohibit financial benefits (beyond salary) to government employees for performing their work — might be the legal basis for requiring that any financial benefits derived from the employee's work be directed to the government. Alternatively, the employer could consider allowing the employee to keep some percentage of the recovery. This would maintain the MFCA's financial incentives but direct those incentives to the harmed agency instead of an employee doing nothing more than performing his or her job.

Section 5J(1) remains relevant to this "forced sharing" arrangement because it invalidates employment conditions that "limit or deny" relator rights. But the government employer can point to ethics law — which prohibits employees from financially benefiting from their work (G.L. c. 268A, §§ 4, 6) and generally forbids conflicts of interest — as a sound basis to restrict not a relator's whistleblowing itself but the potential windfall for doing nothing more than one's job. This approach also serves the overarching FCA principle that fraud should be uncovered and punished, but adjusts the FCA's financial incentives in light of ethics laws applicable to government employees. Should litigation arise over this approach, the would-be relator would be in the unenviable position of fighting only for his payday instead of advocating for the broader benefits of exposing and remedying contractor fraud.

*Requiring Prompt Disclosure to Employer of Evidence of Contractor Fraud or Abuse.* Government employers would be well served to memorialize, in contracts, manuals or policies, the obligations of employees to report suspected contracting fraud or abuse. This will serve to instruct employees on the agency's expectations for all employees. It also will bolster the position that a would-be relator has violated known policies when the employee chose to file a confidential relator action instead of reporting and pursuing a remedy internally. To take those rules into the FCA context, an employer could also identify the government alternative to remedying contractor fraud by describing how the particular agency will treat disclosures of fraud or abuse. For instance: after investigation, if the allegations appear to rise above typical contract disputes, the agency will refer the allegations to the Massachusetts AGO for

investigation under the MFCA. Further, the agency could instruct that employees may also report suspected fraud directly to the AGO or Inspector General; although that may invite external reporting, it accounts for the possibility of supervisor complicity in the alleged fraud. These types of policies highlight in an eventual relator dispute that limiting government relators does not limit FCA investigations and recoveries, because the AGO offers agencies and municipalities an alternative and meaningful route to FCA recovery. Because the MFCA applies to all “political subdivisions,” the AGO routinely and seriously investigates agency and municipal referrals.

*Non-Employee Contractors who provide professional services to the government.* All of the issues raised in this article with respect to government employees may also arise with non-employee professionals hired by the government. The former section 5G(4) would have exempted certain contractors from relator status but no longer does; and section 5J(1) arguably limits restrictions on relator status for contractors as for employees. Conceivably, a third party auditor hired by a municipality to assess a supplier’s adherence to a contract could, while providing the audit to the municipality, also file a relator suit seeking FCA recovery. Therefore, the contractual tools outlined here may be applicable to non-employee contractors as well.

Rather than await the potential uncertainty of a government relator suit, agencies and municipalities should consider affirmative steps that promote reporting and remedying contractor fraud but that avoid financial windfalls for government professionals who do nothing more than the job they are paid to do.

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# The Phifer and Berry Decisions And The Future Of Cell Phone Searches

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by John T. Mulcahy

## Legal Analysis



The Supreme Judicial Court (the “SJC”) recently ruled in two factually similar cases that police can conduct a warrantless cell phone search pursuant to the “search incident to arrest” exception to the warrant requirement. The SJC’s holdings leave open many questions and evolving cell phone technology will create challenges for courts as they grapple with such searches under the Fourth Amendment. This article analyzes those two cases and considers their implications and some larger questions.

In [Commonwealth v. Phifer](#), 463 Mass. 790 (2012) and [Commonwealth v. Berry](#), 463 Mass. 800 (2012), the SJC ruled as a matter of first impression that the police can search a cell phone incident to arrest. The Court noted that its holding in both cases was narrow. In [Phifer](#), the defendant moved to suppress a warrantless search of his cell phone after he had been arrested and transported to the police station. The defendant had been arrested on two outstanding warrants related to drug charges. The detective checked the call history on the phone and discovered the phone number of a person whom the police knew to be a drug user. The defendant moved to suppress; the trial court denied the motion, citing federal circuit and district court decisions holding that a cell phone can be searched incident to arrest.

