

# Boston Bar Journal

A Publication of the Boston Bar Association

**Lateral Movement of Lawyers in Massachusetts —  
Conflicts, *O'Donnell*, and the Future Under  
Amended ABA Model Rule 1.10**

*Donovan v. Philip Morris:*  
**Massachusetts Supreme Judicial Court  
Recognizes Medical Monitoring Claim Despite  
Lack of Clinically Manifest Injury**

**Why Judges Do What They Do**

**The Expanded Reach of the Massachusetts  
Lobbying Law**

**Agreements to Arbitrate Employment  
Discrimination Claims: Something New  
or a Reminder?**

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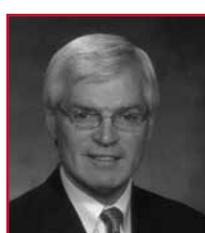
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# Boston Bar Journal

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**Boston Bar**  
ASSOCIATION



By Jack Regan

## Global Matters

**W**e are surrounded by daily reminders of global influences on our lives and, increasingly, our practice of law. The Boston Bar Association (BBA), despite its local name, has been drawn into a wide range of international activities, as the BBA carries out its mission of fostering an inclusive community of lawyers, increasing access to justice by the disadvantaged, providing its members with the resources and relationships to develop successful careers and practices, and promoting the rule of law.

In late February, seven lawyers from the Afghanistan Independent Bar Association (“AIBA”) arrived at the BBA on a U.S. State Department visit, accompanied by translators and former Massachusetts Lieutenant Governor Kerry Healy, their guide to the sites being visited in Greater Boston. The purpose of the Afghan lawyers’ visit was to learn from Boston’s legal community, including its legal services lawyers, how we represent the disadvantaged and how bar associations are structured and funded, with the hope that some of what the BBA does might be instructive to their work in Kabul. Members of the BBA’s International Law Section, including its Co-Chairs, Darren Braham of Ropes & Gray and Gaytri Kachroo of KLS — Kachroo Legal Services, and the BBA’s Immigration Committee attended the meeting, describing to the Afghan attorneys the work they do to train lawyers in the subject matters needed to represent international clients.

The AIBA was founded on August 27, 2008, only 18 months before this visit. Its previous incarnation had been as part of the Ministry of Justice in Afghanistan. It was then spun out as a separate organization as a reform measure after the ouster of the Taliban regime. We learned that there currently were 850 lawyers in the AIBA, and that, unlike the BBA, it grants licenses to practice law and oversees disciplinary proceedings.

The Afghan lawyers were quite surprised to hear that the BBA traces its heritage to 1761, when John Adams and other prominent lawyers in Boston organized Beacon Hill meetings of lawyers — in taverns and coffeehouses — to define who could be a lawyer and who could not, and the ethical standards that should govern the profession. The AIBA is now focused on the same issues, following the evolutionary path of the BBA.

It was striking to hear the Afghan lawyers begin their presentation by saying — matter-of-factly — that because their country had been engaged in an ongoing civil war for the last 30 years, their bar association had emerged with lessons learned from three different governments: the first run by the communists; the second dominated by the Taliban; and the third, now in place, which they described as “semi-democratic”. We learned that no Islamic country uses the adversarial system on which our Anglo-American system of jurisprudence is based.

In Afghanistan, most “cases”, in the sense that we use that word, are resolved through an informal justice system, outside of the courts, that relies upon “Jirghas”, tribal councils of elders to provide a speedy and effective method of resolving disputes. While the Afghan constitution does reference the Jirgha, alongside a formalized justice system, there was a consensus among the delegation that ordinary citizens have more faith that the Jirgha system will resolve issues than the judicial system.

The Afghan lawyers were particularly interested in how bar associations are run and how they raise revenue. The BBA lawyers in attendance explained the various sources of revenue that support the BBA’s work with its approximately 9,500 lawyers. The Afghan lawyers were incredulous to hear that one could charge for continuing legal education and that there was a long-established practice in Boston, and the United States generally, of offering free pro bono legal services to those who need access to justice but could not afford regular attorneys’ fees.

One of the seven Afghan lawyers was a woman, who had established the first all-female law firm in Afghanistan, and was now the AIBA’s Deputy Director. While she spoke through a translator, it was clear that she was proud of her accomplishments and eager to hear from the female members of the BBA in attendance. When we asked permission to take a group photograph and display it on the BBA website, the rest of the delegation looked to their female colleague for approval (which she granted) — because having her picture taken and

publicized may have been construed as disrespectful in her home country.

In addition, as part of the recent BBA Section Study Group, the BBA formed an Immigration Section, to be co-chaired next year by Ellen Kief, a solo practitioner, and Anita Sharma of the Political Asylum/Immigration Representation Project. This new Section evolved from an Immigration Committee because of the explosive growth of immigration statutes and regulations in recent years, the related rise in enforcement activity, and the strong interest of individuals and businesses in obtaining entry of foreign citizens for high technology employment in Massachusetts.

It was to this group of immigration lawyers that the BBA turned, with the assistance of its Public Service Committee, when the earthquake in Haiti caused such dislocation in Boston’s Haitian community. Immigration lawyers from the BBA coordinated an outreach to Mayor Menino’s crisis center, and assisted, with other legal service and nonprofit social service agencies, in the processing of Temporary Status Petitions to permit Haitian citizens lawfully in the United States to extend their stays here.

Most recently, Chief Judge Mark Wolf, of the U.S. District Court, has asked the BBA to assist the federal court in providing programming for a photographic exhibit, depicting the genocide and breakdown of the rule of law in Darfur and Rwanda, now on display at the U.S. Moakley Courthouse. The International Law Section, the Immigration Section, and the Public Service Committee swung into action to work with staff at the federal court to provide this service for members of the judiciary, bar, and public.

