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# RECENT LEGAL DEVELOPMENTS

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# CASE LAW

## I. Expert Testimony

## UNITED STATES SUPREME COURT

### *Weisgram v. Marley*, 528 U.S. 440, 120 S. Ct. 1011, 145 L.Ed.2d 958 (2000)

The plaintiff (Weisgram) brought a civil action in the United States District Court for the District of North Dakota on his own behalf and on behalf of his mother's heirs. He claims under North Dakota strict products liability law, that the manufacturer of an electric space heater (Marley) was responsible for the death of his mother on the theory that a defect in the heater caused a house fire that resulted in the death of his mother by carbon monoxide poisoning. At trial Weisgram offered three experts: the Fargo, ND fire captain, a "fire investigator" and "technical forensic expert," and an expert in the properties of metals. Marley objected that the testimony was unreliable and inadmissible under Rule 702 of the Federal Rules of Evidence (Rule 702). The district court overruled the objection and the jury found for Weisgram.

The United States Court of Appeals for the Eighth Circuit (169 F.3d 514) vacated the district court judgment and remanded the case with instructions that Marley prevail as a matter of law. The Eighth Circuit concluded that the expert testimony was unreliable and therefore inadmissible under Rule 702. The Court found that the experts, although each qualified in his field, were not qualified to answer the specific questions required to establish that the heater was the cause of the fire. The Court also found that the remaining

evidence (considered in the light most favorable to Weisgram) was insufficient to support the jury verdict; and no new trial was required, since that case was (without the excluded evidence) not close, Weisgram had received a fair opportunity to prove his case, and there was no reason to give Weisgram a second chance.

Justice Ginsburg writing for a unanimous United States Supreme Court opined that:

> "Since *Daubert* (*Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 125 L. Ed.2d 469, 113 S. Ct. 2786, [1993]), moreover, parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet. 509 U.S. 579; see also *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143 L. Ed.2d 238, 119 S. Ct. 1167 (1999) (rendered shortly after the Eighth Circuit's decision in Weisgram's case); n12 *General Electric Co. v. Joiner*, 522 U.S. 136, 139 L. ED.2d 508, 118 S. Ct. 512 (1997). It is implausible to suggest, post-*Daubert*, that parties will initially present less than their best expert evidence in the expectation of a second chance should their first try fail."

The Supreme Court found that although Weisgram was "on notice every step of the way that Marley was challenging his experts, he made no attempt to add or substitute other evidence." Citing *Lujan v. National Wildlife Federation*, 497 U.S. 871, 111 L.Ed.2d 695, 110 S. Ct. 3177 (1990), the Court noted that "[A] litigant's failure to buttress its position because of confidence in the strength of that position is always indulged in at the litigant's own risk."

**Practitioner Implications**

From the opinion of the Eighth Circuit practitioners should learn that being qualified as an expert in a field, will not prove to be sufficient to allow for admission of opinion testimony, if the expertise does not relate to the specific facts of the case at hand. The mere fact that one has been a practitioner in the field for twenty years (as the fire captain had), and had his/her opinion accepted on numerous prior occasions, may no longer be sufficient to ensure that you will be qualified as an expert in the field. The court required a "reasonable factual basis for [the] opinions." Citing the U.S. Supreme Court's decision in *General Elec. Co. v. Joiner*, the Court found that, "There is simply too great an analytical gap between the data and the opinion proffered." As the Supreme Court noted in *Joiner*, "whether … studies can ever be a proper foundation for an expert's opinion is not the issue. The issue was whether these experts' opinions were sufficiently supported by the … studies on which they purported to rely." For a forensic examiner for example the issue will likely become, "was the study normed on individuals whose background is similar enough to the subjects in order to be considered relevant to the issue the Court seeks to have evaluated?" Practitioners should be prepared to offer evidence that the conclusions garnered from the use of psychological tests are relevant to the issues of the case at hand and demonstrate why the conclusions are valid in this context and how they are supported by the facts.

From the opinion of the U.S. Supreme Court we should learn that appellate courts will be unlikely to return cases for new hearing on remand, so the best evidence must be put forth at the trial level. Since the Massachusetts Supreme Judicial Court has adopted *Daubert*, *Joiner*, and *Kumho* (at least by implication), it is likely that it will adopt *Weisgram* if presented with the opportunity.

## Massachusetts Supreme Judicial Court

***Theresa Canavan's Case*, 432 Mass. 304, 733 N.E.2d 1042 (2000)**

A self insured employer, Brigham & Women's Hospital (hospital) appealed the decision of the reviewing board of the Industrial Accident Board (board) affirming the decision of an administrative law judge (judge) finding Theresa Canavan (plaintiff) to be temporarily unable to work and that her medical treatment is reasonable and necessary. The hospital argues on appeal to the Supreme Judicial Court (432 Mass. 304) that the medical testimony of N. Thomas LaCava, M.D. (Dr. LaCava) plaintiff's treating physician and testifying expert on diagnosis, disability, and causation was not based on reliable methodology pursuant to the standards set forth in *Commonwealth v. Lanigan*, 419 Mass. 15 (1994). Dr. LaCava's testimony was presented by deposition.

The plaintiff while working as a nurse in the hospital operating room was (according to her testimony before the judge) subjected to various chemicals including ethylene oxide, formaldehyde, and diesel fuel. After one 10-hour day in the operating room she experienced a severe headache, nasal congestion, and dizziness. On returning to work three days later she experienced a fever, headache and swelling of her nose and right cheek. Her symptoms were confirmed. She was diagnosed as having chronic sinusitis, prescribed antibiotics, determined to be disabled and the hospital accepted and paid her workers' compensation benefits. When the treatment proved only marginally effective she was referred to Dr. LaCava.

Dr. LaCava is (or was) a private practitioner, an instructor in pediatrics at the University of Massachusetts Medical School, a staff pediatrician at Holden District Hospital, St. Vincent Hospital, Worcester Hahnemann Hospital, and The Memorial Hospital. He is certified in pediatrics by the American Board of Medical Specialties and certified in environmental medicine, a field not recognized by the American Board of Medical Specialties. Dr. LaCava conducted an extensive medical examination, took the plaintiff's medical history, performed an examination and conducted a number of diagnostic tests. He concluded that among other things, she suffers from multiple chemical sensitivities (MCS) secondary to chemical poisoning, which he believed was caused by exposure at the hospital.

