

# LeClairRyan Accountant and Attorney Liability Newsbrief

Winter 2010

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## Massachusetts Data Security Law: The Final Countdown

In 2007, Massachusetts passed a data security law requiring covered entities to give notice of certain data breaches to affected individuals and specific government agencies. The regulations implementing this law go beyond a reactive notice obligation and require covered entities to take specific action that is designed to protect against data breaches. The regulations are set to take effect on **March 1, 2010** and entities should act now to ensure compliance.

### The Law's Purpose

Massachusetts enacted the data security law in an effort to protect its residents from identity theft. Specifically, the law seeks to protect against unauthorized access to or use of personal information. "Personal information" is defined as an individual's first name or initial and their last name, maintained in combination with one or more of the following:

- Social Security number;
- Driver's license or state-issued identification card;
- Financial account number; or,
- Credit or debit card number.

Excluded from the definition of personal information is information that is lawfully obtained from publicly available information, or from federal, state or local government records lawfully made available to the general public.

### The Law's Coverage

The law applies to any type of entity -- except agencies of the Commonwealth of Massachusetts -- that receives, stores, maintains, processes, or otherwise has access to personal information. Although the law was passed in the wake of some well-publicized data breaches involving financial transaction processing, its scope is not limited to the financial world. In fact, because any entity with employees receives and maintains individuals' names in combination with their social security numbers, most entities are covered. Further, the law applies to entities that receive or maintain personal information of a Massachusetts resident, regardless of whether they are physically located within Massachusetts. Finally, the law and regulations also apply to individuals who receive or maintain personal information in connection with employment or providing goods or services.

### What Covered Entities Must Do -- Time Is Of The Essence

The law itself requires that a covered individual or entity give notice to: (1) the affected individual(s); (2) the Commonwealth's Office of Consumer Affairs and Business Regulation; and, (3) the state Attorney General's Office, when it knows (cont. page 2)



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Save the Date: June 17th, 2010 8:30 am to 12:30 pm  
LeClairRyan's Annual Legal Seminar for CPAs  
This half-day event will be held at the Westin Waltham (MA).

## New Rule Limits Attorney-Client Protection For Transactional Attorneys

In *Commissioner of Revenue v. Comcast Corp.*, 453 Mass. 293 (2009) (“Comcast”) the Massachusetts Supreme Judicial Court recently announced that it would deny the protections of the attorney-client privilege to certain communications between business law attorneys and non-client consultants. The *Comcast* decision is a red flag warning for all Massachusetts attorneys that some non-attorney consultant communications relied on by attorneys may be subject to forced disclosure if not prepared in anticipation of litigation.

The Court in *Comcast* specifically denied the protection of the attorney-client privilege to an in-house attorney as to reports by non-attorney consultants on issues of law because those points of law were not necessary or essential for the attorney to understand the client’s situation as to a specific transaction. Forced disclosure of those materials was avoided, however, because the work-product protection applied to prevent the disclosure.

The *Comcast* ruling crucially important to all attorneys. *Comcast* exposes attorney communications with non-attorney consultants to forced disclosure whenever 1) those communications are not necessary for the attorney to understand the client’s situation, and 2) there is no reasonable expectation of litigation. After *Comcast* a cautious attorney not acting within the sphere of work-product protection has two viable choices: seek advice on issues of law from other attorneys only and never from non-attorneys, or seek non-attorney consultant help only when the consultation is indisputably essential to understanding your clients’ situation. The second option calls for considerable caution.

### Mass. Data Security Law cont.

or has reason to know of a breach of security involving acquisition or unauthorized use of personal information. The regulations that go into effect on March 1, 2010, however, require covered entities to act to prevent data breaches. Specifically, such entities must take two steps: (1) develop a written information security plan (“WISP”) and (2) develop computer system security protocols designed to protect personal information.

#### Written Information Security Plan

Every covered entity must maintain a written plan that describes how it intends to protect personal information in accordance with the data security law and regulations. The regulations have a number of specific requirements. For example, as part of the WISP, the entity must designate one or more individuals to be responsible for maintaining the plan. The WISP also must provide policies for accessing and storing personal information, training of employees and preventing terminated employees from accessing records. In addition, covered entities must take reasonable steps to ensure that their vendors are capable of maintaining appropriate security measures, including requiring them to do so by contract.

