The Massachusetts Chapter of The Federal Bar Association

Matthew C. Baltay - Editor

NEWSLETTER • FALL 2011

President's Column

by Christopher P. Sullivan

Now autumn is here. The students are back in school. The baseball season, at least for Red Sox Nation, is over. However, the baseball season isn't the only thing coming to an end. For the past year it has been my privilege to represent each of you, the members of our chapter, as president. As I pass the leader's gavel to our new president Mary Jo Harris, I reflect on the past twelve months and think about the year ahead.

And what a year it's been. Judge Denise J. Casper joined the district court and Judge Nancy Gertner moved off the bench and on to a new phase of her illustrious career. The FBA Annual Judicial Reception honored Chief Judge Sandra Lynch of the First Circuit Court of Appeals at the Boston Harbor Hotel in what was a terrific atmosphere of collegiality and fellowship for members of our legal community. The chapter sponsored monthly "Breakfast with the Judge" events with diverse topics, speakers and participants. Two Job Interviewing Skills Workshops for the CARE and RESTART program participants were held to give ex-offenders the tools to help them get the job that would give them a new start in life. The YLD had a strong year continuing to contribute to the vibrancy of our organization and as a training ground for future chapter leaders. The FBA sponsored and co-sponsored many CLE programs and worked with the court and other bar organizations for the betterment of our entire community.

Our chapter was well represented at FBA's Annual Convention in Chicago earlier this month with Susan Weise, Jack Schecter, Matt Moschella and me all in attendance. And we played an increasingly larger role in the national FBA as Jack Schecter became head of the Intellectual Property Law Section and Matt Moshcella ascended to the chair of the national YLD.

The year ahead looks full of promise. Our new president Mary Jo Harris has big plans for a busy year for the chapter. Our main stay programs and events will return again this year bigger and better than ever. To help her with all the work to be done, Mary Jo has put together a top quality team to support her as she runs the chapter. If you are looking for a chance to become a more active member, just volunteer and Mary Jo will gladly put you to work! Indeed, Mary Jo's vision for the coming year is already bearing fruit. We will be sponsoring a Law of Wine event this fall. It should be a very pleasant evening of learning

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and fun. I predict the Law of Wine will become an annual chapter event. More news on this event will be coming very soon.

Finally, allow me to thank all the wonderful people who worked so hard to make this past year such a joy for me. I can't begin to name all of many, many volunteers, collaborators, executive council members and chapter officers who so tirelessly gave of themselves to produce the wonderful programs and events the chapter put on this year. You guys are amazing!

The FBA Massachusetts chapter is strong and steadily growing stronger. Our chapter is well positioned for the future success it is sure to enjoy. Thank you all for the opportunity to serve you and this great organization.

New Officers Elected Starting October 1, 2011

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Jonathan D. Mutch
Benjamin Stern
Harvey Weiner

Congratulations to all the candidates who volunteered their talents to our chapter.

View from the Bench: A Candid Conversation with Judge Denise J. Casper

by Christopher P. Sullivan

Recently, our district court's newest judge, Denise J. Casper, agreed to respond to some questions from the Chapter's newsletter and offer some insights and reflections on her work since being sworn in January. Here's some of what Judge Casper had to say.

Question from Chris Sullivan: Since your swearing in January, what has surprised you the most about the job of being a federal judge?

Answer from Hon. Denise J. Casper: What has surprised me, to a certain extent, is the range of big and small decisions that you make as a judge on a daily basis. Clearly, I must always follow the dictates of the law, but what I have found most interesting and most challenging is the exercise of my discretion, day-to-day, about everything from case management to my courtroom protocols to the conduct of trials.

Q: What is the most satisfying part of being a judge?

A: I am enjoying all aspects of my job. The work is both very challenging and satisfying. We have a strong and collegial court of great judges, all of whom welcomed me warmly to the bench. For the most part, the quality of lawyering I see in my courtroom is very high. The most satisfying hearings are those at which the attorneys are making the best arguments on behalf of their clients. I am also enjoying my non-judicial duties. This summer, I had the honor and privilege of working with high school and college students in the Court's Nelson Fellows and the Lindsay Fellows Programs. This year marks the 15th year of the Nelson Fellows program. It was truly gratifying to witness the growth, particularly growth in confidence, of our Fellows over the course of the summer. I am very proud to be a part of these important endeavors and I look forward to working with our Fellows in the summers to come.