Dr. LaCava stated that laboratory tests that he conducted provided evidence that the plaintiff suffered from MCS. He testified that her injury was caused by chemical poisoning at her work environment and that MCS rendered her totally disabled.

Donald D. Accetta, M.D. (Dr. Accetta) testified by deposition for the hospital. Dr. Accetta's testimony directly contradicts the conclusions reached by Dr. LaCava. Dr. Accetta is certified by the American Board of Allergy and Immunology. He is (or was) a private practitioner, a consultant at New England Medical Center, secretary of the New England Society of Allergy and has served on its board and the board of the Massachusetts Allergy Society. He examined the plaintiff twice. He testified that chemicals present in her work environment did not cause the plaintiff's condition. He testified that MCS is "not accepted as a diagnostic disease by mainstream allergists/immunologists and occupational medicine physicians." He diagnosed her as having chronic non-allergic rhinitis caused by nonspecific stimuli that exist in the every day environment. He also found the plaintiff's symptoms to have a "psychogenic component."

The judge after hearing and reviewing the depositions concluded that the plaintiff was totally unable to work as the continuing result of an injury that arose in the course of her employment and that her medical treatment (as prescribed by Dr. LaCava) was reasonable and necessary. He made these determinations "based on the opinions of Dr. LaCava regarding disability and causal relationships." The Board upheld his findings. The hospital appealed.

The Supreme Judicial Court in its decision first outlined the basic principles for admission of expert scientific testimony in Massachusetts. The Court began by noting that in *Commonwealth v. Lanigan*, 419 Mass 15 (1994) Massachusetts adopted, in part, the U.S. Supreme Court's reasoning in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993) and allowed that, "a proponent of scientific opinion evidence may demonstrate reliability or validity of the underlying scientific theory or process by some other means, that is, without establishing general acceptance." *Lanigan*, supra at 26. General acceptance adopted from *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923) had been the Massachusetts standard.

The Court then overturned its decision in *Commonwealth v. Vao Sok*, 425 Mass 787 (1997) that questions of expert scientific testimony admissibility would be reviewed under the "de novo standard of review" and instead adopted the "abuse of discretion standard" as per the U.S. Supreme Court decision in *General Electric Co v. Joiner*, 522 U.S. 136 (1997).

Finally the Court considered the question of whether expert testimony based on personal observation and clinical experience would be admissible without application of the *Lanigan* analysis. While not specifically adopting the U.S. Supreme Court decision in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) the Court found that "There is no logical reason why conclusions based on personal observations or clinical experience should not be subject to the *Lanigan* analysis."

With these principles in mind, the Court addressed the issue of whether the judge properly admitted Dr. LaCava's testimony regarding the diagnosis and course of the plaintiff's disability. The hospital argued that Dr. LaCava's methodology used in reaching his opinions was not generally accepted in the medical field or otherwise reliable under *Lanigan*.

The Court pointed out that the hospital's counsel had objected during deposition to Dr. LaCava offering his opinion on the grounds that foundation was lacking. On examination during his deposition, Dr. LaCava stated that the tests he performed on the plaintiff were accepted by factors familiar with environmental toxicity to determine whether the employee had been poisoned by chemical exposure. He then testified that not every person who suffers chemical exposure suffers MCS. These tests were generally accepted to show chemical exposure but not MCS. The Court found that "there is no evidence in the record to show that Dr. LaCava used a reliable methodology to transform his general finding of chemical exposure to his more specific diagnosis of MCS." The Court also formed that while Dr. LaCava referred to "the literature" as confirming the existence of MCS and to his testing revealing symptomology "highly suggestive of…environmental sensitivity," he did not identify any specific studies that show MCS exists or tests to confirm that a patient suffers from MCS. On cross-examination he admitted that there is a dispute in the medical community regarding the existence of MCS.

The Court concluded that the only evidence on the record that tended to show the plaintiff suffers MCS was Dr. LaCava's assertion. The Court found that an expert's mere assertion that a methodology is reliable is insufficient to pass the *Lanigan* test absent other evidence of its reliability.

As to causation, the Court found that while Dr. LaCava testified that "to within [sic] a reasonable degree of medical certainty" it was his opinion that the plaintiff's condition was caused by chemical exposure in the workplace, he admitted on cross-examination that there is medical uncertainty as to the cause of MCS. Since there was no suggestion the judge conducted a *Lanigan* analysis to determine if Dr. LaCava used reliable methodology to conclude that the chemical exposure caused the plaintiff to suffer MCS, its admission as causation testimony was in error.

The Court reversed the decision of the Board.

**Practitioner Implications**

With this decision, Massachusetts adopts the line of U.S. Supreme Court decisions (*Daubert, G.E. v. Joiner,* and *Kumho Tire*) regarding the admissibility of expert testimony. Justice Greaney in his concurrence asserts that "*Lanigan* will have little application to expert testimony in the so-called "soft sciences, such as psychology and sociology," and "It is here, more than anywhere else that an appellate court will defer to a trial judge's exercise of discretion."

Practitioners would do well to heed the lessons of *Canavan's Case*, particularly in light of the U.S. Supreme Court's decision in *Weisgram* (see this web site). Trial judges will be faced with challenges to use of psychological instruments to support conclusions when the instruments are used in a novel way or with a cohort for which it has not been normed. The validity of conclusions unsupported by a recognized methodology will be challenged. Citing "the literature" without specific examples may well lead to testimony being excluded. Relating opinions to the specifics of a case is now more important than ever.