So while known as a “metropolitan bar association”, the Boston Bar Association now finds itself very much involved, with global issues on many fronts, a trend that is expected to increase and engage even more BBA lawyers. ■

by Gilda Tuoni Russell, Harry Potter, and Jessica Ragosta



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## Lateral Movement of Lawyers in Massachusetts — Conflicts, *O'Donnell*, and the Future Under Amended *ABA Model Rule 1.10*

Over the last 25 years, Massachusetts private-firm lawyers have become more and more transient. Long past are the days when new associates in law firms expected to matriculate over several years to partnership and, thereafter, spend their professional lives at the same firm. Rather, the “expected” path is much the opposite, with lateral lawyer movement very common.

The last few decades have also witnessed heightened scrutiny concerning conflicts of interest when lawyers change law firms. The ethical obstacles encountered with such moves are illustrated by the recent case *O'Donnell v. Robert Half International, Inc.*, 641 F. Supp. 2d 84 (D. Mass. 2009). In *O'Donnell*, an associate was laid off from Seyfarth Shaw LLP (“Seyfarth”) less than a year into her legal career. She found a new position with the firm Lichten & Liss-Riordan P.C. (“Lichten”). Seyfarth and Lichten represented opposing parties in ongoing litigation in federal court. Four days after the associate began working at Lichten, Seyfarth moved to disqualify the firm from the litigation.

It was undisputed that the associate was disqualified from representing Lichten’s client adverse to Seyfarth’s client under Massachusetts Rule of Professional Conduct 1.9 (“Rule” 1.9); the associate had obtained material information about Seyfarth’s client when at that firm and could not be adverse to “her” former client without its consent. The issue was whether the associate’s disqualification should be imputed to Lichten so as to also disqualify the firm.

Generally, a lawyer’s conflicts are imputed to his/her firm. But many states, including Massachusetts, allow firms to “screen” disqualified private-sector lateral lawyers in some situations. Under Rule 1.10(d), however, screening is only permitted in Massachusetts if the disqualified private-sector lawyer “had neither substantial involvement nor substantial material information relating to the matter” causing the conflict.

Applying Rule 1.10(d), *O'Donnell* concluded that the disqualified associate did not have “substantial involvement” in the case. She was not on Seyfarth’s client’s legal “team” and had never entered an appearance for the client. Her involvement was limited to researching a discrete legal issue for 7.2 hours, writing a short memorandum about that research, and attending a practice group meeting at which the case was discussed.

However, the question whether the associate had obtained “substantial material information” about the client was much closer. The court credited the disqualified associate’s testimony that she had no memory of working on, or receiving information about, the case. It also inferred that she received no confidential client information at the practice group meeting or while working on an article related to the case. Nevertheless, the court concluded that she learned of the firm’s legal strategy, and that she received confidential client information when working on the research memo. Although the court admitted that the case was close, it concluded that “in the aggregate,” the material information communicated to the associate was more “substantial” than “insubstantial.” The court emphasized that its decision was based on the totality of the evidence, and that, had the associate only received information at the practice group meeting or while working on the article, its conclusion might have been different.

Because the associate had obtained substantial material information under Rule 1.10(d) the entire Lichten firm was disqualified. The court recognized the hardship that its decision caused; the plaintiffs had to retain new counsel on a five-year-old case. The court nevertheless admonished Lichten for taking “an enormous risk” by hiring the associate despite knowing that she had worked for Seyfarth and that Seyfarth had taken the position that Lichten would be disqualified if it hired her.

The O’Donnell decision illustrates the uncertainty created by Massachusetts’ “substantial involvement” and “substantial material information” limitations on screening of lateral private-sector lawyers. Such uncertainty is why the American Bar Association (“ABA”) rejected these and similar limitations when it adopted amendments to ABA Model Rule of Professional Conduct 1.10 (“Model Rule” 1.10) in February 2009. The amendments permit more liberal screening of disqualified lateral private-sector lawyers. Prior to the amendments, Model Rule 1.10 only allowed a firm to escape imputation of a lawyer’s disqualification in this context if the conflict was created by the lawyer’s personal interest or if the lawyer’s former client consented. The former rule was in sharp contrast to other Model Rules that allowed screening of former

government lawyers (Model Rule 1.11), and former judges, judicial law clerks, arbitrators, mediators, or other “third-party neutrals” (Model Rule 12), who moved to private practice.

The Model Rule amendments permit screening of a disqualified lawyer who changes law firms without requiring former client consent as long as the disqualified lawyer is timely screened and apportioned no part of the fees derived from the matter. Model Rule 1.10(a)(2)(i). In addition, the amendments require that written notice of the screening be given to any affected former clients so that they can ascertain compliance with the rule. Such notice must include “a description of the screening procedures employed; a statement of the firm’s and of the screened lawyer’s compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures.” *Id.* at (a)(2)(ii). The amendments also require the screened lawyer and a partner at his/her new firm to certify to affected former clients the firm’s compliance with the rules at “reasonable intervals upon the former

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client's written request and upon termination of the screening procedures." *Id.* at (a)(2)(iii).

The ABA considered and rejected screening exceptions triggered by a lateral attorney's "substantial involvement" with or "substantial material information" about a former client because such standards were too vague: "Clarity is required when a lawyer and a firm decide whether to consider associating with each other, at which time no tribunal is available to decide the 'substantial involvement' question." ABA Standing Committee on Ethics & Professional Responsibility, Report to the House of Delegates 10 (Feb. 2009). The ABA concluded that the possibility of disqualification by a court adequately addressed situations where the efficacy of screening was doubtful.

While the amendments to Model Rule 1.10, if adopted in Massachusetts, could cure the harsh results of cases such as *O'Donnell*, some of the amendments' requirements are troublesome.