Q: What is the most challenging aspect of being a judge?

A: I did not fully appreciate the large number of pro se litigants before the Court until I became a judge. Handling such cases pose special challenges for judges. Just as one example, a judge must take special care, I think, in explaining the scope of a hearing and the impact of his/her decisions to a pro se litigant in a manner and to an extent that the judge may not need to with parties who have the benefit of counsel. I know that FBA members and many members of the MA bar volunteer to represent indigent litigants and I am happy that so many attorneys have signed up to volunteer for the pro se mediation program created by the Court and led by Chief Magistrate Judge Dein. Programs such as this one are a great aid to the Court and the administration of justice.

Q: How successful have you been in implementing your standing order that younger, less experienced lawyers be allowed greater participation in hearings and trials?

A: The impact of my standing order is difficult to gauge at this point. However, in my own unscientific observation, senior attorneys seem to be taking my order to heart as I see more junior attorneys in my courtroom and, in some cases, taking a more active role in oral argument. Since I issued the standing order in May, I have had it entered on the docket in all of my civil cases so that the attorneys are aware of it. I have also placed the order on the Court's website. As I say in the text of the order, its terms are not self-executing; the order will only have the intended effect of offering more in-court opportunities for new attorneys, if their more senior counsel put it into effect.

Q: What advice would you give to a younger, less experienced lawyer who is going to appear before you for the first time?

A: I urge all lawyers with matters before me to confer in good faith to narrow the scope of their dispute before filing motions and take to heart not only the letter of Local Rules 7.1(a)(2) and 37.1(a), but the spirit of those rules as well. It is helpful to the Court and to parties themselves if the issues to be decided have been narrowed to the most material and critical ones.

Q: What are some of the things that lawyers do when appearing before you that annoy you the most?

A: I have not been on the bench long enough to have developed any pet peeves. Please feel free to ask me again in a few years.

Q: What role do you see for bar associations (especially the FBA) to play in the administration of justice in the district court? What can the FBA do better?

A: As I suggested above, I hope that members of the FBA and other bar associations will continue to volunteer to represent indigent parties. I think that bar associations should continue to work to ensure that there is ongoing dialogue between the bench and the bar. As an attorney, I found that the insights from the judges at programs like the MCLE program "The U.S. District Court Speaks" very helpful to my practice. As a judge participating in that program earlier this year, I have taken some of the feedback from attorneys at that event into consideration in formulating my own protocols. The FBA's series, "Breakfast with the Judge," is another chance for bench-bar interaction in a collegial spirit. I am looking forward to participating in this "Breakfast" series in the future.

The chapter is preparing a complete judicial profile of Judge Casper that will appear in *The Federal Lawyer Magazin*e in an upcoming edition.

Report from the 2011 FBA Annual Meeting and Convention in Chicago

By Jack C. Schecter, Sunstein Kann Murphy & Timbers LLP

The Federal Bar Association held its Annual Meeting and Convention in Chicago from September 7 through September 10, 2011, and the Massachusetts Chapter was well represented. Our President, Chris Sullivan, our National Delegate, Susan Weise, and our newest member of the Executive Board, Ben Stern, all made the trip out to the Windy City. Although not officially representing the Massachusetts Chapter, Matt Moschello and I were also in attendance, Matt as the new Chair of the Young Lawyers Division, and me as the Chair of the FBA's Intellectual Property Section.

Thursday evening, in addition to a Federal Civil Litigation Section Happy Hour, we attended a reception at Chicago's Shedd Aquarium. Friday was filled with CLEs and FBA meetings, including the FBA Young Lawyers Division Award Lunch, with our own Matt Moschella as master of ceremonies. Friday's activities were rounded out with an excellent guided boat tour of Chicago's architecture followed by a reception at the Art Institute of Chicago.