## II. Competency :

## Commitment of Defendant Found Incompetent<br>United States Court of Appeals for the First Circuit

***United States of America v. Filippi*, 211 F.3d 649 (2000)**

The defendant (Filippi) was indicted on charges of "operating a racketeering enterprise" and "racketeering conspiracy, " and related charges stemming from an illegal gambling and extortionate credit scheme. He requested through counsel that he be declared incompetent to stand trial and unable to assist counsel because he suffered from vascular dementia. After a limited initial examination, the government's psychiatrist agreed and the Federal District Court for the District of Rhode Island found Filippi not competent to stand trial. The court then ordered that he be committed to a federal facility for a period not to exceed four months, to determine "whether there is a substantial probability that in the foreseeable future [the defendant] will attain the capacity to permit the trial to proceed," pursuant to 18 U.S.C. § 4241(d). Filippi objected, claiming that the condition (vascular dementia) is irreversible, and that his further confinement violated the Due Process Clause since it served no legitimate purpose.

The United States Court of Appeals for the First Circuit (211 F.3d 649) held that the statute, which requires that "the court 'shall' commit the defendant," gives the district court no discretion. The constitutional question raised by the appeal, "whether automatic commitment with substantial safeguards as to duration is a reasonable, and sufficiently 'narrowly tailored' accommodation of the competing interests," was answered affirmatively. The court held that while the statute is "categorical in determining who shall be incarcerated (sic)," it is much more "flexible and case-oriented in determining the length of incarceration." The court found that the statute provides that the period of incarceration is only for "such reasonable time … as is necessary" to determine whether the defendant will attain "the capacity for trial in the foreseeable future."

The court also found that while the U.S. Supreme Court rejected indefinite commitment in *Jackson v. Indiana*, (406 U.S. 715, 32 L. Ed.2d 435, 92 S. Ct. 1845 [1972]) it "upheld in principle commitment for a 'reasonable period of time necessary to determine whether there is a substantial probability that [the defendant] will attain that capacity in the foreseeable future.' (Citing *Jackson* at 738)."

**Practitioner Implications**

Commitment for purposes of observation or to determine a specific statutorily defined objective does not violate the Due Process Clause, even if the defendant is not dangerous or otherwise commitable, so long as the duration is reasonable and accomplished with substantial safeguards. The Massachusetts practice of requiring the commitment of persons found incompetent to stand trial to comply with civil commitment standards and to provide substantial procedural safeguards (notice, right to counsel, right to hearing, access to independent evaluations, proof beyond a reasonable doubt, etc.) appears to be in accord with this decision.

## New Trial, Standard for Self Representation

**Massachusetts Supreme Judicial Court**
***Commonwealth v. Simpson*, 428 Mass. 646, 704 N.E.2d 1131 (1999)**

Michael Simpson (defendant) was found guilty of two counts of assault with intent to murder (by a hammer and by a knife) two counts of assault and battery by means of a dangerous weapon (hammer and knife) and mayhem. The trial process began with an evaluation pursuant to M.G.L. c. 123 § 15(a) (at defense counsel request) on May 25, 1993. The evaluator expressed concern about his rational understanding of the proceedings against him and about his ability to represent himself. This court ordered commitment to Bridgewater State Hospital for a 15(b) evaluation, produced two reports “neither of which reached a conclusion concerning [his] competence because the defendant declined to participate sufficiently in the attempts of evaluations.” The defendant next sought removal of his counsel for raising the competency question. Counsel was allowed to withdraw and standby counsel appointed. Standby counsel told a third Superior Court judge that he had “very little, if any, doubt [the defendant] knows what is going on.” He also advised the court that the defendant would not cooperate in any further psychological evaluations.

On December 7, 1993 a fourth Superior Court judge set a new trial date and inquired regarding the defense’s desire to represent himself. The resulting colloquy did not suggest any lack of competence. On May 31, 1994 the case went to trial. The defendant participated in a colloquy, assessing his competence to stand trial, with the judge and his answers “gave no limit of any incompetence.” On the second day of trial the defendant conducted his motion in limine to preclude use of prior convictions to impeach him. He also participated rationally, but unsuccessfully in the resolution of his motion to suppress evidence the police seized at the time of his arrest. The jury was then selected.

On the third day of trial the defendant's opening statement was "implausible, rambling, considerably incriminatory, largely immaterial and unquestionably ineffective," The Supreme Judicial Court considering the matter on appeal (428 Mass. 646) agreed with the Appeals Court that the opening statement and subsequent conduct raised "a substantial question of possible doubt" whether he was competent to stand trial. (Citing *Commonwealth v. Hill*, 375 Mass. 50, 62 [1978]).

The Court noted (see footnote 6 at page 653) that prior cases have "suggested that if, in the course of a trial, a judge should perceive that the defendant may lack competence to be tried, the judge, should conduct a competency hearing." See, e.g., *Commonwealth v. Hill*, supra and *Commonwealth v. Vailes*, 360 Mass. 522, 524 (1971). The Court expressed the belief however that "[A]t the time the problem of possible incompetence arose in this case, the possibility of holding such a hearing and then continuing with the trial, only if the defendant were shown to be competent, was nil."

The Court found that the appropriate remedy for the absence of a needed competency hearing, and a decision on the defendant's competence is not immediately apparent. It noted that it had rejected "retrospective determination of competence" in *Commonwealth v. Hill* (supra at 62) on the grounds that, "the mental, condition of the defendant at the time of trial could not reasonably be determined retrospectively." It also noted that while the Commonwealth must prove the defendant's competence at the time of trial by a preponderance of the evidence. (*Commonwealth v. Porter*, 420 Mass 569 [1995]), the Court is reluctant to foreclose [the Commonwealth's] chance to do so (however remote) by reversing convictions at the appellate level. The Court distinguished cases like *Commonwealth v. Hill,* supra, and *Commonwealth v. Nickerson*, 388 Mass. 246 (1983) where the defendants had a history of mental illness preceding the commission of the crime or crimes charged. (The defendant apparently has no such history).

The Court found that the proper forum for presenting the question of this defendant's competence at the time of trial should be a motion for a new trial. Noting that the defendant has consistently declined to assent he is or was incompetent to stand trial, the Court ruled defense counsel must file a motion for a new trial alleging that the defendant was incompetent at the time of trial. The Court then detailed three options for proceeding. If the defendant is found now to be competent and he does not want to contest his competence at the time of trial, the judge may allow him to withdraw the motion for a new trial on a finding of an appropriate waiver, equivalent in quality to a plea of guilty. If the defendant is then competent and wishes to raise the issue of his competence at the time of the trial, the judge should decide the new trial motion. If the defendant is not then competent, no evidentiary hearing may properly be held on the new trial motion.