#### The Comcast Facts

The *Comcast* decision arises out of consulting advice sought by an in-house attorney for U.S. West as to the tax implications of the forced liquidation of certain shares of stock of an affiliate of his client, U.S. West. The U.S. West in-house counsel was an experienced tax attorney not admitted in Massachusetts. As a result, the attorney was not familiar with some aspects of Massachusetts tax law relevant to the proposed stock sale. The U.S. West in-house attorney retained an outside accounting firm, Arthur Andersen LLP (“Andersen”) to assist the attorney in selecting the best vehicle for the transaction. The vehicle identified was a corporate trust. A corporate trust was formed, the assets of the affiliate were transferred to the trust, and the stock was then sold. To evaluate various alternative structures of transaction and possible litigation risks, Andersen provided the U.S. West attorney with six memoranda: five drafts, and one final memorandum. Those materials discussed Massachusetts tax law and analyzed the tax consequences of the various options available to U.S. West and the litigation risks of each.

The stock sale transaction yielded a capital gain of approximately \$500,000 to the corporate trust. Under Massachusetts law at the time of sale, corporate trusts were exempt from filing Massachusetts excise tax returns. The trust filed a federal tax return reporting the capital gain but asserted it was exempt from filing a Massachusetts corporate excise tax return pursuant to then-existing Massachusetts law.

(cont. page 3)

#### Computer System Security Requirements

As part of the WISP, a covered entity must also ensure that its computer security system is designed to protect against unauthorized access to or disclosure of personal information. Such steps include securing user authentication protocols by using unique and secure log-in identifiers and passwords and securing computer access. Covered entities should also encrypt personal information that is transmitted or stored on laptops or other portable devices and maintain up-to-date virus and other system protection.

#### The Time To Act Is Now!

With the March 1, 2010 compliance deadline upon us, entities must act now to ensure that they will be in compliance with data security law and regulations.

Questions about this alert can be directed to:

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## Comcast cont.

Two years later the trust was dissolved and all of its assets were transferred to U.S. West. The Massachusetts Commissioner of Revenue (“Commissioner”) thereafter audited Comcast, the successor of U.S. West. As part of the audit the Commissioner issued a subpoena to Comcast which included documents in control of U.S. West. The subpoena included the six Andersen memoranda prepared in connection with the sale of the stock of the affiliate. U.S. West refused to disclose the Andersen memoranda, timely asserting they were protected from disclosure by both the attorney-client privilege and by the work-product doctrine. The Commissioner moved to compel disclosure of these documents.

The Trial Court agreed with Comcast and held that the Andersen memoranda were protected from disclosure by both the work product protection and the attorney-client privilege. The Commissioner appealed. The Supreme Judicial Court accepted the appeal for direct review and held the Andersen memoranda were protected from disclosure by the work-product doctrine but also ruled that the attorney-client privilege, on the facts presented, would not protect those communications from disclosure.

### Protection Under the Attorney-Client Privilege Is Only Available for “Necessary” Materials.

As to the attorney-client privilege, the Supreme Judicial Court in *Comcast* as an initial matter states that because the communications at issue were between U.S. West and Andersen, a non-attorney and non-client, the principles of the traditional attorney-client privilege do not apply. Comcast also argued, however, that the communications between the U.S. West in-house counsel and Andersen were protected from disclosure in the alternative by what is known as the derivative attorney-client privilege. That privilege is described in *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961). The derivative attorney-client privilege may apply when the use of a non-client accountant or consultant is necessary to assist an attorney for effective work with his client. The reasoning is that an accountant or similar outside consultant is sometimes necessary for an attorney to develop adequate understanding of the client’s issues in the same way that a foreign language translator might be needed and his work would be within attorney-client privilege if the attorney needed the translator to speak to his client.

For “derivative” attorney-client privilege to attach, the information sought from the non-client must be necessary for the effective consultation between the client and the lawyer, not merely useful or convenient. What counts as “necessary” is only what the attorney needs to understand the client’s issues or problems. A communication from a non-client consultant is not protected unless it is “nearly indispensable” or “serves a special purpose” in the provision of the attorney’s legal advice. *Cavallaro v. United States*, 284 F.3d 236, 249 (1st Cir. 2002).

