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# Kids Speak and Lawyers Listen, Thanks to Boston Debate League Partnership with Boston Bar

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## By J.D. Smeallie, President, Boston Bar Association

### President's Page



When Tarae Howell, then a public high school student in Newark, New Jersey, signed up for the Jersey Urban Debate League, becoming a lawyer was the furthest thing from his mind. Despite winning fourteen debate titles over a two-year span, he had no idea he would one day be a third-year litigation associate at Nixon Peabody, much less a debate judge for a very similar program for Boston high school students. This fall, Tarae judged two Saturday morning debate competitions for the **Boston Debate League** (BDL). Afterwards, students plied him with questions about what it's like to be a lawyer and his path to success.

Earlier this year, the BDL approached the Boston Bar Association to see if we would partner with them by providing judges and mentors. We liked what we saw. Not only did such a partnership provide a wonderful opportunity for public service within the Boston Public Schools, but it held the promise of advancing diversity efforts at the BBA. Too few students of color are entering law school. As a result, too few lawyers of color enter the practice each year. By mixing BBA lawyers with students from Boston's high schools with large minority student populations, we hoped that the interest in law exhibited by Tarae's debaters would be sparked as well many times over in other students. Perhaps the germ of a legal career would be planted, and the pipeline of students of color could be expanded. The hope is that some of the students we encounter in the course of volunteering as debate judges or mentors will one day return as lawyers in our community.

The metrics suggest this could very well happen. According to the BDL, debaters are three times less likely to drop out of school than non-debaters, and African-American males who debate, in particular, are seventy percent more likely to graduate from high school than those who don't. Debate assists students in gaining entrance to college but, more importantly, it gives them the necessary skills to succeed and thrive once they get there.

In this regard, the BDL reports that urban debaters improved both their Reading and English ACT scores by fifteen percent and are thirty-four percent more likely to achieve the English college readiness benchmark, and seventy-four percent more likely to achieve the Reading benchmark, after just two years in debate.

The BDL does not require its volunteers to be lawyers. Yet BBA members participating in the program firmly believe that in addition to being extremely worthwhile, this particular volunteer opportunity is a great fit for members of the legal profession. As Tarae puts it, “[a]s lawyers, we have to be zealous advocates for our clients. Therefore, as a judge and a lawyer, I’m able to determine whether a debater has been an effective advocate for her position. It helps me give the student better feedback.”

Stories such as Tarae’s make all of us feel good about helping Boston’s young people develop the reading, critical thinking and advocacy skills associated with debating. Vickie Henry, a Senior Staff Attorney at GLAD, who as a high school student won a state debate championship in her home state of Michigan, says: “[y]ou look right in the faces of the youth getting your feedback and you can see it’s making a difference.”

Bill Fitzpatrick, Associate General Counsel for Litigation at the MBTA, says that what he found appealing about this particular volunteer opportunity is that debating offers Boston youth an opportunity for competition involving academics. “Life is not all about whether you can hit the free throw or hit the ball out of the park,” he said. “Debating gives the students a great outlet for skills that will serve them better in the long run.”

More than a few volunteers have marveled at the support students who are native English speakers gave to students for whom English is a second language, especially during those portions of the debate tournament requiring that they read aloud. They also commented on how heartwarming it is to see students improve dramatically from one tournament to the next.

Both Jessica Bloch of Bloch & Roos and Stephanie Hoeplinger, a solo practitioner, serve as mentors, which means that they’ve committed to spending between sixty and ninety minutes in the classroom every week between October and March, helping teachers and BDL staff prep the students for the tournaments.

“Good for these students for going to this afterschool program and pushing through,” says Jessica. “This experience is challenging but very rewarding.”

Though not required to attend the debates, Stephanie was deeply moved to see the looks on two of her students’ faces when she stopped by on a Saturday morning to see them perform: “Their faces just lit up; they looked so happy that someone not paid to be there really cares. They look up to you as a lawyer.”

“We are just so thrilled to have so many members of the BBA come out, judge at our tournaments, and work with our kids,” Steve Stein, Executive Director of the Boston Debate League, told us. “It is great to

have such wonderful role models be there for our students, many of whom are aspiring attorneys. Our students love that for ninety minutes, they speak and adults listen. When the debate is over, the adults talk for maybe five minutes to provide feedback. That kind of power dynamic doesn't exist anywhere else in their lives. BBA members are participating in an activity that is changing the lives of youth throughout Boston.”

Recently, I had the opportunity to spend a morning at Boston's Josiah Quincy Upper School. What struck me was how genuinely enthusiastic the co-headmasters were in the face of poor facilities, budget constraints and a talent drain to the exam schools. One of the bright spots they described was their students' participation in the Boston Debate League, and the very impressive fact that each and every one of the debaters on the Josiah Quincy team have gone on to college.

The BBA's partnership with the BDL is a public service opportunity that truly hits the trifecta for the BBA — meaningful service to the Boston community, where our lawyering skills provide a special benefit, and with the prospect of expanding the diversity pipeline. I hope more BBA members will consider volunteering for this incredibly rewarding experience.

# Privilege Precludes Asking: What was the Judge Thinking

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## By Judge Nancy Gertner

### Case Focus



On August 9, 2012, the Supreme Judicial Court, for the first time, recognized the existence of a “judicial deliberative privilege.” ***In re Enforcement of Subpoena, 463 Mass. 162 (2012)***. While the Court noted that holding judges accountable for violation of the Code of Judicial Conduct was critical, judicial disciplinary proceedings had to be conducted without doing violence to the independence and impartiality of the judiciary. A judicial deliberative privilege was essential to that end. The privilege they announced was absolute, covering a “judge’s mental impressions and thought processes in reaching a judicial decision, whether harbored internally or memorialized in other non-public materials.” It did not bar an inquiry into the judge’s work, what was said in open court or related in decisions. It only banned an inquiry into what was in the judge’s mind when she made her decision.

The case involved a complaint that had been filed by a district attorney with the Commission on Judicial Conduct, alleging that the petitioner, a judge, had exhibited bias in violation of the Code of Judicial Conduct, S.J.C. Rule 3:09, and citing to a number of examples over a twenty year career. The Commission appointed a special counsel to conduct a confidential investigation of the complaint. The special counsel sought to depose the judge, indicating his intent not only to cover the cases identified in the complaint, but also ones addressed in a series of Boston Globe articles, as well as thirty additional cases.

The subpoena, accompanying the deposition notice, was stunning in its breadth. It demanded “notes, notebooks, bench books, diaries, memoranda, recordation, or other written recollection of cases.” It required the judge to engage in a post hoc reconstruction of his work – outside of the written or public record, reaching back into cases completed years before. Counsel for the petitioner objected, claiming, inter alia, that to the extent the subpoena sought such information it encroached on the judge’s confidential, deliberative communications. The Court agreed.