On Saturday, in addition to the FBA Sections and Divisions Leaders meeting and the National Council Meeting, we

attended the annual awards luncheon. I'm happy to report that the Massachusetts Chapter did exceedingly well. Not only did our chapter receive the Chapter Activity Presidential Excellence Award, but we also received a Meritorious Newsletter Recognition Award and a grant of $1,000 from the Foundation of the Federal Bar Association in recognition of our chapter's Job Interviewing Skills Program for the CARE/RESTART. Along with the many awards the Massachusetts Chapter took home, I'm also pleased to report that the Intellectual Property Section's newsletter, The *IP Legal Browser*, also took home a Meritorious Newsletter Recognition Award.

Following Saturday night's Installation Banquet for the Federal Bar Association's new President, Fern C. Bomchill, it was time to head to O'Hare for the return trip to Boston.

In addition to raising the profile of the Massachusetts Chapter, the Annual Meeting presented a great opportunity to network with other FBA members throughout the country. I strongly encourage anyone who's interested to look into attending next year's meeting, scheduled for September 19-20, 2012 in sunny San Diego, California. Please visit the San Diego Chapter's web site for the meeting at http://www.sandiegofbaconvention.com, and feel free to contact this year's Massachusetts Chapter attendees if you have any questions

Young Lawyers' Division Hosts Interviewing Skills Workshop at Northeastern Law

By Alexander G. Henlin, Edwards Angell Palmer & Dodge LLP

The Massachusetts Chapter's Younger Lawyers' Division hosted a successful interviewing skills workshop for law students on September 7, 2011. With gracious support from the Office of Career Services at Northeastern University's School of Law, the YLD sponsored a panel discussion that offered students practical insights into what legal employers are seeking, particularly in the current market. Past chapter president **Chris Kenney** and past YLD chair **Nicole Murati Ferrer** sat on the panel, and were joined by Windy Rosebush Catino of Edwards Angell Palmer & Dodge LLP. Assistant Dean Randi Friedman moderated. Numerous additional students joined the discussion as their classes let out, leading to a packed room at the end of the panel.

Seventeen students were then offered a chance to conduct a practice interview with FBA members and other volunteers, including **Elizabeth Bostwick**, incoming YLD Secretary **Michele Frangella**, incoming FBA Chair **Evan Ouellette**, current Chapter President **Chris Sullivan**, and incoming YLD Treasurer **Erica Tennyson**. Current YLD Treasurer **Andrew Kepple** coordinated the volunteer effort, and was pleased with the turnout. YLD Chair **Alex Henlin** expressed his appreciation: "The Massachusetts chapter has really gone out of its way to support the YLD in this effort. We're grateful that we could offer this program, give back to the legal community, and introduce the FBA to current law students in such a positive manner."

Roughly 50 students joined a reception that the YLD hosted after the event. Northeastern has expressed its deep gratitude for the program, and looks forward to partnering with the FBA for future events.

RULES UPDATE:

Update on Proposed Amendments to Rule 11 of the Federal Rules of Civil Procedure and Chapter Survey

By Patrick Curran, Ogletree Deakins

In March 2011, proposed legislation was in the U.S. House of Representatives (H.R. 966) and the U.S. Senate (S. 533) that, if enacted, would modify Rule 11 of the Federal Rules of Civil Procedure in a number of significant ways. First, they would make the award of monetary sanctions mandatory, rather than discretionary, upon a finding that Rule 11 has been violated. Second, they would require that the mandatory sanction consist

of an order to pay the parties injured by conduct in violation of the Rule the amount of the reasonable expenses incurred by those parties as a direct result of the violation, including their reasonable attorneys' fees and costs. Third, they would repeal the 21-day "safe harbor" provision of the current rule. Fourth, and finally, they would provide specific examples of the "nonmonetary" directives that, under the current and proposed versions of the Rule, the Court may (but need not) impose on the violating party. On July 7, 2011, the House version of the bill was approved by the House Judiciary Committee, and both bills remain pending.

On August 15, 2011, the Massachusetts Chapter of the FBA distributed a survey to its members soliciting their views on the proposed changes to Rule 11. The results of the survey showed that respondents were strongly in favor of maintaining the discretion afforded federal judges under the Rule in its current form to determine whether monetary sanctions should be awarded upon a finding of violation (88%), and of retaining the current Rule's 21-day "safe harbor" provision (76%). Half of respondents, however, favored the provision of the pending legislation that would require the payment of reasonable expenses incurred by the parties injured by a violation of the Rule, while a majority (53%) favored the provision of the bills that sets forth specific examples of the "nonmonetary" directors that the Court may (but need not) impose on the violating party.