First, the requirement that notification to any affected former client include "a statement that review may be available before a tribunal" seems unnecessary and problematic. The provision appears to invite litigation as to the firm's compliance with required screening provisions. It also contrasts with Model Rule 1.12(c), which permits screening of certain judicial legal professionals who move to the private sector. Model Rule 1.12(c) requires only that notice be "promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule." While former clients may be less sophisticated than tribunals as to their knowledge and understanding of screening procedures, such difference does not seem to justify the additional safeguard of notifying former clients of the availability of judicial review.

Second, Model Rule 1.10 now requires firms to respond promptly to written inquiries or objections about screening procedures and requires the disqualified lawyer and a partner of the firm to "certify" compliance at reasonable intervals on a former client's request and on termination of the screening procedures. These requirements seem unnecessary, and also likely to expose lawyers and firms to an avalanche of administrative work and back-and-forth communications with former clients.

Further, the requirement to certify compliance at the end of a screen overly burdens particularly larger law firms by creating an ethics mandate to permanently track screens and notify former clients when they are terminated. Although the amendments do not require "termination" of screening procedures, and thus, theoretically, screens could continue when no longer necessary, such practice would seemingly contradict the spirit of the amendments.

The burdensome notice requirements of the amendments also contrast dramatically with the requirements of a majority of state rules. Such rules generally require only that notice be given without specifying what it must contain, or specify only that it must describe the disqualified lawyer's prior representation and the screening procedures employed. Massachusetts, however, has some of the most rigorous notice requirements. In addition to providing the former client with notice, Massachusetts requires the disqualified lawyer and his/her new firm to provide an affidavit describing the screening procedures and attesting that (i) the disqualified lawyer will not participate in or discuss the conflicted matter, (ii) no material information was transmitted to the disqualified lawyer's new firm before screening was implemented and notice was given to the former client, and (iii) for the duration of the screen, lawyers of the new firm will be notified that the disqualified lawyer is screened off from the matter. Rule 1.10(e). Although the Massachusetts rule does not require notice to include a statement that review may be available before a tribunal as the Model Rule now does, it expressly provides for judicial review and supervision of screening procedures. Rule 1.10(e)(5).

Despite its problems, amended Model Rule 1.10 would be an improvement over the current Massachusetts Rule and the outcome in *O'Donnell*. The bright-line approach of amended Model Rule 1.10, which allows screens to be erected in most cases of lateral lawyer movement, is preferable to the uncertainty created by the Massachusetts "substantial involvement" and "substantial material information" exceptions. Massachusetts' adoption of amended Model Rule 1.10 would likely prevent law firm disqualification in the majority of cases involving private-sector lateral lawyer movement, including in "close" cases like *O'Donnell*. ■

By David R. Geiger and Creighton K. Page

## *Donovan v. Philip Morris:* Massachusetts Supreme Judicial Court Recognizes Medical Monitoring Claim Despite Lack of Clinically Manifest Injury



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In *Donovan v. Philip Morris USA, Inc.*, 455 Mass. 215 (2009), the Massachusetts Supreme Judicial Court (“SJC”) recognized a cause of action for the projected costs of medical monitoring when a toxic substance has not caused any actual illness or disease, or even clinically manifest symptoms, but only subclinical physiological changes associated with an increased risk of developing a disease. Although rendered in the context of a cigarette product liability case, the *Donovan* decision may have a broad impact on tort liability in Massachusetts, and even nationally.

Plaintiffs in *Donovan* filed a putative class action in the United States District Court for the District of Massachusetts on behalf of all Massachusetts residents age 50 or older who had smoked defendant’s cigarettes for twenty or more pack-years, asserting design defect claims for the cigarettes’ alleged delivery of unreasonably high carcinogen levels. None of the plaintiffs or putative class members suffered from any clinically manifest smoking-related illness; rather, they alleged subclinical changes in their lung tissues and structures and a resulting significant increase in their risk of lung cancer. On defendant’s motion to dismiss for failure to state a claim, the district court certified to the SJC, among other things, the question whether Massachusetts recognizes a cause of action for medical monitoring under the circumstances alleged.

The SJC rejected defendant’s argument that longstanding tort principles required plaintiffs to prove physical harm manifested at least by objective symptomatology in order to recover. Instead, the court held that plaintiffs’ subclinical physiological changes and the attendant substantial increase in plaintiffs’ risk of cancer adequately established the element of injury required by Massachusetts law, and the medical necessity of monitoring adequately established the element of damages. Accordingly, the court held that a plaintiff states a claim for medical monitoring if he or she

proves, among other things: (1) exposure to a hazardous substance that produced subcellular changes substantially increasing the risk of serious disease; (2) an effective medical test for reliable early detection of the disease exists; and (3) such medical tests are reasonably necessary, conformably with the standard of care.

The SJC's decision to recognize a cause of action under the circumstances of *Donovan* is significant for multiple reasons. The decision runs counter to what had been a clear trend *away* from recognizing medical monitoring claims in the absence of a manifest physical injury. That trend started with the United States Supreme Court's decision in *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997), and continued with seven of the last eight state high courts to consider the issue. In its opinion, the SJC did not discuss any of these cases, nor did it discuss the policy concerns which, in addition to fundamental tort principles, had led these courts to reject such a claim. The concerns included that: (1) expansive liability merely for increased risk could impose substantial costs on consumers and society; (2) such liability could deplete resources that should be available to persons who have actually suffered physical harm; and (3) such a novel claim should be recognized, if at all, only by the legislature.

Moreover, although it asserted that its holding was consistent with existing Massachusetts law regarding the extent of physical harm necessary to justify imposing liability in tort, the court embraced the need to expand such liability due to the hazards of "modern living." Thus the court argued that while "tort law developed ... when the vast majority of tortious injuries were caused by blunt trauma and mechanical forces[,] [w]e must adapt to the growing recognition that exposure to toxic substances and radiation may cause substantial injury which should be compensable even if the full effects are not immediately apparent." Indeed, the court suggested it might go even further in a future case, stating that it would "leave for another day consideration of cases that involve exposure to

levels of chemicals or radiation *known* to cause cancer, for which immediate medical monitoring may be medically necessary although *no* symptoms or sub-clinical changes have occurred." (second emphasis added).