A judge speaks through her decisions and in open court. Indeed, the ethical rules prohibit a judge from engaging in a public debate about what she intended to do or meant by her on-the-record statements or findings. A party, for example, is not permitted to subpoena a judge to reconstruct her thought processes after the fact. Judges are never permitted to impeach their own decisions outside of the public record. The reasons for these policies are straightforward: to enable an inquiry into a judge's thought processes would undermine the finality and the integrity of judicial decisions. Even more significant, protecting the judicial deliberative process from after-the-fact attack is essential to the independence and impartiality of the judiciary. The threat that a judge would have to reconstruct her thought processes, according to the Court, "could not help but serve as an 'external influence or pressure,' inconsistent with the value we have placed on conscientious, intelligent, and independent decision-making." Even the most "steadfast jurist," the Court added, would feel pressured to "pick his or her way through some of the decisions of the day by way of a route less likely to disturb the interests of those with the greatest ability to bring about such intrusive examination." That pressure, moreover, may well be more effectively exercised by certain litigants, like the complainant in this case, a district attorney involved in all criminal proceedings. In a footnote the Court took pains to note that danger. While "any disgruntled litigant" could bring a complaint – "the risk is greater in the case of the district attorney," a litigant who was in a unique position to "exert the pressure that would come from probing into deliberative materials."

Significantly, no such privilege had ever been announced in the Commonwealth until *In re Enforcement of Subpoena*. The issue had never before been raised because no special counsel had ever gone where this special counsel sought to go – a disciplinary proceeding not based on allegations of improper extraneous influences, conflicts of interest, or wrongful ex parte communications, but on the four corners of the judge's record. In challenging that record, the special counsel could not have been more explicit: his goal was to understand the judges' thought processes.

While the privilege had never been explicitly recognized before, it was fully consistent with the case law. The Court, for example, had held that communications between a judge and her law clerks were confidential. See *In re Crossen, 450 Mass. 533, 560 (2008)* ("communications about deliberative processes that flow between judge and law clerk were confidential and an important aspect of the administration of justice"). If what a judge says to her law clerk is protected, it makes sense that what a judge says to herself or shares with other judges should be equally protected. Likewise, the Court's decision is consistent with judicial immunity from suit, which, according to the Court, was well settled in its prior case law.

Moreover, the judicial deliberative privilege was no different from the privilege accorded other decision makers whose thought processes must be insulated from public review, most notably, jurors. A juror's verdict cannot be impeached absent allegation of extraneous influences precisely to ensure that he or she will not feel pressured to decide the case in such a way as to avoid public pressure.

Notwithstanding special counsel's claim that a judicial deliberative privilege somehow undermined the Commission's ability to hold judges accountable for misconduct, the Court made clear that judicial disciplinary proceedings will continue in the future, as they have in the past, without subpoenas of this breadth. If there is proof of untoward external influences – a conflict of interest, ex parte communication, a financial interest in the proceeding, or improper public comments – the judicial disciplinary process is invoked. But in those instances the proceeding addresses the judge's *conduct*, not the judge's *beliefs* about her conduct, her thoughts about her conduct, or her notes about her conduct.

The goal here is an accountable judiciary, to be sure, but also a fully independent one, able to carry out its public duties without regard to political concerns, external pressures, and more generally, without fear of retribution. The value of these goals finds no better authority than John Adams, whose seminal writings prior to the adoption of the Massachusetts Constitution underscored the relationship between “judicial independence and impartial decision making. What Adams wrote then is just as compelling now: “[Judges’] minds should not be distracted with jarring interests; they should not be dependent upon any man, or body of men. To these ends, they should hold estates for life in their offices; or, in other words, their commissions should be during good behavior, and their salaries ascertained and established by law.” *In re Enforcement of Subpoena*, 463 Mass. at 169 (citing *Thoughts on Government* (1776) in 4 *Works of John Adams* 198 (C.F. Adams ed. 1851)).

*Judge Nancy Gertner, retired from the federal bench after serving from April of 1994 to August of 2011, to teach full time at the Harvard Law School. She was a signatory on an amicus brief on behalf of former Federal and State judges Margaret A. Burnham, Suzanne V. DeIVecchio, Allan van Gestel, Mel L. Greenberg, Rudolf Kass, Patrick J. King, Charles B. Swartwood and J. Owen Todd.*

# Wearing Two Hats: Being a Mediator and a Trial Judge

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## By Judge Judith Gail Dein

### Voice of the Judiciary



If you have had any cases in federal court, you have probably been asked at various times by the trial judge if your case is ripe for ADR (alternative dispute resolution), and if not now, when. The Alternative Dispute Resolution Act of 1998 requires that each United States District Court authorize the use of ADR in all civil actions. 28 U.S.C. §§ 651 et seq. In the District of Massachusetts, that means that you will have the option of going to mediation before someone who has contemporaneous experience both as a trial judge and as a mediator. In my mind, this is the best of all worlds (and, as they say, this article expresses only the opinion of its author!). I have had the honor of serving in these dual capacities since shortly after my appointment as a Federal Magistrate Judge in August 2000. While the roles are very different, it has been my experience that what I have learned in one capacity carries over, and makes me even more productive, in the other.

Mediations in the District of Massachusetts presently are conducted by all the Magistrate Judges as well as by Edward Harrington, a Senior District Judge who added mediations to his docket in 2009. Magistrate Judges also have an active role in civil cases filed in Federal Court. Many times we are referred specific pre-trial matters from the District Judge presiding over a case. In addition, we have our own dockets of civil cases over which we preside. With the consent of the parties, Magistrate Judges have the authority pursuant to 28 U.S.C. § 636(c) and Federal Rule of Civil Procedure 73 to conduct all pre-trial proceedings as well as jury and jury-waived trials in any civil case in Federal Court. This means that we each try a number of civil cases, both jury and jury-waived, each year, ranging from one-day slip and fall cases to multi-week securities litigation, and everything in-between.

When I was appointed to the bench, the ADR program was run by District Judge David A. Mazzone, with the assistance of a panel of volunteer lawyers. Over time, Magistrate Judges were added to the roster of



mediators and, with Judge Mazzone's untimely death in October 2004, the volunteer panel was discontinued and the Magistrate Judges took the lead in conducting mediations. When a case is scheduled for mediation, it is assigned either randomly or in accordance with the parties' request, if possible. The one caveat is that, except in extraordinary cases, we will not mediate any case in which we are the presiding judge or in which we may be referred pre-trial matters.

There is a real distinction between my role in cases in which I am serving as the mediator, and cases in which I am serving as the presiding judge. As a mediator, I view my role as helping the parties reach a resolution that meets their needs as best as possible. It is my responsibility to help the parties identify the real (sometimes as opposed to the "legal") issues in dispute, and to help them define what they need to settle a case. It is also my role to help them understand the litigation process, their various alternatives about how best to proceed, and the consequences of certain decisions. I work as a negotiator, talking to each side separately, helping each side to understand that there usually are (at least) two sides to every story, and striving to identify a compromise that everyone can live with to his or her benefit.