The SJC ruled that the detective’s review of the defendant’s recent call history was a proper search incident to arrest. The Court relied heavily on [Commonwealth v. Madera](#), 402 Mass. 156, 159-161 (1998) in reaching its decision. In [Madera](#), the Court upheld the search of a gym bag incident to arrest where the police had probable cause to believe that bag contained evidence of the crime charged. The Court ruled that, as in [Madera](#), the police in [Phifer](#) had probable cause to believe that a search of the cell phone would turn up evidence of the crime at issue. Before the defendant’s arrest in [Phifer](#), police saw the defendant on his cell phone and saw him with someone who was a known drug user. Also, the detective had testified that drug dealers use cell phones as part of the drug trade.

The Court also ruled that even though this search was conducted at the time of booking, not arrest, it was still justified as a search incident to arrest; the delay in the search was of no importance because the cell phone found during booking had to have been on the defendant's person at the time of arrest.

The Court cautioned that its holding should be read narrowly, and that its decision would not “necessarily . . . be the same on different facts, or in relation to a different type of intrusion into a more complex cellular telephone or other information storage device.”

On the same date as the Phifer case, the SJC also issued its decision in Berry. In that case, the police saw the defendant sell heroin. After the defendant was arrested and brought back to the police station, the police officer looked at the recent call history on the defendant's cell phone and dialed the most recent phone number, which called the heroin customer. Consistent with Phifer, in Berry, the Court stated that a search of a cell phone does not have to be contemporaneous with arrest, but that it can occur during booking at the police station. The SJC held that the search was proper because it was a “very limited search” and the police had reason to search based on their experience that cell phones are used in drug transactions. The SJC again cautioned that it would not necessarily come to the same conclusion if it were dealing with different facts.

In explicitly noting the limitations of its holdings in Berry and Phifer, the SJC recognizes that the law on cell phone searches is still developing. These cases make clear that court review of cell phone searches will be a fact-specific exercise; at least for the near term, courts will not be able to establish a bright-line rule for analyzing these scenarios. The different factual scenarios and ever-changing capabilities of cell phones make the formulation of such a rule difficult. As Justice Gants' concurring opinion in Phifer points out, the SJC's comparison of cell phone searches to the search of a gym bag in Commonwealth v. Madera might have over-simplified the analysis. A gym bag is a bounded object, while the information that can be accessed through a cell phone is potentially limitless. Phifer and Berry dealt only with call history, but the average smartphone also has a camera, a calendar, maps, contacts, email, text messages, and can even contain a user's flight information and purchase information. It is obvious that this kind of information would be of great interest to law enforcement officials. Flight information and maps could quickly show a police officer the recent whereabouts of a suspect, while purchase information could reveal additional evidence.

Another example of technology's unrestricted potential is Apple's iCloud service. iCloud is a storage system that allows a user to access his or her music, email, contacts, and word-processing documents on several different devices. Information on the iCloud system exists on Apple's computer servers outside the jurisdiction of the Commonwealth's courts. Will police be able to seize a cell phone and access information that exists across multiple jurisdictions through iCloud?

A common criticism of warrantless searches of cell phones is that police can wait to obtain a warrant. The argument goes that a cell phone is different from an automobile, whose mobility means that

evidence can be lost quickly. Automobiles therefore are the proper subject for warrantless searches while cell phones are not; an officer, in possession of a cell phone, can put it away and all of the incriminating material on it is safe until he obtains a warrant. But that argument ignores the current technology. As Courts have already warned, the data on cell phones can be destroyed remotely. United States v. Valdez, 2008 WL 360548, \*3 (E.D. Wis. Feb. 8, 2008); United States v. Dinwiddie, 2008 WL 4922000, \*12 (E.D. Mo. Jan. 29, 2008).