Although not germane to the determination of this case the Court addressed two other important issues. It opined that trial counsel has "the right, if not the duty, to advise the relevant courts of his or her concern about a client's competency to stand trial." The Court found that "courts generally find an attorney has a duty to raise the issue of competency regardless of the accused's desires." The Court also opined that a finding

that the defendant is competent to act as his own lawyer (with standby counsel) may require a greater showing than that the defendant is competent to stand trial. Citing *Godinez v. Moran*, 509 U.S. 389, 400 and its holding that waiver of counsel requires no higher level of competence than that required to stand trial but waiver of counsel must be knowing, voluntary, and intelligent, the Court still asserted as controlling its finding in *Commonwealth v. Jackson*, 376 Mass. 790, (1978). In *Jackson*, the Court found that a waiver of counsel may be approved if the defendant is "adequately aware of the seriousness of the charges, the magnitude of his undertaking, the availability of advisory counsel, and the disadvantages of self-representation. (supra at 795).

**Practitioner Implications**

Practitioners should remember that the Supreme Judicial Court goes to great lengths to point out that this is an unusual case. The principle of stare decisis requires similar facts for a case to be controlling as precedent. There are however several key factors to consider. The evaluation of competence relates to the moment at hand. The court is reluctant to approve retrospective determinations of competency.

Practitioners would also be well advised to spend such energy as is necessary to determine to the extent practicable an accused's former mental health history as the Court implies such history may be a factor to consider when assessing competence. Practitioners should also be prepared to advise the Court of the extent and nature of any prior court ordered evaluations addressing mental health issues if a record of such evaluations exists.

Although not germane to the determination of this case the Court's reference to a Massachusetts standard for competency to waive counsel is also important to note if the possibility of such waiver is apparent. The Court's opinion supports the belief of many Massachusetts practitioners that even the standard as expressed by the U.S. Supreme Court in *Godinez* requires assessment of an accused's capacity to knowingly, intelligently and voluntarily waive a constitutionally guaranteed right.

## Trial Witness
## Massachusetts Supreme Judicial Court
***Demoulas v. Demoulas*, 428 Mass. 555, 703 N.E.2d 1149 (1998)**

In this civil action arising out of the distribution of the estate of George Demoulas, the Supreme Judicial Court (428 Mass. 555) addressed the issue of a witness's competence to give testimony. The question arose when Evanthea, George's widow was unable to testify at trial due to a serious "memory loss condition". Her dispositions were read and on appeal her competency at the time of deposition was questioned. The court found that a two-part test applies to determine competence: "whether the witness has general ability or capacity to (1) 'observe, remember, and give expression to that which she has seen, heard or experienced;' and (2) 'comprehend the difference between the truth and falsehood.'"

Citing *Commonwealth v. Brusgulis,* 398 Mass. 325, 329(1986). The court also found that preliminary questions regarding the qualification or competency of a person to be a witness are reserved almost exclusively to the judge. *Brusgulis,* supra at 329. "The tendency… except in quite clear cases of incompetency is to let the witness testify and have the triers make any proper discount for the quality of her understanding." *Commonwealth v. Whitehead,* 379 Mass. 640 (1980). Finally the court ruled that "inconsistencies in a witness's testimony do not establish incompetency, but usually raise issues of credibility and weight for the fact finder to decide. See *Commonwealth v. Lamontague*, 42 Mass. App. Ct. 213, 218 (1997).

The court found that although it is difficult from the disposition testimony to determine whether Evanthea's inability to answer questions was due to a lack of knowledge or memory impairment considered as a whole, "her testimony was not so inherently unreliable that the jury should not have heard it".

**Practitioner Implications**

A court "In order to determine the mental condition of any party or witness before any court of the Commonwealth," may, pursuant to M.G.L., c. 123 § 19, "request the department to assign a qualified physician or psychologist, who, if assigned shall make such examination as the judge may deem necessary," Practitioners should be aware of the standards expressed in this case.

## III. Insanity Defense

## Burden of Proof

### Commonwealth v. Keita, 429 Mass. 843, 712 N.E.2d 65 (1999)
### Massachusetts Supreme Judicial Court

James Keita (defendant) was found guilty of indecent assault and battery on a person over the age of fourteen years (M.G.L., c. 265 § 13H) after a brief jury-waived trial in the Quincy District Court. The Commonwealth presented testimony of the victim and the arresting officer. Although the defense had raised an insanity defense, the prosecution offered no testimony on the issue. After the prosecution rested, the defense offered the testimony of a "well-qualified forensic psychologist" who gave his opinion of the defendant's "mental condition." The psychologist testified to the defendant's history of mental illness, including 10 Bridgewater State Hospital admissions since 1982. He testified that in his opinion the defendant was suffering from mental illness, was acutely mentally ill on the day of the attack and that the defendant would have had "substantial difficulties conforming his behavior to the requirements of the law." The Commonwealth cross-examined, but offered no rebuttal evidence.

The Court began its analysis by noting that the Commonwealth has the burden of "proving beyond a reasonable doubt that the defendant was criminally responsible at the

time of the crime." See *Commonwealth v. Kappler*, 416 Mass. 574, 578 (1993); *Commonwealth v. Kostka*, 370 Mass. 516, 526 (1976). The Commonwealth may however, prove sanity without presenting expert testimony. *Commonwealth v. Brennan*, 399 Mass. 358, 364 (1987). A trier of fact may accept or reject in whole or in part the testimony of experts that a defendant lacked criminal responsibility and may infer sanity from the defendant's conduct and the facts of the crime. See *Commonwealth v. Kappler*, supra at 579; *Commonwealth v. Lunde*, 390 Mass. 42, 47 (1983). The Court noted that it has permitted the trier of fact to consider as evidence the so-called "presumption of sanity." *Commonwealth v. Kappler*, supra at 583, citing *Commonwealth v. Kostka*, supra at 536. This inference or presumption is based on the trier of fact's "common knowledge that a great majority of people are sane, and the probability that any particular person is sane." See *Commonwealth v. Brennan*, supra. The Court found that a jury instruction concerning the presumption of sanity should be given in every case in which the question of the defendant's criminal responsibility is raised.