So where do the "merits" of a dispute fit into a mediation? And what do the parties mean by the merits? If the parties mean what is "just," that always fits into a mediation — it is the goal of the mediation to reach a resolution that is as fair as possible to all involved under the circumstances presented. If the parties mean who will prevail at trial, while depending on the case that certainly may be a significant factor in a settlement, it is one that I am loath to predict. As a mediator, I only have the very limited information that is provided to me by counsel and the parties, a snapshot that does not begin to address all the information or law that would be available at trial. Nor do I have any sense of the witnesses, and how the information would be introduced at trial. What I do have is the certainty that if you asked any trial lawyer if they have ever won a case they shouldn't have won, they will proudly say yes. Of course that makes the inverse true, have they ever lost a case they shouldn't have lost . . . .

So why does being a trial judge help me be an effective mediator? Obviously, as a trial judge, I do have some very practical experience with the litigation process which I can share with the parties. I also have encountered many of the substantive areas of the law that come before me as a mediator. More importantly, however, I think that as a trial judge I have experience in hearing how things actually sound in a courtroom. A trial is very different than a summary judgment argument, and I can help explore with the parties how their theory of the case may resonate with the fact finder and what they really think they can accomplish in a trial. Finally, and perhaps even most importantly, I bring to the parties in a mediation the assurance that their concerns are being heard and considered by a judicial officer. The setting may not be as formal as a trial, but their side of the story is being considered as seriously.

And why does being a mediator help me be an effective trial judge? On a very basic level, it reminds me continuously what our judicial system is all about. Obviously while presiding over a case the information I have is limited by the rules of evidence, and the dispute, appropriately, is defined by the parameters of the law. I rule on numerous motions as they come before me, and I hear the evidence as presented at

trial. Having spent hours talking with the litigants and counsel in mediations, however, I am constantly aware of the people behind the disputes, and why the cases, and my rulings, are so significant. I know why the litigants have sought the assistance of the judicial system in resolving their disputes. Hopefully I will never forget that my role, in any capacity, is to help insure that justice is done.

*Judith Gail Dein had over 20 years of civil litigation experience before being appointed as a Magistrate Judge on July 31, 2000. She is a 1976 graduate of Union College, Schenectady, New York, and received her J.D. from Boston College Law School in 1979. In 2011 she received a Community Peacemaker Award from the Community Dispute Settlement Center of Cambridge in recognition of the court's Mediation Advocates Panel, which provides pro bono representation to pro se civil litigants in mediations.*

# Avoiding Immigration-Related Employment Discrimination: Tips for Employers

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By Anjali Waikar

## Practice Tips



As the national debate concerning immigration reform continues, the federal government has turned its attention to cracking down on employers who hire unauthorized workers. Such efforts were highlighted in the federal immigration raid of the Michael Bianco, Inc. factory in New Bedford in 2007, where nearly 350 individuals were rounded up and placed in deportation proceedings. The company ultimately pled guilty to 22 counts relating to the hiring of unauthorized workers and paid a \$1.5 million fine. To respond to such increased scrutiny, the government has offered employers various tools to check employees' work authorization. For example, the Town of Milford recently became the first municipality in New England to sign up for IMAGE, a federal program providing employers with education and training on hiring procedures, fraudulent document protection, and use of employment screening tools like E-Verify that allows employers to check an applicant's work eligibility.

Illegal immigration is fueled by job opportunities. Accordingly, many well-intentioned employers, in the face of increasing scrutiny, are concerned about what they can and should be doing to ensure they are not violating federal immigration laws by hiring unauthorized workers. There are myriad considerations employers face, including how to correctly fill out the I-9 Form, how to respond to Social Security "no match" letters, and whether to enroll in E-Verify, to name a few. What, then, are some of an employer's obligations with respect to ensuring that it is not employing unauthorized workers? What risks does an employer face by terminating an employee whom the employer believes has submitted false documents? What are best practices an employer may follow to avoid immigration-related employment discrimination? This article provides an introduction to these issues and practical tips for lawyers who advise employers that are seeking to comply with the law without running afoul of immigration-related antidiscrimination laws.

## **Immigration Laws in the Workplace**

The federal Immigration Reform and Control Act of 1986 (IRCA) prohibits knowingly hiring undocumented workers and imposes affirmative obligations on employers to verify a new employee's identity and work authorization. IRCA also prohibits employers from discriminating against employees who look or sound "foreign." IRCA prohibits national origin discrimination against all work-authorized individuals in hiring, recruitment, referrals and discharge practices, as well as discrimination based on citizenship status for certain categories of workers, unless such discrimination is otherwise required by law or government contract. The antidiscrimination provisions of IRCA apply to all employers with at least four employees. In addition, employers are subject to the antidiscrimination provisions of Title VII of the Civil Rights act of 1964 as well as Massachusetts' antidiscrimination laws, particularly General Laws Chapter 151B.

To enforce its antidiscrimination provisions, IRCA created the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), located within the Civil Rights Division of the Department of Justice. It is the only governmental office specifically designed and empowered to protect the civil rights of immigrant workers.

In 2000, OSC and the Massachusetts Commission Against Discrimination entered into a memorandum of agreement whereby each entity would support the other's missions and notify complainants of their right, if applicable, to file a complaint with the other agency. See <http://www.justice.gov/crt/about/osc/pdf/Massachusetts.pdf>. Accordingly, for the purpose of satisfying the statute of limitations, complaints under IRCA may also be filed with the MCAD. Since 2006, OCS has issued at least ten letters of resolution to Massachusetts employers, either concluding independent investigations or memorializing voluntary settlement agreements with the charging parties. For example, on January 31, 2012, OSC issued a letter of resolution resolving an investigation into allegations that a Massachusetts company discriminated on the basis of national origin by demanding that a lawful permanent resident present a green card. The resolution included full back pay of \$900 and company training on the antidiscrimination provisions of IRCA.

### **Tips for Avoiding Immigration-Related Discrimination**

With this background, lawyers should be aware of the following tips for avoiding immigration-related employment discrimination:

**Citizenship Requirements.** Employers may violate IRCA, as well as Title VII based on national origin discrimination, by imposing citizenship requirements or giving preference to U.S. citizens, in the absence of a legal requirement to do so (e.g., pursuant to law or government contract).

**I-9 Form.** The I-9 Form is required of all employees upon hire, regardless of the employee's national origin or citizenship. Employees are required to present documentation to their employers to establish

both identity and employment eligibility. Failing to verify new employees' identity and employment eligibility by completing the I-9 Form violates federal immigration law. The I-9 Form provides for several combinations of legally acceptable documents. Employers should maintain consistent procedures relating to I-9 Forms or face potential discrimination claims under IRCA. For example, employers should not:

- Request more or different documents than the I-9 Form requires to validate a candidate's legal status, as doing so may violate IRCA. Likewise, employers must not selectively request proof of permanent residency or other work authorization from an applicant based on his or her national origin. Instead, employers should ask all applicants for acceptable documents indicated on List A or B and C on the I-9 Form;
- Reject government-issued documents that reasonably appear to be genuine and to relate to the employee presenting them. However, if the document does not reasonably appear to be genuine or to relate to the individual, the employer may ask the employee for additional documentation and should not employ the person if he or she is unable to comply.