Thus, by the time a police officer obtains a search warrant, even though the cell phone has been safely stored in an evidence locker, the incriminating evidence on that phone could be gone. Law-enforcement officials caution that this scenario could present significant problems in fighting crime.

Perhaps acknowledging that time can be of the essence in these searches, some courts rely on the exigent circumstances exception to the warrant requirement, rather than the search incident to arrest exception. United States v. Lottie, 2008 WL 150046, \*3 (N.D. Ind. Jan. 14, 2008); United States v. Parada, 289 F. Supp. 2d 1291, 1303 (D. Kan. 2003). Indeed, in contrast to the SJC, other courts have disapproved of searches that are “incident to arrest” but separate in time from the arrest. See, e.g., United States v. Gibson, 2012 WL 1123146, \*10 (N.D. Cal. Apr. 3, 2012); see also, United States v. Valdez, 2008 WL 360548, \*3 (E.D. Wis. Feb. 8, 2008); State v. Isaac, 2009 WL 1858754, \*5 (Kan.Ct. App. June 26, 2009).

The search incident to arrest doctrine raises concerns of its own. While the Phifer and Berry courts suggested that a search conducted at booking is still a search incident to arrest, other courts have interpreted the exception literally – any search later in time from the actual arrest is not a search incident to arrest. Practically speaking, police officers will not be able to search much of a cell phone at the exact time of arrest. Depending on how the search incident to arrest exception is applied going forward, a police officer might be able to get through only a small part of a suspect’s address book or recent call history before the arrest is completed. Then, police would presumably be required to obtain a search warrant for the rest of the cell phone. Police would then have to contend with the reality that they may not yet have seen the most damning evidence and that this relevant evidence could be destroyed remotely. In fact, the developing law leaves undefined the limits on the scope of a search of cell phones incident to arrest. Should police officers be able to search any phone the defendant possesses for information or files related to the crimes that they are investigating? Or should police only be allowed to search a phone that is, itself, connected to the crime being investigated? One court has answered the second question affirmatively, finding that police were not warranted in searching a cell phone while arresting an individual for public intoxication and neglect because the phone could not be tied to those particular crimes. Kirk v. State, 974 N.E.2d 1059, 1071 (Ind. Ct. App. 2012).

One thing the cases make clear is that the law is not developing at a rate that keeps pace with technology. As the cases above indicate, courts disagree about how long a search may take place after

arrest and still be “incident to arrest,” and there has been little consideration of how closely such a search must be tied to the crime being investigated. Ruling that the search is required by exigent circumstances also has its pitfalls – most obviously, the argument that, once seized and secured, a cell phone may properly be searched pursuant to a warrant. A Supreme Court concurrence offers one potential avenue for lawyers to explore in trying to explain the need for cell phone searches at the time of arrest. In the 2004 case of Thornton v. United States, 541 U.S. 615, 629-30 (2004), Justice Antonin Scalia, joined by Justice Ruth Bader Ginsburg, argued in a concurring opinion that, instead of its traditional justifications, search incident to arrest could be understood as an “evidence-gathering” tool used to compile, at the time of arrest, any evidence related to the crime charged. This conception of search incident to arrest could better be suited to the search of cell phones given the uncertainty over whether data on a cell phone can be or will be destroyed remotely.

As the SJC recognized in both Phifer and Berry, the law on cell phone searches is in its infancy. This body of law will likely force a significant development in Fourth Amendment jurisprudence. No longer is it the search of a glove box or a gym bag. Indeed, the rapid pace of innovation appears to prevent the establishment of any clear guiding principles for cell phone searches. Courts must carefully assess how traditional search and seizure principles should be applied to cell phones and how those principles could be altered to reach a common-sense approach that is constitutionally sound. The Legislature would be wise to consider these same questions in order to provide much-needed guidance to courts, and practitioners would be well advised to educate courts about the relevant technology where a cell phone search is at issue.