On September 7, 2011, the FBA's Board of Directors passed its 2012 Issues Agenda, in which it addressed a number of pending legislative issues, including the pending legislative proposals to amend Rule 11. Consistent with the views expressed by most respondents to the Massachusetts Chapter's survey, the Board stated that the FBA "opposes legislative proposals to eliminate judicial discretion in the imposition of sanctions for frivolous litigation, including proposals to revise Rule 11 . . . by imposing mandatory sanctions and preventing a party from withdrawing challenged pleadings on a voluntary basis within a reasonable period of time."

Proposed Changes to Rule 45 of the Federal Rules of Civil Procedure

By Brian K. Wells, Robins, Kaplan, Miller & Ciresi L.L.P

Recently, the Committee on Rules of Practice and Procedure of the United States Judicial Conference of the United States (the "Committee") proposed amendments to Rule 45 of the Civil Rules of Civil Procedures ("Rule 45) directed to subpoenas. The Committee approved for publication the proposed Rule at the June 2011 Standing Committee meeting. The public comment period for the proposed amendments ends on February 15, 2012.

Since 1991, when Rule 45 was extensively amended, a few issues have arisen that the current amendments address. These current amendments were designed to simplify the subpoena process and address perceived abuses of the rule. Specifically, the Committee proposed Rule 45 be amended to:

- Allow the court hearing the action to issue subpoenas rather than the court within 100 miles of the witness' residence;
- Give authority to attorneys who appear in the court hearing the action to serve a subpoena anywhere in the United States;
- Consolidate and simplify the language regarding service and compliance;
- Extend the geographical area limitation for compliance with a subpoena to parties;
- Provide a transfer mechanism for subpoena-related motions to the court hearing the case, and contempt authority to that court if a transfer is allowed; and,
- Require parties give notice to other parties when they serve a subpoena.

The Committee proposed to allow the "issuing court" (i.e. the court hearing the action) to issue the subpoena (instead of the local court) because attorneys are authorized to issue a subpoena in any court in which the action is pending. Thus, requiring the local court to issue the subpoena is unnecessary, especially since the local court generally only learns of a subpoena if there is a dispute about that subpoena. Thus, this amendment allows for the easier administration of issuing subpoenas.

In a similar vein, the Committee proposes to make explicit the place-of-service provisions of the current rule. In practice, the current rule allows for service anywhere in the United States but requires a subpoena be issued by a local court. As a result, an attorney in the local court would be necessary to serve the subpoena. Now, the place-of-service amendments allow for an attorney admitted to the court hearing the action to serve the witness anywhere in the United States without regard to the local court. This change, however, does not affect the requirement that compliance with a subpoena must occur within the geographical limit contained in the current rule.

The Rule 45 amendments also serve to consolidate and simplify the current provisions on place of service and compliance. Under the current Rule 45, one must consult multiple provisions to identify the proper court and the place of service and compliance. Under the proposed Rule 45, Rule 45(c) largely continues to require the geographical limitations on place of compliance, but simplifies and consolidates the multiple provisions into one subsection to determine where compliance

can be required. Similarly, it removes the need to reference state law as required by the current Rule.

With the proposed amendments, the Committee sought to cure the practice of making parties travel more than 100 miles for trial. Under the current Rule 45, a line of cases required parties to travel further than the geographical limitation based upon the plain language of the rule which excluded parties from the geographical limit. The amended Rule 45 would make clear that the geographical limitation applies to parties and non-parties. The Committee reasoned that this change was required because the current Rule 45 was applied inconsistently. Further, requiring a party witness to travel without limitation could lead to abuse of the rule for tactical purposes. Thus, under the proposed Rule 45, all persons would have the protection of the geographical limitation.

The Committee also proposed amendments that would explicitly allow a current practice where local courts transfer to the court hearing the action motions regarding the subpoena. This amendment requires either the consent of all parties and the witness, or a showing of exceptional circumstances. The Committee noted that such circumstances have to be particularly strong where the subpoena is served on a local nonparty. Parallel amendments to Rule 45(g) and Rule 37(b)(1) allow either court (the local court or the court hearing the action) to enforce the orders through a finding of contempt after such transfer is entered.