**Timing.** Employers who ask to see a job candidate's documents before making a hiring decision may face discrimination claims if the candidate is not offered the job. Instead, employers should request proof of work authorization after making a contingent offer of employment.

**Expiring Documents.** Employers must not refuse to hire a qualified worker whose employment authorization expires in the future. Instead, employers must complete the hire with the understanding that the employee must provide evidence of continuing employment authorization before the document's expiration date.

**Re-verification of Current Employees.** Employers must not require an employee to "re-verify" his/her employment eligibility after s/he has already done so. Employers are also prohibited from re-verifying employment eligibility in many other situations, such as when a worker returns from approved leave or is reinstated after an unlawful suspension or termination. See 8 C.F.R. 274a.2(b)(1)(viii)(A). Only in limited circumstances may an employer require "re-verification," such as when an employment authorization document presented has expired or is about to expire or when the employer has "constructive knowledge" that the worker is not authorized. An employer has "constructive knowledge" – and thus a duty to investigate – where it has knowledge that would lead a reasonable person to believe that an individual is not authorized to work in the United States, such as when ICE notifies the employer that the employee may have presented false documents.

**Contacting Federal Authorities.** Some employers may be tempted to contact federal authorities to "verify" a worker's work eligibility or social security number. Because such a "verification" effort is likely to be ineffective due to extensive inaccuracies in the information maintained by the federal government, employers should accept documents that reasonably appear to be genuine and to relate to the employee

presenting them. Further, employers should not routinely investigate documents without reason to believe such documents are false.

## **Conclusion**

The antidiscrimination provisions of IRCA prohibit unfair, immigration-related employment practices. It is possible to comply with the federal laws governing employment verification without triggering exposure to claims of discrimination. Employers should be advised to treat all employees consistently regardless of citizenship status or national origin and to create and implement uniform policies and procedures relating to employment verification in order to avoid claims of immigration-related discrimination.

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# Staying Out of Harm's Way – Avoiding Legal Malpractice Claims

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By Robert L. Ullmann and Jonathan L. Kotlier

## Practice Tips



Every law firm—no matter its size, reputation, or practice area—will someday face the specter of a legal malpractice claim. No firm is immune. However, there are steps attorneys and their firms can take to minimize the risk of a claim and to maximize their ability to defend themselves. The authors have handled several legal malpractice cases and in all these cases there have been aggravating factors that have made the case much more difficult to defend and increased the settlement value of the case. Despite lawyer jokes, we are actually human and we do make mistakes. However, what we do not want to do is to exacerbate those mistakes through ancillary errors that put the lawyer or firm in a bad light. By avoiding such errors, the law firm will decrease its exposure and will be in a position to contest the claims, rather than having to capitulate to avoid negative publicity. This article will identify some of those ancillary errors and suggest ways to avoid them.

The following fictionalized scenario illustrates several possible errors: A senior associate in a multi-national law firm is approached by a former colleague and now in-house attorney with an opportunity to defend his company in a litigation matter. The case involves a former employee who sued the company for millions of dollars alleging wrongful termination. The senior associate has never handled this type of matter before and, in fact, has never before tried a case. However, he figures that the case is sufficiently similar to other cases on which he has helped partners that he believes he could represent the client effectively and, really, what are the chances the case will actually go to trial? In his pitch to in-house counsel, the senior associate represents he is an experienced litigator (but does not mention that he has never before tried a case) and promises that the case will be overseen by a very experienced senior partner. He crafts a proposed litigation budget for the client and, in his enthusiasm to win the client, produces a budget that is unrealistically low, far below those of the other firms in the mix. The client is

pleased with the pitch and the budget and retains the attorney and his firm. The senior associate is pleased with himself, because he is up for partner within the year.

Their pleasure is short-lived. The in-house counsel sees himself as an active participant in the litigation team. He raises concerns about strategy decisions and legal arguments. The senior associate ignores the client's request to advance certain defenses and proceeds with the litigation without addressing the client's concerns. In doing so, just in the discovery phase alone, the senior associate and his cadre of more junior associates rack up legal fees more than ten times what he had estimated the fees would be through trial. This helps his bid to become partner, but does not endear him to the client.

The case eventually proceeds to trial and the senior associate, now a new partner, takes on the role of lead trial counsel even though he has never taken a case to trial. He does not bring in a senior partner to help try the case. At trial, the attorney continues to ignore the questions and suggestions of the client. In so doing, he fails to make a legal argument that has merit and could have significantly impacted the result. The jury verdict is a disaster for the client, with damages exponentially greater than the attorney or the client ever expected. After all appeals are exhausted, the client brings a malpractice action against the firm.

The demand letter's main claim is that the senior associate failed to make a legal argument that a reasonable attorney would have made in the case. This is a standard malpractice claim based on the negligence standard articulated by the courts. To prevail, the client must show that the senior associate failed to "exercise the degree of care and skill of the average qualified petitioner." *Fishman v. Brooks*, 396 Mass. 643, 646 (1986). On this standard, the firm has some quite plausible defenses to the claims.

Moreover, the client will face the hurdle of providing adequate expert testimony to prove the senior associate's negligence. In *Pongonis v. Saab*, 396 Mass. 1005 (1985), the Supreme Judicial Court explained that expert testimony is required to demonstrate an attorney's negligence unless "the claimed legal malpractice is so gross or obvious that laymen can rely on their common knowledge to recognize or infer negligence." This is not an easy hurdle to clear. The Appeals Court, in *Colucci v. Rosen, Goldberg, Slavet, Levenson & Wekstein, P.C.*, 25 Mass. App. Ct. 107, 111 (1987), required a client to demonstrate through expert testimony that the attorney's failure to learn about and comply with a procedural statute, which was both crucial to the client's case and widely known within that field of law, was negligent. If the client in this fact pattern wants to challenge the senior associate's trial strategy and legal arguments, it will need to prepare itself for a battle of the experts.

An additional hurdle for the client in this fact pattern is the element of causation. To prove causation on a litigation malpractice claim, a client must present a "trial within a trial" and show that he would have "probably" prevailed in the underlying case but for the attorney's negligence. *Fishman*, 396 Mass. at 647. For the most part, this hurdle also requires expert testimony that establishes a link between the



attorney's negligence and the bad outcome for the client. See *Frullo v. Landenberger*, 61 Mass. App. Ct. 814, 818 (2004).

The hurdles for the plaintiff are high, but what makes the case highly risky to defend are the attendant embarrassing and aggravating factors—the legal fees so far exceeding the proposal, the senior associate not being forthcoming about his lack of trial experience, the failure to address the client's concerns that actually had merit, and the failure to bring in a senior attorney who had significant trial experience. The risk that such embarrassing allegations would become public make it impossible for the firm to defend. It has to settle.