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# The Sword and the Shield Revisited: Developments in the Implied Waiver of Privilege

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by Jonathan I. Handler, Jillian B. Hirsch, and Emily Zandy

Legal Analysis



Recently, the Massachusetts Supreme Judicial Court (“SJC”) and the United States District Court for the District of Massachusetts both issued important decisions addressing implied waiver of the attorney-client privilege and work product doctrine under Massachusetts law. The decisions turned on application of the “at issue” doctrine: the implied waiver of privilege that occurs when a party puts otherwise privileged information “at issue” in litigation. Massachusetts courts have previously held that privilege waiver occurs when the privilege holder affirmatively interjects the substance of otherwise privileged information into a claim, counterclaim or defenses and an opposing party needs access to that information to respond properly.[1]

But Massachusetts courts have not, until now, explored in detail the considerations of fairness that factor into whether waiver has occurred. The courts’ decisions in *Clair v. Clair*, No. SJC-11256, 2013 Mass. LEXIS 10 (Mass. Jan. 25, 2013), and *Columbia Data Products v. Autonomy Corp. Ltd.*, C.A. No. 11-12077-NMG, 2012 U.S. Dist. LEXIS 175920 (D. Mass. Dec. 12, 2012), provide practitioners with much-needed guidance on those considerations by making clear that litigants cannot use privileged material as both a sword and a shield. In other words, litigants may not base their legal positions on privileged material while simultaneously denying their opponent access to that information on the ground that it is privileged.

## The “At Issue” Waiver Doctrine

Under the “at issue” waiver doctrine, the attorney-client privilege is waived where a litigant affirmatively places the subject of its own privileged material at issue in litigation so that the opposing party must access that privileged material to defend the claim asserted against it. As the First Circuit noted in *In re Keeper of Records*, the logic behind the doctrine is most apparent in cases involving an “advice of counsel” defense where a client asserts reliance on his or her attorney’s advice as a defense to another’s claim.[2] According to the First Circuit, “when such a defense is raised, the pleader puts the nature of its

lawyer's advice squarely in issue, and, thus communications embodying the subject matter of the advice typically lose protection.”[3]

Outside the “advice of counsel” context, the reach of the “at issue” doctrine is less predictable and, as a result, perhaps more controversial. In interpreting “at issue” waiver, many courts have adopted some permutation of the standard articulated by the U.S. District Court for the Eastern District of Washington in *Hearn v. Rhay*, in which the Court concluded that implied waiver should be found when three conditions exist:

(1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense.[4]

However, this approach has been much criticized on the grounds that it conflates the question of waiver with separate issues of relevance.

### **Previous Massachusetts Cases Addressing The “At Issue” Doctrine**

The SJC first addressed the “at issue” waiver doctrine in *Darius v. Boston*.<sup>[5]</sup> In *Darius*, the SJC recognized that “a litigant may implicitly waive the attorney-client privilege, at least partly, by injecting certain claims or defenses into a case.”<sup>[6]</sup> However, the court emphasized that application of the doctrine was subject to certain limitations. First, the court stated that “[a]n ‘at issue’ waiver, in circumstances where it is recognized, should not be tantamount to a blanket waiver of the entire attorney-client privilege in the case.”<sup>[7]</sup> By definition, “it is a limited waiver of the privilege with respect to what has been put ‘at issue.’”<sup>[8]</sup> Second, the court made clear that “there can be no ‘at issue’ waiver unless it is shown that the privileged information sought to be discovered is not available from any other source.”<sup>[9]</sup>

Relying on *Darius*, other Massachusetts courts have since addressed the “at issue” doctrine, applying the two-part framework set forth above in deciding whether to find waiver.<sup>[10]</sup> However, not until *Clair* and *Columbia Data* did the courts offer much guidance on how considerations of fairness bear on the judicial application of the “at issue” doctrine.

### **The Clair Case**

*Clair* involves the dissolution of Clair Auto Group, a chain of automobile dealerships owned by four brothers. In 2007, the brothers sold the majority of the companies’ dealerships, real estate, and other assets to Prime Motor Group (“Prime Motors”). In coordination with that sale, the brothers devised a plan to transfer corporate life insurance policies on their lives from the Clair companies to the brothers individually. Following the sale, and at the death of two of the four brothers, familial relations deteriorated. The two surviving brothers refused to recognize their deceased brothers’ widows as partial

owners in the remaining assets, and the widows, in turn, suspected that the brothers were using post-sale assets for personal rather than business-related purposes.