It is not enough that the non-client consultant is useful or that the non-attorney consultations improve the attorney’s ability to represent the client.

Applying these tests to the facts in *Comcast*, the Supreme Judicial Court held the U.S. West in-house counsel did not seek information from Andersen that was necessary to understanding the situation of his client. The U.S. West in-house counsel was a tax attorney, who possessed the knowledge and expertise to effectively communicate with his client as to the tax consequences of the sale without aid from a non-attorney. The non-attorney consultant materials included information about Massachusetts tax law filing requirements. Those materials were held to be not necessary for the attorney to understand the client’s position, but were merely useful to understanding Massachusetts tax law requirements at the time. Accordingly the materials were not privileged as necessary or essential to the attorney’s understanding of the client’s situation. The derivative attorney-client privilege therefore did not apply. The *Comcast* Court on this point expressly noted that if the attorney had engaged a Massachusetts tax attorney rather than a non-attorney consultant to provide the same tax law information, the attorney-client privilege would have fully protected the communications from disclosure as the consulted Massachusetts attorney in that instance would be advising a client.

### Protection of Materials Prepared Because of Existing or Anticipated Litigation.

As mentioned, the *Comcast* Court, despite finding no attorney-client privilege, did not order disclosure because the defendant timely and correctly asserted the protections applicable to work product.

The work product doctrine is codified in Rule 26(b)(3) of the Massachusetts Rules of Civil Procedure. Rule 26(b)(3) protects, among other written materials, those documents received from a representative of a client other than an attorney from disclosure if the documents were prepared in anticipation of litigation. This protection from disclosure can be overcome if a party demonstrates a substantial need for the information contained in the document and that substantially equivalent information cannot be obtained other means, e.g., from another person, without undue hardship. If the information sought, however, is the mental impression, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation the materials are referred to as “opinion” work product and are given heightened and potentially absolute protection from disclosure.

The threshold work-product protection inquiry is whether the document sought was prepared “in anticipation of litigation.” In *Comcast*, the Supreme Judicial Court adopted a “because of” test to determine whether a document is prepared in anticipation of litigation. (cont. page 4)

## CPA Mobility Legislation Signed by Governor Patrick

Practice mobility, the ability of a licensee to gain a practice privilege outside of his/her home state without obtaining an additional license in another state where he/she will be serving a client, has been a key issue for the CPA profession over the past few years.

Conducting business across state borders has become an everyday occurrence for CPAs, creating a critical need for a uniform mobility system allowing licensed CPAs to provide services across state lines without unnecessary burdens that do not protect the public interest. In the past, each state had its own rules, regulations and requirements to allow out-of-state CPAs to provide services in the state, resulting in a patchwork system that was inefficient and increasingly difficult to navigate. Compliance and enforcement of the system was almost impossible, with multiple, cumbersome processes and disparities in requirements. Business realities, including the increase in interstate commerce and virtual technologies required a change.

On February 4, 2010, Massachusetts became the 46th state to enact the CPA Mobility Law. The Mobility Law allows CPAs to represent clients in multiple states without having to be licensed in every state where the client does business. It provides the right balance of trust and public protection. It removes requirements for notification before a CPA can temporarily practice in another state and provides automatic jurisdiction to State Boards of Accountancy over all CPAs practicing in their state, enabling states to discipline

out-of-state licensees. By removing boundaries to practice in the United States, CPAs are able to serve individuals and businesses in need of their expertise. At the same time, a State Board of Accountancy's ability to discipline under the mobility provision is enhanced and is based on the CPA and the CPA firm's performance of public accounting services, either physically, electronically or otherwise within a state, rather than restricting the Board's authority to only those holding a state's license.

### The Mobility Law

- Allows CPAs to respond to the public's needs while continuing to ensure their appropriate regulation and discipline, regardless of the state of original licensure
- Creates easier access to appropriate expertise, fosters greater competition and lowers future compliance costs to provide services and
- Increases Massachusetts' jurisdiction by allowing the Board of Public Accountancy to fully discipline any wrongdoers – whether based in or out of state

Passage of the Mobility Law is a boon to Massachusetts CPAs and accounting firms.

Article by Nancy M. Reimer, Esq.