As you read this sample fact pattern, you probably think to yourself that this example is exaggerated and that there is no way I or my firm would make similar mistakes. Think again—this example is a disguised, real life situation involving a prestigious law firm (not based in Massachusetts), and as lawyers we all face at least some of the pressures that led the lawyer and firm astray. What follows is a discussion of the errors cited above and how firms and individual attorneys can take steps to avoid these pitfalls.

1. *Always be objective and straightforward with a client*

Nothing exacerbates the damage in a legal malpractice case more than the plaintiff being able to allege that his lawyer or law firm was not straight with him. What lawyer or firm would want to litigate a legal malpractice case in which their honesty and credibility are questioned? In addition to reputational damage, the lawyer and law firm are now at risk of greater liability. The Appeals Court, in *Frullo v. Landenberger*, 61 Mass. App. Ct. at 822, has signaled that a client can bring Chapter 93A claims in cases of alleged deceit or dishonesty. “There is no doubt that the provisions of G.L. c. 93A apply to attorneys.” *Id.* Not only does this create exposure to multiple damages and attorney's fees, but it also gives the opportunity for the client to avoid the hurdle of expert testimony on negligence. Claims grounded in allegations of dishonesty, fraud, deceit, and misrepresentation are not subject to the same expert testimony requirement applied to professional negligence claims. See *Brown v. Gerstein*, 17 Mass. App. Ct. 558, 566-67 (1984). Resist the temptation to puff or exaggerate. The resulting leverage to settle (especially with the possibility of multiple damages) will be difficult to withstand.

2. *Puffing during the pitch*

Being straightforward applies as much to the pitch as it does to the post-engagement work. Competition for work can be very intense and you might be tempted to exaggerate your qualifications and minimize your estimate of projected cost. Again, resist the temptation. Any statement the lawyer or law firm makes regarding its experience and expertise is bound to become part of a disgruntled client's complaint in a legal malpractice action. One recent and sensational example is the complaint filed by infamous UBS whistleblower Bradley Birkenfeld against Schertler & Onorato, LLP, the firm that represented him in his whistleblower suit. Birkenfeld now alleges that the firm and its attorneys “falsely represented themselves to [Birkenfeld] as experienced in and knowledgeable about federal whistleblowing laws and procedures”

when, in reality, they had “very limited experience in the area.” Complaint at ¶ 14, *Birkenfeld v. Schertler & Onorato, LLP*, Civil Action No. 0008397-12 (D.C. Super. Ct. Oct. 31, 2012). There are few better ways to undermine the defense of a legal malpractice claim than to have misrepresented to the client your familiarity with a particular type of transaction, your expertise in a particular area, or your trial experience. It will magnify any error the attorney may have made. Again, you and your firm will pay a premium for not wanting this case to be litigated in the public eye.

### 3. *Maintain clear lines of communication with clients*

Almost every malpractice claim arises out of a client feeling personally wronged by the attorney. This is why client communication is so important. Whenever an attorney receives client complaints about a lawyer’s strategic decision, the quality of work, or an unfortunate event, the attorney should respond in a way that both alleviates the concern and affirms to the client that you are on the same team. Not only will the attorney be fulfilling his ethical obligations under Rule of Professional Conduct 1.4, but he will also build a stronger rapport with the client and earn the client’s loyalty. A client pleased with a law firm’s responsiveness and care will be more understanding in the event that the matter sours.

### 4. *Listen to, and get “buy-in,” from the client*

Clients can have some pretty harebrained ideas, but every now and then... Whether good or bad, all client ideas and suggestions need to be addressed. If you do not think it is a great idea and you discuss the idea with the client, you can often explain the weaknesses and get the client to agree with your view. Even if you and the client continue to disagree, you are most likely talking about a judgment call, which is a very difficult basis for a malpractice claim. If you ignore the client, you will only alienate the client, and if it turns out that you were wrong, you are not going to want a public record of the client being a better lawyer than you.

### 5. *Establish clear email protocols for your attorneys*

Although the law in this area is not absolutely clear, there is a reasonable chance that if a client sues you for malpractice he will be able to get his hands on the internal emails relevant to his case or transaction. In almost every malpractice case, the most damaging document is not the contract, the court filing in the dispute, or an internal memo, but rather the informal emails among law firm attorneys. These are the communications where the smoking gun typically lies—either in the form of an admission of a mistake from one attorney to another or an error made in a hastily drafted intra-firm email. In *Vlachos v. Weil*, No. 11028/2009, 2011 WL 1348397, at \*2 (N.Y. Sup. Ct. Apr. 8, 2011), a New York trial court considered the admissibility of emails in which the attorney admitted that he was at fault in failing to ensure that his clients received the money they were owed as part of a stock deal. Whether those emails would come into evidence as a party admission or not, the malpractice suit caused the lawyer’s self-critique to become a matter of public record.

Finally, this probably goes without saying, but don't say anything negative or unflattering about your client in an email—it will not reflect well on you and it will not be something you will want to see the light of day. In one federal court case, a former client of Day Pitney brought forth emails in which his lawyers demeaned him, demonstrating the lawyers' "crude behavior." *Iannazzo v. Day Pitney LLP*, No. 04 Civ. 7413(DC), 2007 WL 2020052, at \*10 (S.D.N.Y. July 10, 2007). Although the client was ultimately unsuccessful in his malpractice suit, Day Pitney could not call the resolution a complete success if its attorneys were on record as antagonistic to and disrespectful of the firm's clients.

6. *Construct an oversight program for all cases.*

Many malpractice claims arise from an attorney who is in over his or her head, either because the matter is outside the attorney's area of expertise or is too complicated for less experienced attorneys. Certainly where an attorney who is out of his depth takes on a matter that does not end well, you can be sure the client will examine the situation closely. As a remedy, every law firm should consider instituting a formal program in which a senior attorney is assigned to each matter, and meets monthly with the day-to-day manager of the case, so the junior attorney can bounce ideas, issues, or concerns off of the senior attorney. Without a formal procedure in place, the junior lawyer will often feel uncomfortable raising concerns until it is too late.

\* \* \* \*

With the number of malpractice claims rising every year, most law firms will face the specter of malpractice suits. Under the legal standards applicable to malpractice claims, errors in judgment will often be quite defensible and will not be an embarrassment to the firm. The trick is to avoid exacerbating the situation by making mistakes that put the lawyer or the firm in a bad light and that make a confidential settlement the only real option.

### **A Word About Conflicts of Interest**

Much has been written about the trouble law firms can find themselves in when they take on matters that involve a conflict of interest. Most lawyers understand the basic ethical prohibitions on being adverse to another client of the firm, having clearly divided loyalties, or disclosing confidential client information. However, there are many situations in which a client's waiver or even simply disclosure to the client can prevent serious problems down the road. Where an undisclosed conflict exists, the client can paint almost any attorney error as being caused in part by the law firm's conflicted loyalties. This is not where you want to be.