On April 9, 2010, Claire M. Clair (“Claire”), the executrix of the estate of her husband, James E. Clair, Jr., and Jane M. Clair, the executrix of the estate of her husband, Mark J. Clair (together, the “Plaintiffs”), brought an action in Superior Court against the two surviving brothers, individually, Clair International Inc., and Clair LP (collectively, the “Defendants”), challenging the post-sale disposition of the business assets and seeking a declaratory judgment as to their ownership rights in the companies. The Defendants filed counterclaims alleging, among other things, that Claire’s deceased husband had breached his fiduciary duty to them.

During the course of discovery, Claire sought access to all privileged communications regarding valuation, purchase, and sale of the life insurance policies, including legal advice from corporate counsel. She argued that she was entitled to this information because the Defendants had waived the attorney-client privilege by placing such information “at issue” in their counterclaim. Relying heavily on its decision in *Darius*, the court agreed.

The court explained, consistent with *Darius*, that Claire’s ability to raise a defense depended upon her access to otherwise privileged information. Indeed, “at the heart of proving or disproving the counterclaim” were “disclosures that [Claire’s] [husband] may or may not have made to the Clair brothers and to corporate counsel” regarding the life insurance policies and transfer of ownership.[11] The court concluded, therefore, that Defendants had “placed their otherwise privileged communications ‘at issue.’”[12] Having determined that Claire had satisfied the first prong of the two-part test, the court turned to the second prong. The *Clair* court found that the only sources of this information were corporate counsel and the surviving brothers, “all of whom were within the circle of privilege held by the companies.”[13] The court emphasized that Defendants “cannot have it both ways”[14]; they may not rely on privileged communications as the basis of their counterclaim that Claire’s husband breached his fiduciary duty and simultaneously deny Claire a legitimate means to inquire into their assertions and raise a defense. .

Although the court granted Claire access to certain privileged information, it adhered to the *Darius* court’s call for a “limited” rather than “blanket” subject matter waiver. The court limited Claire’s discovery only to those privileged communications between the companies and their counsel that related to the life insurance policies at issue.

### ***The Columbia Data Case***

In March 2005, Columbia Data, a software company, entered into a license agreement with Connected Corporation (“Connected”). Under the license agreement, Columbia Data granted Connected a license to “integrate, market and distribute” its backup software. The parties agreed on the percentage of royalties

to be paid and provided for Columbia Data's right to retain an independent accounting firm to conduct an annual audit of Connected's books and records. Iron Mountain later acquired Connected.

As of 2008, Iron Mountain had yet to make any royalty payments under the license agreement, citing poor sales of products incorporating Columbia Data's software. In 2010, Columbia Data allegedly discovered that Iron Mountain had in fact sold products listed in the license agreement. Columbia Data confronted Iron Mountain, and the parties began negotiating over the payment of royalties.

Concerned that litigation was on the horizon, Columbia Data retained outside counsel, who in turn retained an accounting firm to conduct an audit of Iron Mountain's books and records. Significantly, Columbia Data did not inform Iron Mountain that the accounting firm had been hired by outside counsel. The accounting firm ultimately concluded that Iron Mountain owed Columbia Data \$23 million in royalty fees under the License Agreement. Accordingly, Columbia Data filed a complaint against Iron Mountain, seeking redress for copyright infringement, breach of contract, breach of implied covenant of good faith and fair dealing, and unfair and deceptive trade practices.

In the early stages of litigation, Columbia Data represented that its accounting firm was independent and insisted that the royalty audit was conducted according to the terms of the license agreement. But, six months after filing suit, Columbia Data took the opposite position when its litigation counsel retained the accounting firm as a testifying expert in the case. At that point, Columbia Data argued that because the accounting firm was its expert, its discovery obligations were limited to those required by Fed. R. Civ. P. 26(b)(4), which governs disclosure of expert testimony. In response, Iron Mountain filed a motion to compel.