In addition, although *Donovan* expressly recognized a cause of action only for recovery of the projected costs of medical monitoring, the court's recognition of subcellular changes as an adequate injury to support recovery of these tangible costs could also potentially support recovery for related, and highly subjective, emotional distress damages such as for the fear of developing the disease for which monitoring is required. While the court suggested that a higher degree of injury would be required to support a claim for negligent infliction of emotional distress than for physical injury, this was the direct opposite of the court's earlier suggestion in *Sullivan v. Boston Gas Co.*, 414 Mass. 129, 138 n.9 (1993).

Finally, the court pronounced in dicta that it would not follow the traditional "single controversy rule" of claim preclusion to prohibit a medical monitoring plaintiff from bringing a second claim for monetary damages should he or she later contract cancer. The court asserted that the rule "was never intended to address the problem of toxic torts where a disease may be manifested years after the exposure."

For these and other reasons, *Donovan* likely will be cited by litigants and courts throughout the country in support of various forms of expanded tort liability. ■

By Judge Jeffrey A. Locke

## Why Judges Do What They Do A Review of Bail Laws in Massachusetts



Judge Jeffrey A. Locke is an Associate Justice of the Superior Court.

Perhaps no judicial decision is more likely to generate public outcry than an order releasing a defendant on bail. This is especially so when the released defendant commits a new crime, leading to the claim that the judge coddled the criminal at the expense of public safety. While understandable, this outcry is often misguided.

The right to bail, rooted in common law, has been described as being, “as old as the law of England itself...” *Commonwealth v. Baker*, 343 Mass. 162 (1961). In Massachusetts the right to release before trial, except in capital cases, was first codified in 1641 and finds expression in the Massachusetts Declaration of Rights. See *Mendonza v. Commonwealth*, 423 Mass. 771, 778 n.3 (1996).

There are different sources for bail depending on the particular court involved. In the District Court, where the vast majority of bail issues are addressed in the first instance, bail is governed by G.L. c. 276, § 58, which contains a presumption in favor of release on personal recognizance. See *Delaney v. Commonwealth*, 415 Mass. 490, 495 (1993).

Only when a District Court judge determines that release on personal recognizance will not provide reasonable assurance of a defendant’s future appearance may bail be imposed. In those instances, Section 58 enumerates seventeen factors that a judge may consider in setting bail. Grouped categorically, they relate to the offense charged (nature and circumstances and potential penalty, whether the charge involves domestic abuse or a violation of a restraining order); to the defendant (*e.g.*, family, community, and employment ties, financial resources, history of mental illness or substance abuse); and to prior involvement with police or courts (*e.g.*, prior convictions, probation or parole status, existence of pending cases, history of court defaults). If the judge sets bail, it must be the minimum amount necessary to assure the defendant’s presence at trial, and may be reviewed upon a petition to the Superior Court.

A defendant’s potential danger cannot be considered in imposing bail under Section 58. Indeed, when the Legislature added dangerousness to the list of factors as part of a Bail Reform Act in 1992, that provision was struck down as violative of due process. See *Aime v. Commonwealth*, 414 Mass. 667 (1993). The statute, however, is not entirely blind to the pretrial conduct of a defendant. Section 58 provides that if a defendant is charged

with a new offense while on release, a judge may revoke the earlier bail and detain the defendant for 60 days.

Bail in the Superior Court derives from the common law “inherent authority” of the court and is codified in G.L. c. 276, § 57. As in the District Court, “[T]he essential purpose of bail is to secure the presence of a defendant at trial to ensure that, if the defendant is guilty, justice will be served.” *Querubin v. Commonwealth*, 440 Mass. 108, 113 (2003). Unlike in the District Court, Section 57 carries no presumption favoring release on personal recognizance.

Section 57 also does not enumerate factors to be considered in setting bail, although the judge may be guided by the same factors found in Section 58. *See Querubin, supra* at 115-116 n.6; *see also* Rule 2 of the Rules Governing Persons Authorized to Take Bail. Moreover, although Section 57 instructs a judge to consider whether release will “endanger the safety of any other person or the community,” it does not provide the substantive or procedural due process safeguards considered necessary to detain a defendant without bail. *See Mendonza*.

Notably, while Sections 57 and 58 permit a judge to impose a cash bail or other form of surety, neither allows a judge to impose terms and conditions of release, except to avoid contact with a victim. *See Commonwealth v. Dodge*, 428 Mass. 860, 865 (1999). Unquestionably, conditions such as pretrial probation, a curfew, home confinement or electronic monitoring are often effective in monitoring a defendant’s conduct during release and assuring his whereabouts as trial approaches. However, the Legislature limited their application to three scenarios: G.L. c. 276, § 42A (authorizing a court to set conditions of release in domestic abuse cases), G.L. c. 276, § 87 (pretrial probation requiring a defendant’s consent), and G.L. c. 276, § 58A (conditions imposed in lieu of pretrial detention).

Following the SJC’s decision in *Aime* striking down dangerousness as a bail consideration in Section 58, the Legislature enacted G.L. c. 276, § 58A, which

authorizes pretrial detention in limited instances. Upheld as constitutional in *Mendonza*, it applies to proceedings in both the District and Superior Courts and permits a judge to detain a defendant for up to ninety days (subject to periods of excludable delay) upon a finding, by clear and convincing evidence, that the defendant presents a danger to another person or to the public, and that there are no conditions of release that could reasonably assure the defendant’s appearance at trial and the safety of another person or the community. Section 58A applies only to felony offenses “that [have] as an element of the offense the use, attempted use or threatened use of physical force against the person of another, or any other felony that by its nature involves a substantial risk that physical force...may result,” as well as certain offenses involving domestic abuse. The SJC recently ruled that unlawful possession of a firearm is not a triggering offense under Section 58A. *See Commonwealth v. Young*, 453 Mass. 707 (2009).