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# EATON, TITLE and FORECLOSURE: Where Is “Here,” How We Got “Here,” and Where We’re Going

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By Paul R. Collier, III

## Point



A quartet of decisions by the Supreme Judicial Court rejected mortgage lending industry efforts to immunize itself from liability for predatory and reckless loan underwriting and unauthorized foreclosures. While the industry criticizes these decisions, it makes no real argument as to their doctrinal soundness. Instead, “setting blame aside,” the industry objects that these decisions provided no benefits to homeowners, and created “outright chaos” in the marketplace.

As to the first of these claims, the industry is being disingenuous at best, dissembling at worst. The claims and defenses based on the Supreme Judicial Court decisions have preserved literally thousands of homes in the Commonwealth. Yet, notwithstanding its professed concern for the welfare of struggling homeowners, lending industry voices in every fora have opposed mortgage modifications that reduce loan principal (and other homeowner relief measures) because of the “moral hazard” flowing from debt-buried homeowners escaping the consequences of their borrowing conduct. In truth, the industry seeks only to set aside its responsibility for the dire state of many under water U.S. homeowners.

As to the claim of “market chaos,” the evidence shows nothing of the sort. To the contrary, realty tracking services document increasing numbers of properties purchased at foreclosure sales, declines in bank-owned properties, and increases in “short sales” and other alternatives, both in Massachusetts and nationwide. The number of homes preserved, moreover, will only increase as a result of the Attorney General’s Home Corps grants providing legal representation to homeowners facing foreclosure.

## The Past as Prologue

The Supreme Judicial Court presaged the housing market collapse in *Commonwealth v. Fremont Inv. & Loan*, 452 Mass. 733, 739 (2008), where the Court affirmed now-Supreme Judicial Court Justice Gants' decision that origination of mortgage loans "doomed to foreclosure" violated the Consumer Protection Act. Judge Gants reached this conclusion after the Commonwealth's Attorney General reviewed nearly two hundred sub-prime loans made by Fremont, and objected to foreclosure of most of those loans as predatory and unfair, or, as Judge Gants held in a related decision, "made with reckless disregard of the risks of foreclosure." Predictably, securitized lenders' "reckless" loan origination practices led inexorably to the "careless" foreclosure of those unsound mortgages; this explosion of securitized mortgage foreclosures drove the Supreme Judicial Court's foreclosure trilogy: *United States Bank Nat'l Ass'n v. Ibanez*, 458 Mass. 637 (2011), *Bevilacqua v. Rodriguez*, 460 Mass. 762 (2011), and *Eaton v. Fannie Mae*, 462 Mass. 569 (2012).

Before narrowing the discussion to decisional precedent, some context is merited. First, while predatory loans touched all races and all communities, sub-prime loans were overwhelmingly made to borrowers of color. Since the foreclosure crisis began, communities of color experienced nearly double the foreclosure rates of white communities, with all of the collateral damage which high-foreclosure communities face. Comparing 2004 and 2009 Census Bureau data, the financial fallout of the losses of family homes, and loss of value even where families preserved their homes, resulted in the greatest wealth disparity by race ever recorded, with the median net worth of black American families falling to one twentieth that of white families, median black net worth falling to \$5,677, and one third of black American families with zero or negative net worth. <http://www.pewsocialtrends.org/2011/07/26/wealth-gaps-rise-to-record-highs-between-whites-blacks-hispanics/>

### **Ibanez, Bevilacqua, and Eaton**

*Ibanez* was the first of the trilogy, where the securitized trustee foreclosed on a home despite not having title to the mortgage which provided the sole authority for the non-judicial foreclosure. By a back-dated assignment, the trustee admitted to acquiring the mortgage over a year after the foreclosure sale, and then sought a judicial declaration of valid, conveyable title. In support, the Real Estate Bar Association (REBA) asserted that "...it was the understanding of the conveyancing bar that it was acceptable practice for a noteholder to commence foreclosure proceedings with the understanding that the necessary confirming assignments could be obtained and later recorded." The *Ibanez* Court rejected this "understanding," observing that Massachusetts authority had been to the contrary for two centuries:

Recognizing the substantial power that the statutory scheme affords to a mortgage holder to foreclose without immediate judicial oversight, we adhere to the familiar rule that "one who sells under a power [of sale] must follow strictly its terms. If he fails to do so there is no valid execution of the power, and the sale is wholly void." ...

One of the terms of the power of sale that must be strictly adhered to is the restriction on who is entitled to foreclose. The "statutory power of sale" can be exercised by "the mortgagee or his executors,

administrators, successors or assigns.” ... Any effort to foreclose by a party lacking “jurisdiction and authority” to carry out a foreclosure under these statutes is void.

*Ibanez, supra* at 646-647. Holding the “retroactive” foreclosure sale void, the *Ibanez* court also declined the invitation to hold that the promissory note and the securitization documents gave the trustee sufficient “financial interests” and “indicia of ownership” to foreclose.

*Bevilacqua* followed *Ibanez*. There, both mortgage bankers and the title industry sought to launder properties foreclosed by non-mortgagees in violation of *Ibanez* by contending that the sale of such properties with void foreclosure titles created a valid title in subsequent purchasers. *Bevilacqua, supra* at 774 – 778. The Court disagreed:

[T]he key question in this regard is whether the transaction is void, in which case it is a nullity such that title never left possession of the original owner, or merely voidable in which case a bona fide purchaser may take good title.... Our recent decision in the case of *U.S. Bank Nat'l Ass'n v. Ibanez*, 458 Mass. 637, 647 (2011), however, concluded that “[a]ny effort to foreclose by a party lacking ‘jurisdiction and authority’ to carry out a foreclosure under [the relevant] statutes is void.” We decline the invitation to revisit this issue.

*Eaton* closes the trilogy. In *Eaton*, the Supreme Judicial Court faced the obverse of the question presented in *Ibanez* – whether the holder of a mortgage assignment but not the debt could foreclose upon a property for non-payment of that debt. Here, both REBA and the title insurance industry contended that unity of mortgage title and note was not required for foreclosure. Again, this was a disingenuous position: although both had argued in *Ibanez* that noteholders could foreclose without assignment of the mortgage because the debt was the important issue, both argued in *Eaton* that the debt was wholly unnecessary to foreclosure.

Industry representatives grafted onto this argument the same, frantic “sky-is-falling” predictions asserted in *Ibanez* and *Bevilacqua*: that if the “unity” requirement was affirmed, then, because recording of notes in Registry or Land Court records was not a legal requirement, all record titles would be in question. This was puzzling, since in *Ibanez* the industry had vehemently argued that assignments of mortgages at the Registry historically were not, and should not be, required; but if unrecorded and unrecordable mortgage assignments posed no threat to title integrity, then why did unrecorded notes threaten civilization as we know it?