Finally, the amendments clarify notice requirement for parties. Each party must give notice to other parties when they serve a subpoena. This amendment was made because, under the current rule, many parties fail to give notice even where the other party has the right to expand on certain subpoenas, *i.e.* requests for the production of documents and things.

These amendments to Rule 45 have only been proposed and the Committee is seeking comments on them until February 15, 2012. The Committee particularly invites public comments on the following topics::

(1) Additional notices: Proposed Rule 45(a)(4) relocates and somewhat expands the requirement in current Rule 45(b)(1) that notice be given to all parties before a subpoena is served, and includes trial subpoenas within the notice requirement. It does not, however, require any follow-up notices, such as a notice that production has occurred, that the initial demands of the subpoena have been modified, or otherwise. The Committee received suggestions that additional notices should be required, but concluded that such additional requirements would be more likely to produce difficulties than benefits. It invites commentary on whether additional notices should be required beyond the one specified in Rule 45(a)(4).

(2) Standard for transfer of subpoena-related motion: Proposed Rule 45(f) adds authority for the court in which a subpoena-related motion is filed to transfer the matter to the court in which the underlying action is pending. The Committee is particularly interested in comment on the standard for such transfer:

(a) Party consent: The proposed rule provides that, absent exceptional circumstances, party consent is necessary for such transfer in addition to consent of the person to whom the subpoena is directed. Should party consent be required? Should consent of the person subject to the subpoena suffice without party consent?

(b) Exceptional circumstances requirement: Absent consent, the rule permits transfer only in exceptional circumstances. Is that standard too confining? Are the circumstances offered as illustrations in the Committee Note "exceptional," or might they arise with some frequency? Is there reason for concern that courts might be unduly prone to transfer such motions under a laxer standard? Alternatives have been suggested, such as "good cause," or focusing on "the interests of the parties, the interest of the person subject to the subpoena, and the interests of effective case management." If the exceptional circumstances standard unduly confines the court's ability to transfer subpoena-related motions, what alternative formulation would be desirable?

(3) Party and party officers subpoenaed for trial: As noted above, the Committee concluded that the 1991 amendments were not intended to authorize nationwide subpoenas requiring parties or party witnesses to testify at trial. After much discussion, it also concluded that permitting such subpoenas would invite abuse in some situations. Nonetheless, because cases upholding this power suggested that some courts regarded having such authority as valuable in some circumstances, the Committee has included as an Appendix a possible Rule 45(c)(3) that would confer limited authority to order such testimony at trial. The Appendix is not a Committee recommendation. It is offered only to stimulate comment, including the desirability of any authority to command a party or party's officer to testify at trial beyond the limits that apply to a nonparty, and also the best way to define any such authority. The Committee is particularly interested in comment on these issues:

(a) Desirability of adding such authority: Is the amendment presented in the Appendix preferable to restoring the 1991 meaning of the rule? Are there instances in which an expanded ability to command testimony at trial from a party or party officer is important to fair disposition of cases?

(b) Standard for exercise of such authority: Is the language

in subdivision (c)(3) in the Appendix appropriate for such authority if it is added to the rules?

(4) Overall simplification effort: Overall, one important objective of these amendments is to simplify the operation of Rule 45. The Committee invites comments on whether the efforts at simplification are successful, and whether further simplification of the rule might properly be considered.

Comments may be submitted electronically at Rules_Comments@ao.uscourts.gov or in writing to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Washington, D.C. 20544.

CASE FOCUS:

US District Court: Age Discrimination and the Labor Management Relations Act

By Martin J. Rooney, Curley & Curley, P.C.

The US District Court for Massachusetts very recently handed down an opinion which provides a comprehensive analysis of the ADEA, ERISA and the LMRA, along with related Massachusetts state law claims. In *Cameron v. Idearc Media Corp.*, 2011 U.S. Dist. LEXIS 101736 (Sept. 9, 2011), Magistrate Judge Sorokin addressed many claims by the plaintiffs under the Age Discrimination in Employment Act (ADEA), Mass. Gen. Laws c.151B, and ERISA as applied in a case involving a unionized sales force. In this case, the plaintiffs were all over 40 years of age and employed to conduct in-person sales calls for directory advertising (or "yellow pages"). The plaintiffs were part of the Communications Workers of America, Local 1301, and subject to a collective bargaining agreement. After plaintiffs were discharged, they brought claims under the ADEA, c. 151B, and ERISA, alleging that the employer discharged them either to terminate older workers and/or to terminate workers with looming pension benefits.