While noting the inconsistency between placing the burden of proof of sanity on the Commonwealth and then allowing a presumption of sanity to satisfy that burden, the Court found that this has been the "law of the Commonwealth for decades." The Court pointed out however, that it has never held that the presumption is alone sufficient to meet the Commonwealth's burden. The Court pointed to *Commonwealth v. Clark*, 292 Mass. 409 (1935) and *Commonwealth v. Smith*, 357 Mass 168 (1970) which the Court felt allow the jury to infer sanity from their "common knowledge of the fact that a great majority of men are sane." The Court then pointed to the testimony that the defendant did not struggle with police, was cooperative during booking, and answered all questions. It further asserts that his version of the incident (that he accidentally brushed up against the woman) suggests that he knew what conduct was lawful. An inference that he lied was therefore warranted according to the decision. "This inference, if made, would tend to suggest that he appreciated the wrongfulness of his conduct. The evidence [the Court has] recited, thin as it may be, is sufficient along with the presumption of sanity, not only to warrant the judge's finding of guilt, but also to justify [the Court] not ordering a new trial." See *Decision* at 849.

The Court also chose this decision to announce that "A case for shifting the burden of proof to the defendant to prove his sanity has not been made." In Massachusetts the Commonwealth continues to bear the burden to prove beyond a reasonable doubt that the defendant was criminally responsible for his conduct.

## IV. Privilege:<br>Crime Fraud Exception

**The United States Court of Appeals for the First Circuit**
***In Re Grand Jury Proceedings (Violette),* 183 F.3d 71 (1999)**

The defendant (Violette) has been the target of an on going federal grand jury investigation into allegations that he provided false information to financial institutions

for the purpose of obtaining loans and credit disability insurance in order to fraudulently induce payment on the policies. The government alleges that Violette malingered an array of disabilities to health care providers, then caused these providers to transmit the information to underwriters of the credit disability policies. In the course of its investigation, the government subpoenaed two licensed psychiatrists to appear before the grand jury. The doctors appeared but asserted the psychotherapist-patient privilege on Violette's behalf. The government sought to enforce the subpoenas and argued that the psychotherapist-patient privilege as established in *Jaffee v. Redmond*, 518 U.S. 1, encompasses a "crime-fraud exception." Violette countered moving to intervene and to secure access to all investigative information. The district Court allowed Violette to intervene, but denied his motion for access and after argument ordered enforcement of the subpoenas. Violette appealed on grounds that (1) "the denial of access to the investigative materials violated due process; and (2) that there is no crime-fraud exception to the psychotherapist-patient privilege, or that the evidence sought [in this case] falls outside the scope of such exception."

The United States Court of Appeals for the First Circuit (183 F.3d 71) held that "Only when communications are intended directly to advance a particular criminal or fraudulent endeavor will their privileged status be forfeited by operation of [the crime-fraud] exception." The court (citing Justice Cardozo's opinion in the U.S. Supreme Court decision in *Clark v. United States*, 289 U.S. 1 [1933]) explained that,

> "The recognition of a privilege does not mean that it is without conditions or exceptions. The social policy that will prevail in many situations may run foul in others of a different social policy, competing for supremacy. It is then the function of a court to mediate between them, assigning, so far as possible, a proper value to each, and summoning to its aid all the distinctions and analogies that are the tools of the judicial process."

The party seeking to assert the psychotherapist-patient privilege bears the burden of showing that the privilege applies. He/she must show that the "allegedly privileged communications were made (1) confidentially (2) between a licensed psychotherapist and her patient (3) in the course of diagnosis or treatment. (see decision at pg. 73, citing *Jaffee*, 518 U.S. 1, 15). The district court found that the communications were not made in the course of "diagnosis or treatment." The First Circuit opined that, "The court's implicit rationale appears to have been that because the communications were made in furtherance of fraud, they could not have served a bona fide therapeutic purpose. *Id*. at 73."

In addition to holding that a crime-fraud exception to the psychotherapist-patient privilege exists, the First Circuit held that courts should look to the client's intent not the belief of the therapist as to whether or not treatment was the ultimate goal of the communication. Finally the court held that the public interest in the secrecy of on-going grand jury proceedings generally outweighs a party's interest in obtaining such materials.

**Practitioner Implications**

The distinction between privileged material (statements made by one person or another which may be withheld as confidential by that other person when he is a witness in court regarding the conversation) and confidential material (communication intended only for the knowledge of a particular person) must be kept clear. Courts and legislatures establish privileges and they are thereby able to limit or structure their scope. Confidentiality arises as an outgrowth of an ethical obligation imposed by the nature of a relationship. Ethical obligations are governed by the bodies that create and impose them. The mere fact of a relationship may not be sufficient to shield the communications resulting from that relationship when the question is one of privilege and the ability to prevent disclosure in court. Here, the First Circuit opines that courts should look to the intent of the party making the disclosure to determine whether or not the purpose of a privilege against disclosure is being served or subverted. Practitioners should seek consult from senior clinicians and legal counsel when confronted with dilemmas such as the one posed in this case.

***In Re Grand Jury Subpeona (Juvenile),* 430 Mass. 590, 722 N.E.2d 450 (2000)**
**Massachusetts Supreme Judicial Court**

In this case, two fourteen year old boys, both eighth grade students and living with their parents since birth, were arrested and arraigned on charges of rape, kidnapping, assault and battery and assault and battery by means of a dangerous weapon. The father of the alleged victim, a classmate of the boys, spoke to one mother and then separately to each of the boys' fathers after they had discussed the matter with their sons. The district attorney subpoenaed the boys' parents to testify before the grand jury investigating the incident. The assistant district attorney indicated she might "ask questions at the hearing about the substance of the communications the boys had with their parents. The boys and their parents moved to quash the subpoenas, asserting a "child-parent privilege." The Superior Court denied the motion, noting that no such privilege currently exists in the Commonwealth. The court stayed enforcement of the subpoenas to permit the parties to appeal.