The Court affirmed the “Unity Rule,” holding that the term “mortgagee” meant a mortgagee who also holds the underlying mortgage note....” Yet, despite what the Court described as 150 years of precedent, the Court limited its holding to prospective application, “because of the fact that our recording system has never required mortgage notes to be recorded.” The Court explicitly suggested that non-recording issues be resolved by a title affidavit system, creating a Registry record for future foreclosure titles.

## Back to the Future

Although the Legislature moved quickly to adopt the suggested affidavit system, there are several significant issues simmering in trial court proceedings. Some have come about as a result of legislative efforts to address predatory lending and foreclosure activities which have so tarnished a banking industry once perceived as more George Bailey than Gordon (“Greed is Good”) Gekko, while others are simply the latest strategies of a securitized finance sector determined to force foreclosed homeowners and invisible investors, rather than the banks and mortgage loan servicers, to pay the costs of its practices. Most importantly, after four years of over-patient state and federal governmental cajoling of securitized loan servicers to preserve families in their homes where a mortgage modification would produce more value than a sale by foreclosure, the Legislature has now made these mortgage modifications mandatory in G.L. c. 244 §§35A, 35B, and 35C. “An Act Preventing Unlawful and Unnecessary Foreclosures” compels loan servicers to do what sound business judgment (and basic humanity) could not. The industry should face close scrutiny to ensure that the statutorily-required “net worth” comparison between the “value” of affordable modifications (preserving the family’s home) and the value obtained from the foreclosure sale of that home bears more relationship to reality that their predatory lending “underwriting standards” did.

In that vein, contrary to their own entwined funding, purchasing and securitizing structures, securitized trustees and their servicers argue in the courts that their pre-ordained mortgage loan pipeline represents an arms-length, *bona fide* purchaser transaction. On that basis, the finance industry now argues that it should be immune from liability for the predatory practices of their originating assignors despite long-established precedent that assignees stand in the shoes of their assignors. These issues are currently on direct appellate review in the Supreme Judicial Court in *Drakopoulos v. U.S. Bank, Trustee*, SJC – 11271.

Similarly, the issue of whether only a mortgagee may undertake foreclosure-related action has arisen again, this time with regard to the G.L. c. 183 §21 and c. 244 §35A requirements concerning exercise of the statutory and contractual powers of sale and mortgage acceleration. §35A has, since May 1, 2008, expressly commanded that only a “mortgagee” may accelerate a residential mortgage, and that the required notice “**shall inform the mortgagor of... the name and address of the mortgagee or anyone holding thereunder...**” Confronted with trustees and/or servicers sending these notices without any mortgage assignment, and even representing originators or servicers as the “mortgagee,” trial courts have differed both as to the meaning, and the effect of a breach of this provision.

Finally, industry counsel assail the Supreme Judicial Court decisions as “unnecessarily” and “ill-advisably” rejecting the industry’s lending and foreclosure practices which the Court – and many experienced Massachusetts conveyancers, including Judge Keith Long, the Land Court Judge deciding both *Ibanez* and *Bevilacqua*, and Mass. Lawyer’s Weekly’s “Avuncular Adviser” – have characterized as surprisingly careless; instead, the industry practices should have been approved because they represented local practices. But our courts long ago recognized that an entire industry could choose expedience over due care, and that the judiciary was ill-advised to subordinate the public interest to



private ordering. *The T. J. Hooper*, 60 F.2d 737 (2d Cir.N.Y. 1932). From unsound loan origination to false robo-signing of judicial documents to careless foreclosure of family homes, the securitization industry has shown, again and again, that expedience is king. Where the lending industry is seeking to dispossess families from their homes with no judicial oversight, surely requiring that lenders do so meticulously in compliance with the minimal requirements of the mortgage and the law is not too much to expect.

If the industry's reckless underwriting and their careless foreclosures are any guide, there is indeed more to come.

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# Eaton v. Federal National Mortgage Association: Additional Burdens Provide Little Consumer Benefit

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By Richard A. Oetheimer and Diane C. Tillotson

## Counterpoint



From the perspective of conveyancing attorneys and national mortgage lenders and servicers, the recent foreclosure decisions from the Massachusetts Supreme Judicial Court (“SJC”) have been surprising and a bit puzzling. Surprising that in such a seemingly settled area of the law the standard foreclosure practices of Massachusetts counsel, in reliance on local title standards, would be found not to conform to state law. Puzzling because the decisions neither address nor resolve the root of the problems underlying the litigation. The decisions have also highlighted some relatively unique aspects of Massachusetts mortgage law.

In many if not most American jurisdictions, the mortgage is mere security for the note and follows the note as a matter of law. See *Carpenter v. Longan*, 83 U.S. 271 (1872). Although Massachusetts has recognized this principle, by holding that the mortgagee holds the mortgage in trust for the note holder, who is the beneficial owner of the mortgage, the SJC’s decision in *U.S. Bank, N.A. v. Ibanez*, 458 Mass. 637 (2011) held that only the mortgagee can foreclose and that a note holder requires an assignment of the mortgage to do so. In *Eaton v. Federal National Mortgage Association*, 462 Mass. 569 (2012), the SJC held that, prospectively, a mortgagee must either hold the note or be the authorized agent of the note holder in order to foreclose. Because, as a matter of practice, notes have never been recorded in Massachusetts, retroactive application of this holding would have produced disastrous results as it would have been impossible to determine the validity of any foreclosure of record. Prospective application of this rule, while manageable, places additional burdens on the lenders and conveyancers but does little to address the underlying consumer issues.

*Eaton, Ibanez and Bevilacqua v. Rodriguez*, 460 Mass. 762 (2011), share a common ancestry: each case arises from efforts by a party grappling with the consequences of the plummeting value of real estate during the recent economic downturn. In *Ibanez*, the central player was a bank foreclosing without a valid assignment of the mortgage at the time of the foreclosure. *Bevilacqua* involved a purchaser for value after a foreclosure sale looking to establish good title in light of *Ibanez*, and in *Eaton*, a homeowner sought to defend against eviction and stay in her home. While each of these cases continues to have a significant impact on foreclosure practice in Massachusetts, the “deficiencies” addressed by the SJC in those cases were not at the root of financial problems faced by the parties and the Court’s decisions do little to resolve those issues. Recognizing that the Court can decide only the issues in the litigation before it, it is nonetheless unsettling that the loss to the consumer parties would have occurred regardless whether the assignment in *Ibanez* was timely delivered and/or recorded or whether the note in *Eaton* was held by the foreclosing mortgagee.