The court first comprehensively reviewed the factual allegations and found that most were lacking in substance. Importantly, the allegations also involved extensive interpretation of the CBA as to the employer's rights and responsibilities. Turning to the legal issues, the court first notes the important change in federal age discrimination law brought about by *Gross v. FBL Financial Services, Inc.*, in 2009, where the US Supreme Court clarified that the plaintiff must prove "but for" causation to prevail under the ADEA. The court then applied the familiar burden-shifting analysis approved for age discrimination cases by the First Circuit in *Velez v. Thermo King de Puerto Rico, Inc.*, while noting that the US Supreme Court still has not addressed the interesting question of whether or not that analysis is in fact applicable to claims under the ADEA. The Court also noted that Massachusetts state law has also applied a similar analysis, but noting that the SJC has yet to address the open issue of whether the state will follow the federal law with regard to mixed motive cases (or with respect to causation standards) – which rule is that such analysis does not apply to the ADEA. [N.B.: *See Haddad v. Wal-Mart Stores, Inc.*, 455 Mass. 91,113, n. 27, reserving issue of whether Massachusetts will follow *Gross*.]

In addressing the employer's defense that the LMRA barred the federal and state law claims, the court agreed with that legal contention. The court found that since the factual arguments made by the plaintiffs all involved interpretation of the CBA, the LMRA provided the exclusive remedy for any alleged violation of the CBA. A plaintiff may not simply recast alleged violations of the CBA as discrimination claims in order to avoid the remedies provided in the LMRA. The court did note that where a CBA may be only tangentially involved, a different result could be found. Likewise, and for the same reasons of federal labor law policy, plaintiffs' ERISA claims were also barred.

Cameron provides an excellent summary of the current law, both federal and state, in the field of age discrimination, and for that reason alone merits review by employment practitioners, as well as anyone looking for a solid review of the law in this field. Further, the opinion addresses the interesting intersection of discrimination claims in situations involving a collective bargaining agreement, an area the First Circuit has not directly addressed, and holds that as a matter of federal labor law, the Labor Management Relations Act will trump any such discrimination claim which requires the court to interpret provisions of the CBA. Anyone involved in prosecuting or defending such claims will need to take into consideration the interplay of these laws in the handling of each case.

The District of Massachusetts Limits Applicability of Peer Review Privilege

By Peter F. Herzog, Sherin and Lodgen LLP

The Introduction

The Commonwealth of Massachusetts, under G. L. c. 111 § 204(a), recognizes a medical peer review privilege by which "the proceedings, reports and records of a medical peer review committee shall be confidential and . . . shall not be subject to subpoena or discovery, or introduced into evidence, in any judicial or administrative proceeding. Health care providers routinely rely on this privilege to protect from disclosure physician performance evaluations and other documents otherwise discoverable in judicial and administrative proceedings. On July 15, 2011, the U.S. District Court for the District of Massachusetts ruled in *Gargiulo v. Baystate Health Inc.*,

et al. (Case No. 11-CV-30017, U.S.M.J. Kenneth P. Neiman) that the medical peer review privilege did not protect from disclosure the performance records of a surgical resident and her similarly situated peers in a federal anti-discrimination lawsuit brought against a health care provider.

Background

Baystate Health, Inc. and Baystate Medical Center, Inc. (collectively "Baystate") employed Dr. Debra Gargiulo as a surgical resident beginning in 2005. Dr. Gargiulo initially received positive performance reviews; however, her reviews became progressively worse after two years in the program. In early 2008, Dr. Gargiulo took a medical leave of absence due to apparent post-traumatic stress disorder, and was told she could return to Baystate only on a remediation plan. Approximately one year later, Baystate informed Dr. Gargiulo that she could not return to complete her residency.