A single justice of the Supreme Judicial Court reversed the trial judge's decision without opinion and reported the matter to the full court. The petitioners ask the Court to create, on the basis of social policy consideration, a privilege as to confidential communications by unemancipated minor children to their parents whereby the parents could not be compelled to testify as to such communications in the context of criminal proceedings. The District attorney counters that, if the requested parent-child privilege is to be created, the Legislature is the appropriate body to do so.

The Court (430 Mass. 590) analogized to a similar situation where it was called upon to create a testimonial disqualification for minor children in the case *In Re Three Juveniles v. Commonwealth*, 390 Mass. 357 (1983). After the Court declined to create the privilege, the Legislature enacted M.G.L., c. 233, § 20, which provides that

unemancipated, minor children, living with a parent (including natural and adoptive parents) "shall not testify before a grand jury, trial on an indictment, complaint or other criminal proceeding, against said parent, where the victim in such proceeding is not a member of " the same household.

The Supreme Judicial Court again deferred the matter to the legislature as the proper body to balance the "vital, yet competing, social policies," and create and justify a "privilege to refuse to respond to a judicial inquiry" which the Court found is "essentially a political question; i.e., it is an allocation of the power as between the various components of the society." See *Decision* at n13, quoting Comment, The Parent-Child Testimonial Privilege: A Survey of its Acceptance by the Courts, 19 Lincoln L. Rev. 127 (1991), quoting 23 C.A. Wright & K.W. Graham, Jr., Federal Practice and Procedure § 5422, at 673-674 (1980).

The Court did however offer some guidelines. It noted that to its knowledge "only one appellate court, with authority to create privileges has considered whether a parent of an unemancipated minor child may be compelled to testify as to confidential communications. See *Matter of Application of A & M*, 61 A.D.2d 426, 403 N.Y.S.2d 375 (N.Y. 1978) which created a privilege on the facts of the case before it. The Court also outlined issues to be considered if the legislature decides to act. They include: who will hold the privilege; who would determine whether a child should waive the privilege; whether biological, adoptive, foster, and de facto parents will be included; the age of the child to whom the privilege will extend; should there be any exceptions for crimes such as child abuse or intrafamily violence; when would the right commence; and which conversations or activities would be privileged.

The Court continued the stay of the subpoenas until the conclusion of the January 2000, legislative session. If the legislature had not acted by that time, the petitioners would be afforded an opportunity to raise and argue in Superior Court any potential constitutional claims (both state and federal) that may surround their confidentiality claims.

**Practitioner Implications**

The issues raised in this case bear watching as the legislative session unfolds. It seems clear that various interest groups will weigh in on both sides of the issue and those interested would be well served to contact their legislators.

***Commonwealth v. Neumyer*, 432 Mass. 23, 731 N.E.2d 1053 (2000)**
**Massachusetts Supreme Judicial Court**

Craig Neumyer (defendant) was indicted for two counts of rape and a third count of indecent assault and battery on a person over the age of fourteen years. In the preparation of his defense, he sought certain records of the Boston Area Rape Crisis Center (BARCC). A Superior Court judge ordered BARCC to produce a sanitized copy of its

"hotline" records showing the time, date and fact of a telephone communication between the victim and a rape counsellor. The judge concluded that this portion of the record was not privileged. The judge also ordered BARCC to produce records of the substance of the telephone conversation between the victim and the counsellor for in camera inspection after he determined these records were privileged, but may be relevant pursuant to the Court's decisions in *Commonwealth v. Bishop*, 416 Mass. 169 (1993) and *Commonwealth v. Fuller*, 423 Mass. 216 (1996). BARCC refused to comply with the order and the judge found BARRCC in contempt. The Supreme Judicial Court granted BARCC application for further review.

The Court (432 Mass. 23) framed the issue as another application of the so-called *Bishop-Fuller* procedure, which mandates a five-step process to determine privilege, and then permits in camera inspection of otherwise privileged treatment records of victims in sexual assault cases. The defendant must by motion, demonstrate "a good faith, specific, and reasonable basis for believing that the records will contain exculpatory evidence which is relevant and material to the issue of the defendant's guilt," and whether the material is available elsewhere. The issue to be resolved where whether the time, date, and fact of a communication between the victim and the rape counsellor are privileged and whether this defendant's proffer was sufficient under the *Fuller* standards to trigger an in camera inspection.

The Court concluded that the trial judge had properly identified the records showing the time, date and fact of a telephone communication between the victim and a rape counsellor to be not protected by the sexual assault counsellor privilege. A "confidential communication" is defined by M.G.L., c. 233 § 20J as "information transmitted in confidence by and between a victim of sexual assault and a sexual assault counsellor … including all information received by the sexual assault counsellor which arises out of and in the course of such counselling." The Court agreed with the Court of Appeals that the date and time of the communication is not "information transmitted" or "information received by" a counsellor during the course of counselling. The Court went on to point out (although it noted that the dissent maintains otherwise) that "this is the traditional interpretation accorded all privileges, including that in 20J." Citing *Commonwealth v. Clancy*, 402 Mass 664 (1988) (patient-psychotherapist privilege does not protect existence of fact of hospitalization, dates, or purpose of hospitalization); *United States v. Lowe*, 948 F. Supp. 97 (D. Mass. 1996) (rape counselling records with dates of contact, length of contact, nature of contact [i.e., telephonic or in person] and the name of rape crisis counsellor not privileged communication). See also *In re Subpoena Served Upon Zuniga*, 714 F.2d 632, (6th Cir.) cert. Denied, 464 U.S. 983 (1983) ("as a general rule, the identity of a patient or the fact and time of his treatment does not fall within the scope of the psychotherapist-patient privilege") (See opinion for a more extensive list).