The court ruled, as a threshold matter, that the materials at issue were not protected by either the work product doctrine or the attorney-client privilege; nonetheless, because the parties had briefed the "at issue" doctrine, the court addressed it. The court concluded that Columbia Data had affirmatively placed the "audit report, the audit process, and [the] [accounting firm's] status as an independent auditor directly at issue in [the] litigation," and, therefore, "fairness require[d] the defendants be allowed to explore the full panoply of information available to [the] [accounting firm] for its 'independent' audit."<sup>[15]</sup> As the court emphasized, "[Columbia Data] cannot use [the] [accounting firm's] status and work as an independent auditor as a 'sword' against the defendants, while relying on the attorney-client privilege and the work product doctrine as a 'shield' to prevent disclosure of related materials."<sup>[16]</sup>

### **The "At Issue" Doctrine Post-*Clair* and *Company Data***

In light of *Clair* and *Columbia Data*, practitioners now have a much better understanding of what arguments a court will likely find persuasive in considering the application of the "at issue" doctrine. While both courts applied the two-part framework set forth in *Darius* – namely, that waiver must be appropriately limited in scope and confined to instances where the information sought is not otherwise available – their analysis did not end there. Rather, they focused heavily on considerations of fairness, taking particular

note of whether the party invoking the privilege did so as a means to gain an unfair tactical advantage in litigation. As the *Columbia Data* court aptly stated, litigants may not use protected information as “both a sword and a shield.”<sup>[17]</sup> Likewise, the *Clair* court emphasized that a party “cannot have it both ways.”<sup>[18]</sup> Put another way, the courts will not tolerate, as a matter of fairness, a party relying on privileged material in support of a claim while simultaneously denying the opposing party access to that information because it is protected from disclosure.

Lawyers and clients must carefully weigh the risks of asserting a claim, counterclaim, or defense premised upon privileged material. They should contemplate whether the opposing party will need access to that information to respond. They should think about whether the opposing party can access that information from any other source. They should consider the potential consequences of having to disclose that privileged material to their opponent because, once they have put that material “at issue,” it may be too late to turn back. Finally, although courts to date have construed the scope of “at issue” waivers narrowly, there is always the risk that under certain circumstances, a court will adopt a more expansive construction.

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[1] See e.g. *Darius v. City of Boston*, 433 Mass. 274, 277 (Mass. 2001) in which the court accepted “as a general principle, that a litigant may implicitly waive the attorney-client privilege, at least partly, by injecting certain claims or defenses into a case.”

2 *XYZ Corp. v. United States (In re Keeper of Records)*, 348 F.3d 16 (1st Cir. 2003).

3 *Id.* at 23.

4 *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975).

5 433 Mass. 274 (2001).

6 *Id.* at 278.

7 *Id.* at 283.

8 *Id.*

9 *Id.* at 284.

10 See, e.g., *McCarthy v. Slade Assocs., Inc.*, 463 Mass. 181, 190-93 (2012) (finding no waiver where information sought was otherwise available); *Global Investors Agent Corp. v. Nat'l Fire Ins. Co.*, 76 Mass. App. Ct. 812, 816-19 (2010) (finding limited waiver of privilege where plaintiffs put at issue the advice of their counsel and information was unavailable from any other source).

11 *Clair v. Clair*, No. SJC-11256, 2013 Mass. LEXIS 10, at \*32 (Mass. Jan. 25, 2013).

12 *Id.* at 34.

13 *Id.* at 33.

14 *Id.* at 34.

15 *Columbia Data Products v. Autonomy Corp. Ltd.*, C.A. No. 11-12077-NMG, 2012 U.S. Dist. LEXIS 175920, at \*53 (D. Mass. Dec. 12, 2012).

16 *Id.* at 55.

17 *Id.* at 52.

18 *Clair*, 2013 Mass. LEXIS 10, at \*34.