Notably, a dangerousness proceeding under Section 58A is triggered only upon motion by the Commonwealth, filed at the defendant’s first court appearance. A prompt hearing is required and the defendant has the right to counsel, to cross-examination and to compulsory process. The Commonwealth must prove that no conditions of release will reasonably assure the safety of any other person or the community.

To conclude, the law permits pretrial detention based on an individual’s potential danger only when the defendant has committed a predicate felony, only upon motion by the prosecutor, only when danger is proved by a heightened standard of clear and convincing evidence, and only when no conditions may be fashioned to ensure public safety. In all other cases, bail is permitted only to reasonably assure the defendant’s future appearance in court. If the result displeases the public, discourse should focus on the law rather than a judge who applied it correctly. ■

By Robert Ruddock

## The Expanded Reach Of The Massachusetts Lobbying Law



Robert Ruddock is a founding partner of Smith & Ruddock focused on managing public policy issues, lobbying, ballot questions, policy litigation, and business-government relations. Prior to founding the firm and for 18 years, Mr. Ruddock represented Associated Industries of Massachusetts (“AIM”), the state’s largest business advocacy organization, as General Counsel and Executive Vice President for Government Affairs.

Some Massachusetts lawyers went to bed on December 31, 2009, and awoke the next morning to discover that they had become “lobbyists.” Regrettably, others may have become lobbyists without knowing it.

Chapter 28 of the Acts of 2009 (Chapter 28) made important changes to the state’s ethics, political finance, and open meeting laws. The lobbying components of Chapter 28, which became effective on January 1, 2010, swept activities previously not considered lobbying into the category of “lobbying.” Being a lobbyist comes with considerable responsibilities, including registration, activity disclosure requirements, ethical limitations and restrictions on personal actions.

### Are You a “Lobbyist”?

The threshold question who is a “lobbyist” under Massachusetts law should be evaluated by all practitioners now that the statute has been amended. At the outset, the basic focus of the lobbying law is on “communication” with a legislative or executive official. If there is no “communication,” there is no lobbying. “Communication” includes activities by a specific person interacting directly with a government official seeking a specific result regarding legislation, a regulation, a standard, a rate, a policy, or the procurement of goods and services. In the course of representing clients, many lawyers in Massachusetts are expected to “communicate” with legislative and executive officials on a regular basis.

Chapter 28 expanded the definition of communication to include all the time and costs associated with the planning, research and strategizing that went into creating a direct communication with legislative and executive officials and how it is delivered, in addition to the direct communication itself. The consequences of the expanded definition of “communication” are twofold: (i) the time spent and compensation paid for such preparatory work is taken into account in determining whether the “incidental” lobbying safe haven, discussed below, has been exceeded; and (ii) disclosure of the costs associated with such preparatory planning, research, and strategizing, and who was paid for that work, is required on a semi-annual basis.

In addition to the “communication” component of lobbying, there is also a required component of “compensation or reward” for doing the communication. A recent Secretary of State opinion addressed the status of a volunteer who as-

sisted a non-profit in formulating policy positions, provided research on an issue, and actually engaged in communications with government officials to advance the non-profit's positions. The opinion stated that a person who is a volunteer to a non-profit, having no ownership in the organization and who is not paid by the organization for engaging in lobbying activities (e.g., direct communications), would not be a lobbyist for the non-profit because the person did not receive "compensation or reward" from the non-profit for the communications.

Merely "incidental" communication with legislative and executive officials is not lobbying. Under the prior law, if a person (1) spent less than 50 hours lobbying or (2) was compensated less than \$5000 for lobbying activity in either the first six months of the year, or in the second six months of the year, that person was not a lobbyist for that period under the "incidental" safe harbor. The safe harbor was available if the person was under the hours limit or was under the compensation limit.

Under Chapter 28, the safe harbor for "incidental" lobbying was made more narrow and less safe. Now if a person spends less than 25 hours lobbying and is compensated no more than \$2500 for such activity in the either of the two six month time periods, the person is within the safe harbor for "incidental" activities and does not have to register as a lobbyist. The numerical thresholds have been reduced; if either the hours threshold or the compensation threshold is individually exceeded, the safe harbor is unavailable.

Chapter 28 left in place a variety of exemptions intended to exclude specific types of communication with governmental officials from "lobbying." For example, G. L. c. 3, § 39, excludes from the definition of "policy" the "adjudication or determination of any rights, duties, or obligations of a person made on a case by case basis, including but not limited to the issuance or denial of a license, permit, or certification or a disciplinary action or investigation involving a person." The availability of other exemptions, such as those relating to adjudicatory proceedings and public bids, should be assessed on a case by case basis against the

definitions of G. L. c. 3, and other provisions of the lobbying law.

### **The Consequences of Becoming a "Lobbyist"**

Once a person becomes a lobbyist, that person must abide by the standards for lobbying behavior established by statute. Failure to do so is punishable by imprisonment and fines of up to \$10,000. Among other things, lobbyists are limited by: (i) an overall cap of \$12,500 annually on the aggregate of campaign contributions to candidates for state, county and local office; (ii) an absolute prohibition on gifts of any size to a government official (with certain exemptions for close relatives); and (iii) a yearly contribution limit of \$200 per candidate for state, county or local office. Contingency fees for lobbying success are absolutely prohibited.

An on-line course on the Secretary of State's website must be completed before registering as a lobbyist. Registration is required annually between December 1 and December 15 for any lobbying activities anticipated during the following calendar year. Both the lobbyist and the client served by the lobbyist must register. Registration of an unregistered person hired for lobbying during the year must take place within ten days of the "hire," or within ten days after a person exceeds the incidental or other statutory exemptions. The semi-annual disclosure reports must indicate the client, lobbying salaries, issues lobbied, positions taken, and the direct, indirect, and preparatory costs supporting the entire lobbying effort.