The Court next considered the sufficiency of the defendant's proffer. BARCC contends that the judge improperly applied the *Fuller* standard in ordering an in camera review of the records, i.e., that the defendant's proffer was insufficient to warrant in camera review. The defendant's affidavit pointed out that the victim testified at the probable cause hearing. She testified that she only formed the opinion that she was raped after speaking

with a rape crisis counsellor. The affidavit further stated that the victim testified that she (1) had intercourse with her best friend's boy friend, the defendant, and had not told anyone because she did not want to ruin her friendship with her best friend; (2) vacillated as to whether she "had intercourse" with the defendant or "only oral sex"; (3) was involved in alcohol and drug activity on the night of the alleged incident; (4) lied to her grandmother about the events of that night; (5) continued to socialize with the defendant after the incident, including spending a subsequent night in his bedroom; (6) that the victim was extremely susceptible to manipulation by peer pressure; and (7) was under treatment for depression and had been prescribed Prozac (apparently at the time of the incident). The Court found that the focus of the inquiry is "on whether all (or any) circumstances indicate that the requested information is likely to be relevant and material." The Court ruled that for purposes of satisfying the *Fuller* inquiry, the defense had met its burden.

**Practitioner Implications**

The source of much legal protection for the information we deem to be confidential either by ethical guidelines or otherwise is the legislature. Cases outlined at this site point out that the Supreme Judicial Court is not wont to create or expand privilege (the protection from disclosing confidential material in court). The statute in question in this case, M.G.L. c. 230 § 20J, does not speak in terms of privilege. It is phrased in terms of "confidential communication." The statutory language "such confidential communications shall not be subject to discovery" does not speak in terms of privilege. For purposes of records from treatment of victims of sexual assault, the distinction has been blurred. The decision points to the "sexual assault counsellor privilege" as protecting the "hotline" records. For the moment this confusion in terms applies only in this area. The principle of stare decisis directs that a similar fact pattern is necessary to support the offer of a case as binding precedent. The warning is clear however that the issue of "what is and is not privileged" and "what is and is not confidential" is far from settled. In areas in which practitioners are not engaged in treatment, compelled disclosure of information may be only a prosecutor's subpoena away from forced disclosure. In an era of electronic record keeping, any gains achieved by the U.S. Supreme Court's recognition of the need for confidentiality in *Jaffee v. Redmond*, 518 U.S. 1 may soon disappear. The need to advocate for protection of the concept that an expectation of privacy is the motivation for much therapeutic disclosure should be reinforced at every opportunity. Questions regarding what "should be protected" may give way to more immediate concerns for what "is protected."

## V. Civil Commitment

## MASSACHUSETTS SUPREME JUDICIAL COURT

***Acting Superintendent of Bournewood Hospital v. Baker*, 431 Mass. 101, 725 N.E.2d 552 (2000)**

The respondent (Baker) appealed from the denial of her motion to dismiss a petition for civil commitment brought pursuant to M.G.L., c.123 §§ 7 and 8 and a petition for an order authorizing treatment with antipsychotic medication brought pursuant to M.G.L., c.123 § 8B brought by Bournewood Hospital (Bournewood). Baker claimed that since she was at all times a "conditional voluntary" patient (pursuant to M.G.L. c.123 § 10 and 11) and had not given notice of her intent to leave Bournewood, then the hospital lacked authority to petition for her commitment and the District Court lacked jurisdiction over the subject matter of the petitions. The Supreme Judicial Court granted Baker's application for direct appellate review.

The parties filed an agreed statement of fact with the Appellate Division of the District Court. Baker was admitted for a period of up to 10 days to Bournewood on August 29, 1998 pursuant to M.G.L., c.123 § 12. She applied for care and treatment during this period on a conditional voluntary basis pursuant to M.G.L., c.123 §§ 10 and 11. The acting superintendent accepted her application. She accepted some medication but not antipsychotic medication. On September 2, 1998 Bournewood petitioned for her commitment and the next day added a petition to authorize treatment with antipsychotic medication. Baker filed a motion to dismiss both petitions. On September 18, 1998 the District Court denied her motions and after hearing ordered her committed for a period of up to 6 months and further ordered that she be treated with antipsychotic medication. Baker filed to stay the orders pending appeal and that motion was also denied.

Although Baker had been released during the appellate process, the Supreme Judicial Court agreed to hear the case as the "question [it presents] is one of public importance, is very likely to arise again in similar circumstances, and where appellate review could not be obtained before the question would again be moot."

The Supreme Judicial Court (431 Mass. 101) reversed the decision of the District Court. It found that M.G.L., c.123, "Sections 7(a), 8(a), and 11 must be read together when reviewing an order for commitment of a conditional voluntary patient." Section 11 contemplates filing "… after the patient gives notice of an intention of leave or withdraw." The Court held that Section 7's reference to "failure to hospitalize" must be read in conjunction with Section 8 which "requires a finding that a '<u>discharge</u>' of the patient 'would create a likelihood of serious harm'" (emphasis by the Court). A conditional voluntary patient, who does not offer notice of intent to leave, is not at risk of imminent discharge, an element of the Court found necessary in such cases.

The Court found that involuntary hospitalization at the "initiative of government" results in a "massive curtailment of liberty, which requires a showing of 'imminent danger of harm.'" Citing *Commonwealth v. Nassar,* 380 Mass. 908, 917 (1980) quoting *Lessard v. Schmidt*, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972) (three-judge court), vacated and rewarded on other grounds, 414 U.S. 473 (1974). Without the risk of imminent discharge there is no likelihood of serious harm, since the immediacy of harm arises from the immediacy of discharge as well as from any mental illness. The Court found that supporting the acting superintendent's claim that the statute gives him authority to seek commitment of any patient at any time without having to prove likelihood of serious

harm on “discharge,” would “render that word in the statute superfluous, a result that is disfavored.” See *Bynes v. School Comm. of Boston*, 411 Mass 264, 267-268 (1991).

With respect to the petition for an order to involuntarily treat Baker, pursuant to M.G.L., c.123 § 8B, the SJC also reversed the District Court. It agreed with Baker’s contention that an order for treatment is invalid unless is it predicated on a valid commitment order. The Court found that Section 8B(b), “expressly provides that such a petition shall not be heard or otherwise considered by the court unless the court has first issued an order of commitment on the pending petition for commitment.”