Due to Baystate's actions, Dr. Gargiulo filed suit in the U.S. District Court for the District of Massachusetts under diversity jurisdiction, given that Baystate is a Massachusetts resident, and Dr. Gargiulo is an Ohio resident. She alleged state law age and disability discrimination claims, as well as federal law claims under the Americans with Disabilities Act and Age Discrimination in Employment Act.

Dr. Gargiulo moved the court to compel Baystate to produce her records, performance evaluations and reports, as well as those of her similarly situated peers. Baystate opposed the production on the grounds that (i) Massachusetts peer review privilege protected the requested documents from disclosure, and (ii) in the alternative, the court should recognize a federal common law peer review privilege. Dr. Gargiulo argued that Baystate should produce her performance evaluations because the medical peer review privilege does not apply in the context of federal discrimination claims.

Discussion

The Choice of Law Issue

Under Federal Rule of Evidence 501:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

Thus, the court first explored whether federal or state privilege law applied to Dr. Gargiulo's claim for the performance evaluations. Baystate contended that the court should apply state privilege law, pursuant to *Gill v. Gulfstream Park Racing Ass'n, Inc.*, 399 F.3d 391, 401 (1st Cir. 2005), because the court exercised diversity jurisdiction over Dr. Gargiulo's suit.

The court rejected Baystate's argument, noting that Dr. Gargiulo also brought substantive federal claims under the Americans with Disabilities Act and Age Discrimination in Employment Act. The court found that, in addition to diversity jurisdiction, Dr. Gargiulo's claims satisfied federal question jurisdiction. Thus, "the court [was] disinclined to promote form over substance in order to address the present dispute," and it ruled that any privilege would be governed by federal law, pursuant to FRE 501. In finding that federal law controlled, the court relied on the rule that "when there are federal law claims in a case also presenting state law claims, the federal rule favoring admissibility, rather than any state law privilege, is the controlling rule." Having resolved this threshold issue, the court next turned to Baystate's argument that it should adopt a federal common law peer review privilege.

The Court Rejects A Federal Peer Review Privilege

The court rejected Baystate's argument that it adopt a federal common law peer review privilege in this case. First, it noted that neither the First Circuit nor the District of Massachusetts had ever adopted such a privilege. Second, the court looked to the First Circuit's two-prong test, articulated in *In re Hampers*, 651 F.2d 19, 22 (1st Cir. 1981), to determine whether to recognize a state privilege under federal common law.

The first prong of *Hampers* required the court to determine whether Massachusetts recognizes such a privilege. The court assumed, *arguendo*, that Massachusetts courts would recognize the peer review privilege in this case. Thus, the court turned to the second prong, which requires the court to determine whether the state's asserted privilege is "intrinsically meritorious."

The court found that the privilege was not intrinsically meritorious because the federal interest in promoting disclosure of evidence in discrimination cases outweighed the state interest in promoting candor in the medical review process. It reasoned that:

- the few federal courts recognizing such a privilege have done so only in the context of medical malpractice claims;
- the Supreme Court has cautioned courts against recognizing privileges broadly; thus, extending the privilege beyond medical malpractice claims would "cut too broad a swath";
- Congress did not specifically create an evidentiary rule

protecting peer review documents;
- there exists a strong federal interest in fighting discrimination.

Based on these issues, the court concluded that "[w]hile it is important to promote candor and confidentiality in the review process . . . the privilege ought not be used as a shield against violations of federal discrimination law." Accordingly, the court ordered Baystate to produce the performance evaluations to Dr. Gargiulo.

Implications For The Future

Gargiulo will impact future employment discrimination cases in a medical context. First, plaintiffs in these cases will now be sure to include federal law claims in any lawsuit brought against an employer health care provider. Second, the decision encourages forum shopping, as these plaintiffs will make every effort to bring suit in federal court to compel disclosure of materials otherwise protected under state law peer review privilege. This ruling, however, does not completely erode the purpose of the medical peer review privilege. The *Gargiulo* court expressly limited the application of this rule to discrimination cases, and recognized that the peer review privilege continues to protect such information from disclosure in the context of medical malpractice claims.

Hospitals and medical staff should be aware of the *Gargiulo* decision, and recognize that federal courts may grant employees discovery of peer review records in federal discrimination claims. *

*This article was submitted for publication in the Mass Defense Lawyers Association's newsletter.

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