### **Conclusion**

The amendments to the Massachusetts lobbying laws create a significant practice issue for attorneys and a potential trap for the unwary. Communicating with government officials on behalf of a paying client needs to be approached with an extra measure of caution. Chapter 28 changed the thresholds for what is lobbying, what is incidental, and what has to be reported. Being unaware of what the law requires may expose practitioners to personal civil and criminal liability as well as a negative public relations impression. ■

By Ellen Zucker

## Agreements to Arbitrate Employment Discrimination Claims: Something New Or a Reminder?



Ellen Zucker is a partner at Burns & Levinson LLP and a member of its Litigation Department, where her practice focuses on employment law, business litigation as well as white collar criminal defense. Ms. Zucker represents Dr. Carol Warfield and argued her case before the Supreme Judicial Court.

The American Recovery and Reinvestment Act was signed into law in February of 2009. The legislation was big news for a new administration and a country wobbling its way through an economic crisis. Predictably scant attention was paid to Section 1553 of the Act, which established protections against retaliation for employees and contractors who report concerns about any misuse of stimulus dollars. Even less attention was paid to the fact that Congress established that “no pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of a dispute arising under this section.” 123 Stat. 115, § 301 (2009).

In December of 2009, the President signed into law the Defense Appropriations Act of 2010. Section 8116 of the law prohibits federal contractors and subcontractors on large defense projects from requiring employees and independent contractors to sign agreements to arbitrate civil rights and torts claims arising out of an individual’s employment as a condition of their employment.

Taken together, these actions mark the first time federal laws have been enacted to limit the use and enforceability of agreements to arbitrate. They suggest a growing wariness about requiring aggrieved employees to pursue the vindication of important statutory rights through arbitration.

Congress was not alone last year in sounding a cautionary note on the subject. The Massachusetts Supreme Judicial Court (“SJC”) expressed its reservations as well in *Warfield v. Beth Israel Deaconess Medical Center, Inc.*, 454 Mass. 390 (2009).

In *Warfield*, the SJC considered whether the former Chief of Anesthesiology at the Beth Israel Deaconess Medical Center (“BIDMC”) could be required to submit to arbitration claims of discrimination and retaliation under M.G.L. c. 151B. *Id.* at 391. Dr. Warfield was a member of the medical staff in the Department of Anesthesia at the BIDMC and on the faculty at Harvard Medical School. She had served in both capacities for 20 years when she became chief of her department at the start of 2000 (she also became the first woman at the BIDMC to hold a named chair professorship). In 2001, the BIDMC hired Dr. Josef Fischer as chief of surgery. At the start of 2002, Mr. Paul Levy became the hospital’s president and chief executive officer. *Id.* at 393. Dr. Warfield was terminated from her post as chief in July of 2007. Dr. Warfield thereafter filed her complaint alleging that, from the time Dr. Fischer and then Mr. Levy arrived, she faced a pattern of discriminatory treatment by Dr. Fischer, as well as bias and indifference escalating to punitive reprisals from Mr. Levy and the hospital when she dared to complain about Dr. Fischer’s allegedly inappropriate conduct. Dr. Warfield’s complaint described her termination in July of 2007 from her post as chief as “discriminatory and retaliatory in its motivation and defamatory in its effect.” *Id.* Dr. Warfield alleged that thereafter she continued to face on-going retaliatory treatment. *Id.*

The question before the Court was whether or not the defendants could compel Dr. Warfield to arbitrate her statutory claims of discrimination and retaliation, as well as

related torts. *Id.* at 395. The answer would focus on the scope and force of a contract Dr. Warfield had signed in March of 2000 after becoming chief of her department. The contract set out certain of her duties as chief, her compensation and benefits in that post, as well as the conditions upon which she could be terminated from her appointment for cause or without cause. *Id.* at 391–92. Acknowledging that Dr. Warfield was and would remain an employee of the Harvard Medical Faculty Physicians at the Beth Israel Medical Deaconess Center (“HMFP”) and that she served as a faculty member of Harvard Medical School, the agreement further recognized that, in those various other roles, Dr. Warfield “was bound by the separate articles, bylaws, rules, guidelines, regulations, procedures, and standards of BIDMC, HMFP and Harvard Medical School.” *Id.*

The contract contained, at section 17, the provision that obligated the parties to subject to arbitration:

*Arbitration.* Any claim, controversy or dispute arising out of or in connection with this Agreement or its negotiations shall be settled by arbitration.

*Id.* at 392. The contract related to Dr. Warfield’s employment as chief of anesthesiology and did not govern her relationship with BIDMC or HMFP generally. As the SJC observed, “[n]either § 17 nor any other provision of the agreement made reference to employment discrimination statutes or claims.” *Id.* at 392.

Dr. Warfield opposed the defendants’ efforts to compel arbitration. Although the day for broad challenges to the arbitrability of employment claims has come and gone (and will not return absent further action from Congress and the Massachusetts Legislature), Dr. Warfield argued that the arbitration clause in her chief’s contract did not sweep as broadly as the defendants argued. She posited that, by signing an agreement with a vaguely written arbitration clause, she had not consented to a waiver of her right to pursue important statutory rights in a judicial forum.

The SJC agreed and set out a new interpretive rule to guide consideration of whether an employer may oblige an aggrieved employee to resolve complaints under the state’s anti-discrimination laws through arbitration.<sup>1</sup> Along the way, the SJC decided issues that had been somewhat unresolved in this area and suggested an approach to M.G.L. c. 151B’s substantive rights and remedial scheme that practitioners would do well to note.