The Court noted that Baker had applied for conditional voluntary status, and Bournewood had accepted her applications. Once created, the “framework of rights” such status affords a patient can not be curtailed “essentially as a matter of convenience.” The Court pointed out that a comparable proceeding to determine the issue of competence to give informed consent to treatment exists in the Probate and Family Court pursuant to M.G.L. c. 201 § 6. See *Rogers v. Commissioner of Department of Mental Health*, 390 Mass 489 (1983).

**Practitioner Implications**

Civil Commitment on an involuntary basis is a “massive curtailment of liberty.” The Supreme Judicial Court has made clear that administrative convenience will not support such an intrusion where the facts do not warrant application of the law. Instances may well arise where the question of a person’s competency to request a conditional voluntary commitment or to remain hospitalized under such status requires a judicial determination. Practitioners would be well advised in such circumstances however, to consider the need to address commitment questions and treatment questions independently. Linking the two may well lead to providing additional issues for counsel for respondents to raise at hearing.

## VI. Hypnosis
## Massachusetts Supreme Judicial Court
***Commonwealth v. Kater*, 432 Mass. 404, 734 N.E.2d 1164 (2000)**

The Defendant (Kater) was found guilty of kidnapping and murder in the first degree for the 1978 disappearance of Mary Lou Arruda. This decision is the result of the seventh appeal (there were four trials in the case). A full history of the case is set fourth in the opinion (432 Mass. 404).

In this appeal, Kater argued seven issues. His fourth assertion that, "he was denied his right to due process of law and his right to effectively cross-examine witnesses through the use of previously hypnotized witnesses," provides issues of import for forensic

practitioners. Kater claims that a "witness's memory after hypnosis is so irreparably altered that the witness cannot be cross-examined in a meaningful way." He asserts that they should be forever barred from testifying on the matter thus affected.

In resolving the issue the Supreme Judicial Court noted that in *Kater I* (388 Mass. 519 [1983]) it had ruled that hypnotically aided testimony is inadmissible at trial because it is unreliable. In *Kater II* (394 Mass. 531 (1985]), *Kater III* (409 Mass 433 [1991]) and *Kater IV* (412 Mass. 800 [1992]) the court further distinguished its ruling and ordered that "admissible prehypnotic evidence be separated from the inadmissible hypnotically aided testimony of trial witnesses".

The trial judge in this last trial permitted hypnotized witnesses to testify only to facts that were documented in the record before their hypnosis procedures were performed. The court found that such a restriction, which exceeded it directive in *Kater I*, *Kater II* and *Kater III*, proved more favorable to the defendant. The limitations on the witnesses eliminated the risk that their testimony might be affected by hypnosis.

The court found that as a result Kater faced a choice no different from other defendants who succeed in suppressing certain evidence. They either forgo certain areas of cross-examination due to the risk of opening the door to damaging evidence or forfeit the benefit of suppression.

**Practitioner Implications**

The risk inherent in affecting the admissibility of evidence by exposure to hypnosis militates against its use in all but the most extreme instance. The message to take from the *Kater* saga however is that not all evidence from everyone hypnotized will be excluded. If called upon in the rare instances where the need for current results outweighed the need for subsequent prosecution (in an ongoing kidnapping for example) practitioners would be well served to document as extensively and accurately as possible the extent of the witness pre-hypnotic memory for possible later use.

## VII. STATUTORY LAW

## MASSACHUSETTS

## Commitment

### Changes to Massachusetts General Laws, Chapter 123

On August 13, 2000 Acting Governor Jane Swift signed into law Chapter 249 of the Acts of 2000 (the Act) which amends the procedure for emergency civil commitment in

Massachusetts. The Act took effect on November 11, 2000 (ninety days from enactment). The Act's main advocate was Representative Michael P. Cahill, Chairman of the House Human Services and Elder affairs Committee.

The Act begins by amending the time period prescribed in M.G.L. 123 § 7(c) for commencing hearings of petitions for commitment from the current 10 days to 4 days. (Note: For purposes of this statute time frames do NOT include the day of the event [i.e.: filing, signing a three day notice, admission, etc. - See Mass. Rules of Civil Procedure, Rule 6], but begin on the next day, excluding intermediate Saturdays, Sundays and legal holidays. Someone for whom the petition was filed on the Wednesday before Thanksgiving for example would require a hearing commenced by Wednesday of the next week).

The Act then amended M.G.L. 123 § 11 by adding a requirement (not previously part of the law, even though already followed by most clinicians) that prior to accepting an application for voluntary admission, the admitting or treating physician shall assess the person's capacity to understand that:

> "(i) the person is agreeing to stay or remain at the hospital; (ii) the person is agreeing to accept treatment; (iii) the person is required to provide the facility with three days written advance notice of the person's intention to leave the facility; and (iv) the facility may petition a court for an extended commitment of the person and that he may be held at the facility until the petition is heard by the court. If the physician determines that the person lacks the capacity to understand these facts and consequences of hospitalization, the application shall not be accepted."

The Act also amended M.G.L. 123 § 12 by reducing from 10 days to four days the period for hospitalizing a person while a determination to file a petition to commit is being made.

The Act further requires that a person admitted pursuant to the provisions of the Act be advised that upon his request, the Committee for Public Counsel Service (CPCS) will be notified of his name and presence at the facility. CPCS shall then appoint counsel to meet with the person and determine his need for representation. Any person who has reason to believe that his admission was the result of "an abuse or misuse of the provisions" of the Act, may request an emergency hearing which the district court "shall hold such hearing on the day the request is filed…or not later than the next business day."

The Act further codifies the existing district court practice of appointing counsel in Section 12 hearings.

Finally, the Act provides for review (four months from the Act's effective date and quarterly thereafter) and report to the legislature, by the chief justice of the district court and CPCS of the additional costs required as a result of the Act, and the court's ability to carry out the responsibilities the Act creates. The Act also requires DMH to collect data and report the same to the legislature to aid the above evaluation.