The fact pattern underlying *Eaton* is not uncommon. In 2007, Henrietta Eaton refinanced the mortgage on her home in the Roslindale section of Boston, executing a promissory note and mortgage in favor of BankUnited, FSB. Although BankUnited was identified as the lender in the mortgage, Mortgage Electronic Registration System, Inc. (“MERS”) was named as mortgagee and as a result became the holder of legal title with the power of sale as nominee of BankUnited or its assignee. The mortgage gave MERS the right to foreclose and sell the property. Two years later, MERS assigned its interest in the mortgage to Green Tree Servicing, LLC (“Green Tree”) and when Eaton failed to make payments on the note, Green Tree foreclosed and was the highest bidder at the sale. Shortly thereafter, Green Tree assigned its rights to Fannie Mae which commenced a summary process action to evict Eaton from her home in early 2010.

Eaton defended the summary process action with a counterclaim asserting that the foreclosure was void because Green Tree did not hold the note at the time of the foreclosure. The Housing Court stayed the foreclosure proceeding to give Eaton the opportunity to seek relief in the Superior Court, the Supreme Judicial Court having not yet decided *Bank of New York v. Bailey*, 460 Mass. 327, 333-34 (2011), where it determined that the Housing Court had jurisdiction to adjudicate counterclaims alleging invalid foreclosure sales in summary process actions. Notably, while Eaton raised claims concerning the validity of the foreclosure, she never disputed that the arrearages were owed or claimed that the note had been paid. The Superior Court agreed with Eaton that the foreclosure sale was invalid. The SJC interpreted G.L. c. 244, § 14 to require a foreclosing “mortgagee” to be either the note holder or the authorized agent of the note holder, and remanded *Eaton* for further proceedings on the agency question. Responding to pleas from the conveyancing and lending bar, the Court, noting that “significant difficulties in ascertaining the validity of a particular title” would arise if its holding was not limited to prospective operation, limited its *Eaton* holding to mortgage foreclosures for which the notice of sale was given after June 22, 2012, the date of the opinion.

As noted above, the effect of the *Ibanez* and *Eaton* decisions is to introduce an element of uncertainty to legal titles. Massachusetts is a “title theory” of mortgages state where the granting of a mortgage vests legal title in the mortgagee regardless of the note holder’s identity. While payment of the underlying debt would certainly be a defense to foreclosure, as noted below, there is nothing to suggest that this is a problem. In addition, *Eaton* raises a question concerning those situations where a mortgage is used as security for something other than a debt, for example, as security for the performance of obligations under a settlement agreement. While this concern is not relevant in the consumer context, *Eaton* is not limited to consumer transactions. The Court in *Eaton* did avoid some of the adverse effects of its earlier *Ibanez* ruling by giving its decision only prospective effect. For this reason, any concern that *Eaton* does not resolve “foreclosures in the pipeline” is misplaced; the date of publication of the notice is the touchstone (just as in *Ibanez*). So long as the notice issued prior to the opinion, no relationship to the note need be shown. See e.g.; *McKenna v. Wells Fargo Bank*, 693 F.3d 207 (1st Cir. 2012).

Legislative response to *Eaton* was swift and in the summer of 2012, the General Court amended G.L., c. 244, § 14 and added §§ 35(B) and 35(C). The amendments, effective November 1, 2012, provide a solution for dealing with the impacts of *Eaton* for residential mortgages (and residential foreclosures) of one to four-family dwellings. Prior to the notice of foreclosure sale, the creditor/foreclosing mortgagee must certify compliance with the *Eaton* requirements and the certification must be based on a review of the creditor’s business records and provides “conclusive evidence in favor of an arms-length third-party purchaser for value, at or subsequent to the resulting foreclosure sale” that the requirements have been met. Lenders may not pass on the cost of preparing these affidavits or any curative actions taken in response to *Eaton* to third parties. The Real Estate Bar Association of Massachusetts (“REBA”) has recently promulgated a form of affidavit meeting the requirements of Section 35(C).

The legislative response, while welcome, did not resolve all open issues. For example, the four-month gap relating to notices published between the June 22, 2012 date of decision and the November 1, 2012 effective date is not addressed, nor are mortgages related to commercial or other properties or large residential complexes. Presumably, affidavits meeting the requirements of Section 35(C) coupled with documentary evidence sufficient to satisfy the title insurance industry will satisfy the conveyancing bar’s need for the requisite certainty in certifying titles, albeit without the protection provided by Section 35(C) for residential properties. Conveyancers will need to ensure that the affidavits are executed by persons with appropriate authority and are duly recorded with the foreclosure documents. Certifying title to any property with a foreclosure in the chain of title will impose added burdens on the lender and conveyancing attorney and create additional caseload for the state’s housing courts as the “*Eaton* or *Ibanez* defense” will likely be raised in numerous summary process actions.

Whether they are right or wrong in their construction of Chapter 244, as a matter of public policy were the Court’s decisions necessary or advisable? Did the problems identified in those cases need to be addressed? Consumer law advocates have argued that securitization of loans resulted in fragmentation

of interests that makes it impossible for a mortgagor to challenge authority to foreclose or to seek relief from the mortgage debt. But this argument does not withstand scrutiny.

What consumer law advocates are really lamenting is the institutionalization of the mortgage market in recent decades. For most borrowers, the era of calling George Bailey at the neighborhood Building & Loan to work out their financial difficulties is long past. These market forces were in place with the rise of the secondary mortgage market long before securitization.

When mortgages are securitized, the identity of the trustee, who holds the notes in a pool for the benefit of the certificate holders (the investors) is of little to no practical benefit to borrowers. Under the contractual documents governing the securitization, responsibility for the relationship with borrowers resides in the loan servicers. Federal law in the form of the RESPA statute, 12 U.S.C. §§ 2601 *et seq.*, ensures that borrowers know who is servicing their loan, and where they are to send their loan payments. Generally it is the servicer who controls the foreclosure decision and process.

Some consumer advocates view it as problematic that the legal and equitable ownership and foreclosing authority are not united in a single party. But has this posed a real-world problem? Have borrowers been foreclosed who were not genuinely in default? No one is suggesting any pattern of this; in *Ibanez*, Justice Cordy's concurrence noted there was no dispute that the mortgagors were in default and subject to foreclosure. Is there any evidence of strangers to the mortgage debt foreclosing? Again, no: in *Ibanez* the plaintiffs were the securitization trusts; and in *Eaton* it was the mortgage servicer. Have any mortgagors had creditors make competing claims to their loan debt? Once again, the answer is no; there is no evidence anyone has paid or been called upon to pay twice due to securitization.

In sum, the Court's recent decisions have had the consequence of causing confusion in the marketplace, slowing the foreclosure process and complicating resale of properties. Questions of affixing blame for the sharp decline in housing prices and the resulting increase in foreclosures aside, it is natural to feel empathy for those at risk of losing their homes, and understandable to want to help them. Recent Massachusetts legislation is designed to do so by affording opportunities to certain borrowers to be considered for loan modifications. But at the same time there is a consensus among experts that an efficient foreclosure process is also a necessary component of stabilizing housing prices. It is hoped that the recent legislation passed in response to *Ibanez* and *Eaton* will have the effect of providing what the SJC in *Bevilacqua* believed it could not: good title to innocent third-party purchasers.

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