Turning first to three preliminary issues that had, in prior cases, either been presumed or unresolved, the SJC clarified that: (1) only limited mechanisms are

available in state court for review of orders denying a party’s motion to compel arbitration;<sup>2</sup> (2) the Massachusetts Arbitration Act, (“MAA”) M.G.L. c. 251 §§ 1–19, applies to the arbitration of employment disputes and its provisions are to be interpreted in the “same manner,” as the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (“FAA”), *Warfield*, 454 Mass. at 394;<sup>3</sup> and (3) claims brought under M.G.L. c. 151B may be subject to arbitration. *Warfield*, 454 Mass. at 394.<sup>4</sup>

The Court then focused on its central inquiry. Its approach was not novel. At the start, the SJC acknowledged the longstanding federal and state policies favoring arbitration and noted that decisions regarding arbitration must be made “with a healthy regard” for those policies. *Id.* at 396. Importantly, the Court recalled that “the purpose of the FAA was and is ‘to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.’” *Warfield*, 454 Mass. at 399.<sup>5</sup>

At essence, the SJC reminded us, the inquiry is all about the contract. While the observation is nothing new,<sup>6</sup> what the Court did with it is noteworthy. In *Warfield*, the Court avoided the tendency too often seen in this area of the law to begin and end an analysis with an invocation of the general policy favoring arbitration. Instead, the *Warfield* Court engaged in a careful consideration of the words of the contract itself and then analyzed those words in light of well-established principles of contract interpretation under state law.

The Court began by observing that certain phrases employed in Dr. Warfield’s contract — “‘arising out of and similar phrases” — have been construed generally as constituting “broad” language that triggers an interpretive presumption in favor of arbitration. 454 Mass. at 396-397. The Court then considered whether the presumption should exist where the rights the defendants argued had been waived by the contract language arose under the state’s anti-discrimination laws.

The Court anchored its analysis in “state law principles of contract interpretation [that] make clear that considerations of public policy play an important role in the interpretation and enforcement of contracts.” *Id.* The SJC then stressed that M.G.L. c. 151B expresses an “overriding governmental policy proscribing various types of discrimination,” *id.* at 398, and that the remedial scheme set out in M.G.L. c. 151B gave rise not only to substantive rights “but also makes available to the aggrieved party comprehensive administrative as well as judicial avenues of redress for substantive statutory

violations." *Id.* Indeed, recourse to the courts was not simply a procedural nicety but an essential part of Chapter 151B's remedial scheme. *Id.* n. 12 (detailing the important rights accorded the plaintiff in a judicial forum).<sup>7</sup> In light of established contract principles and the statutory rights at issue, the Court reasoned, the "overriding, statutorily expressed public policy against discrimination," *id.* at 400 n. 16, including permitting aggrieved employees to access "comprehensive administrative and judicial remedies is so strong that, in our view, it calls for distinct treatment." *Id.*<sup>8</sup>

The *Warfield* Court thus announced a new interpretive rule:

[A]n employment contract containing an agreement by the employee to limit or waive any of the rights or remedies conferred by c. 151B is enforceable only if such an agreement is stated in clear and unmistakable terms.

454 Mass. at 398.<sup>9</sup> As for Dr. Warfield's claims, the SJC found that "[r]ead as a whole, the contract language chosen by the parties suggests an intent to arbitrate disputes that might arise from or be connected to the specific terms of the agreement itself; there is no contractual term dealing with discrimination." *Id.* at 402. Moreover, the Court noted that "there is nothing in the arbitration clause or elsewhere in the agreement stating that any claims of employment discrimination by Warfield are subject to arbitration." *Id.* Accordingly the contract is "insufficiently clear to constitute an enforceable agreement" that would require Dr. Warfield to arbitrate her claims. *Id.*<sup>10</sup>

Three other issues raised in the context of the *Warfield* case – two decided by the Court and one not reached – suggest that the *Warfield* Court, with six of seven justices in the majority, moved together to create a practical body of law that would not upend all arbitration agreements but would instead assure real consent to any agreement to arbitrate workplace discrimination claims.

First, having determined that Dr. Warfield's statutory claims were not subject to arbitration, the Court had to decide what to do with her common law claims. The Court acknowledged that it is often appropriate to litigate claims not covered by an arbitration agreement while submitting covered claims to arbitration, whatever the concerns of efficiency and economy. *Id.* at 403 – 04. The Court found, however, that "where, as here, Warfield's common law claims are so integrally connected to her G.L. 151B claims," all claims should be tried together in court. *Id.*

Second, the Court considered the trial judge's alternative basis for denying the defendants' motions to dismiss: that Dr. Warfield's contract had an explicit termination clause, providing for the contract's termination at the same time Dr. Warfield's appointment as chief would terminate, and the arbitration provision in that contract did not expressly state that it survived the termination of the contract generally. Thus, the trial court had found, the obligation to arbitrate had terminated as well. The SJC disagreed and stated in dictum that "[a]greements to arbitrate are separable from and generally survive the termination of the underlying contract." *Id.* at 402-403 n. 20.<sup>11</sup>

Third and finally, the *Warfield* Court declined to address a key issue raised by the individual defendants who had argued that they should be permitted to compel arbitration of claims against them even though they were not signatories to the agreement to arbitrate. As the *Warfield* case wound its way through the appellate process, the Massachusetts Appeals Court decided *Constantino v. Frechette*, 73 Mass. App. Ct. 352 (2008), holding that where the agreement to arbitrate did not clearly define employees of the corporate entity as parties to the contract, an individual employee could not invoke the arbitration clause and compel arbitration of the signatory's claims against him or her. The defendants in *Warfield* cited the *Constantino* decision as a central basis for their petition for direct appellate review and as a case calling out for correction. The *Warfield* Court was silent on this issue. Less than two months later, the SJC declined to hear an appeal in *Constantino*, leaving the Appeals Court reasoning undisturbed. *Constantino v. Frechette*, 454 Mass. 1112 (2009).

To date, *Warfield* has been cited by one appellate court. In *Dixon v. Perry & Slesnick, P.C.*, 75 Mass. App. Ct. 271 (2009), the Massachusetts Appeals Court considered whether to compel arbitration of a former employee's claim under the state Wage Act. Citing to *Warfield*, the Court rejected the employee's argument that her Wage Act claims were generally not arbitrable and determined, through application of contract principles, that the employee intentionally waived her right to a judicial resolution of her claims. In short, the SJC's *Warfield* decision resulted in the compelling of arbitration of the plaintiff's wage claims in *Dixon*.

Indeed, the rule set out in *Warfield* is at once bold and modest. It unapologetically embraces the importance of the Commonwealth's anti-discrimination laws. Yet it continues — as it must without risking preemption — to uphold "the language and generous spirit" of the FAA and the MAA and requires only that "parties

seeking to provide for arbitration of statutory discrimination claims ... state clearly and specifically that such claims are covered by the contract's arbitration clause." *Warfield*, 454 Mass. at 400.

The implications of *Warfield* are relatively straightforward. Where employers want to require an employee to submit claims of discrimination to arbitration, they must now say so clearly and unambiguously. When employees are asked to sign employment agreements

that will require them to submit any claims under state anti-discrimination laws to arbitration, they cannot simply hold their breath, sign the agreement and assume they will be able to challenge its enforcement at a later date if the need arises. If employees do not want to waive their statutory rights, they must say so. These are tough conversations to have but the *Warfield* Court invites them — and perhaps it invites all of us to join the conversation about arbitration begun in earnest at a legislative level in Washington, D.C. last year. ■

## Endnotes

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- 1 Announcing its new rule, the SJC noted that, prior to *Warfield*, the Court "had never been called on to interpret the scope of... [generally broad] language when used in an employment agreement's arbitration clause where the employee raises claims of discrimination under G.L. c. 151B." *Id.* at 397.
- 2 In state court, under the MAA, an order denying a motion to compel arbitration is entitled to interlocutory review and "is treated summarily." *Warfield*, 454 Mass. at 395; *see also* M.G.L. c. 251, §§ 2, 18. In the absence of an evidentiary hearing below, the reviewing court analyzes the facts alleged "as it would a motion to dismiss." *Id.* at n. 9.
- 3 Prior to *Warfield*, some had argued that the MAA did not apply to employment disputes. Unlike the Federal Arbitration Act, 9 U.S.C. §§ 1 – 14 (1988), or the Uniform Arbitration Act upon which the MAA was based, the MAA focused on "commercial disputes." *See also* Report of the Commission on Uniform State Laws, 1960 House Doc. 94, at 7 — 8 (recommending that "the Uniform Arbitration Act, restricted to commercial arbitration, be substituted for General Laws, Chapter 251, but that labor arbitrations be left to the recently enacted Chapter 150C").
- 4 The Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1988) ("FAA") provides that arbitration clauses "shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. If a state law ground to revoke or limit the application of an arbitration clause is not applicable to revoke or limit the application of a contract in general, that state-law principle shall be preempted by the FAA. *See, e.g., Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996); *Preston v. Ferrer*, 552 U.S. 346 (2008).
- 5 The history of policies favoring arbitration indeed have their roots in efforts to create labor peace and arrive at mechanisms, short of strikes, for resolving broad labor disputes and a history of seeking mechanisms that would allow industry to resolve disputes efficiently while allowing commerce to operate. The history of the FAA and its initial purpose is set out by the dissent in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 125-126 (2001) (Stevens, J., joined by Ginsburg, J. and Breyer, J.).
- 6 As early as 2001 SJC had cautioned: "[O]ur recognition of the benefits of arbitration do not allow us to compel [a plaintiff] to arbitrate in the absence of any binding arbitration clause that would cover his dispute .... 'Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *Ladd v. Scudder Kemper Investments, Inc.*, 433 Mass. 240, 246 (2001).
- 7 This is certainly not the first time courts have placed priority on access to the courts with respect to discrimination law. The Court here echoed the concerns once raised by Justice Gants as a trial court judge who declined to compel arbitration of claims brought against a non-signatory to an arbitration agreement: "This Court well understands the desire of overburdened courts to resolve related disputes in a single forum, especially when that forum will be arbitration, but courts cannot succumb to the temptation of denying a plaintiff his right to a jury trial and to the various safeguards provided by our trial courts ... in its case against one party simply because the plaintiff has agreed to arbitration with another." *Vassalluzzo v. Ernst & Young LLP et al*, 2007 WL 2076471 at \*5 (Gants, J., Mass. Super.); *see also e.g., Stonehill College v. Massachusetts Comm'n Against Discrimination*, 441 Mass. 549 (2004), *cert. denied sub nom Wilfert Bros. Realty v. Massachusetts Comm'n Against Discrimination*, 543 U.S. 979 (2004)(plaintiffs seeking damages under M.G.L. c. 151B have a constitutional right to a jury trial).
- 8 The lone dissenter in *Warfield*, Justice Cowin, questioned the singling out of claims brought under M.G.L. c. 151B, arguing that there is nothing in "the nature of antidiscrimination claims [that] require a special approach." *Id.* at 405.
- 9 The SJC was careful to acknowledge the vitality of policies favoring arbitration and ground its decision in general principles of contract interpretation, avoiding any possible argument that the rule announced violated the FAA and was preempted by it. *See id.* at 400 n. 14.
- 10 The Court rejected the analysis of the Massachusetts Appeals Court in *Mugnano-Bornstein v. Cromwell*, 42 Mass.App.Ct. 347 (1997) requiring the plaintiff to arbitrate claims of sexual harassment and gender discrimination, even where the agreement did not contain any specific reference to such claims. *Warfield*, 454 Mass. at 397 n. 11.
- 11 *See also South Bay Boston Management, Inc. v. Unite Here, Local 26*, 587 F.3d 35, 42 – 43 (1st Cir. 2009) (setting out standards for analyzing the post-expiration arbitrability of disputes in a labor context).



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