### *Comcast* cont.

The “because of” test asks “was the document prepared because of existing or expected litigation?” Applying that test, the Court held that the Andersen memoranda sought by the Commissioner were protected from disclosure because they contained analysis by Andersen intended to inform U.S. West as to litigation risks associated the various alternatives available to U.S. West as to the stock sale. The record showed “little doubt” that U.S. West “had the prospect of litigation in mind when it directed preparation of the Andersen memoranda.” Actual anticipation of possible litigation thus gave rise to work product protection.

The Supreme Judicial Court in *Comcast* went on to rule that the Andersen memoranda contained the mental impressions, conclusions, opinions, and legal theories of Andersen and therefore constituted highly-protected “opinion” work product. The Commissioner did not demonstrate that this opinion work-product was a “singular instance” warranting disclosure. The Commissioner also did not overcome the opinion work product protection by proof that the memoranda were unique or that the same or equivalent factual and non-legal information as to business reasons was not available from sources other than the memoranda. On that

basis all of the contested Andersen materials were held to be protected from disclosure.

### The Impact of *Comcast* for All Transactional Attorneys.

Prior to *Comcast*, many attorneys may have thought that communications with non-attorney consultants were protected from disclosure because they were initiated by the attorney to help formulate legal advice. *Comcast* is a wake-up call that the attorney-client privilege rule is more strict. Business attorneys need to operate on the assumption that all non-litigation communications with non-attorney consultants may be subject to forced disclosure unless deemed necessary and essential to the attorney's understanding of the client's situation. Where an outside non-attorney consultation involves non-attorney views as to matters of law and if litigation is not anticipated, *Comcast* teaches that there is a clear and harsh risk of forced disclosure because no attorney-client privilege will apply.

Article by Paul G. Boylan, Esq.  
and Alberto G. Rossi, Esq.

## Courts Question Counsel Fees Charged in Probate Matters

Recent scrutiny of counsel fees in two high-profile probate matters underscores the importance of exercising prudence and maintaining perspective when undertaking – and billing for – work to protect a client’s assets. According to the Probate and Family Court Judge in one case, *In Re: Guardianship of Kenneth E. Simon* (“*Simon*”), the aggressive tactics of a guardian and his attorney were “egregious” and the fees charged “outrageous” where they charged the ward’s estate approximately \$500,000 in fees for an 83-day guardianship (spent mostly to keep the ward’s wife from his money and assets). The Supreme Judicial Court (“SJC”) admonished counsel in another case, *In the Matter of the Estate of Bartley J. King* (“*King*”), for “unnecessary overlawyering” that resulted in charges of more than \$800,000 to defend a will contest in an estate whose total value was approximately \$1.2 million. In *Simon*, the judge ordered the guardian and his counsel to return of \$328,770.97 in fees and costs to the estate. In *King*, the SJC ordered the lower court judge to reconsider the reasonableness of the fee award, with attention to the “necessity of the services, the extent to which duplicate or redundant effort was involved, and the conduct of the party seeking the award.” In both cases, the courts focused on the attorneys’ billing for unnecessary services and redundant efforts.

### ***Simon*: “Unnecessarily Hostile,” “Aggressive,” and “Improper” Strategy to “Spend Every Last Dime.”**

Problems in *Simon* began as soon as a guardian was appointed to represent the 71-year-old ward, a retired financial manager deemed incompetent due to a debilitating disease. The judge ruled that from the very beginning, the guardian and his attorney engaged in a strategy the Court called “unnecessarily hostile,” “aggressive,” and “improper,” which ultimately increased fees and costs. They filed a complaint for divorce, even though the evidence indicated the ward did not want a divorce and would not have approved the complaint had he been able to do so. They also hired a private investigator at a cost of over \$20,000 to investigate whether the ward’s wife was engaging in any criminal activity (the investigation turned up nothing), and a research firm at a cost of over \$3,000 to determine whether the wife’s first marriage had ended in divorce. They spent nearly \$80,000 on depositions (which both the guardian and counsel attended and billed for), almost \$4,000 on a new estate plan, and almost \$6,000 to prepare complaints alleging conversion against the ward’s wife in the Superior Court, all without evidence that the ward would have authorized these expenses had he been aware of them or been of sound mind. As described in the judge’s decision, the guardian and his counsel also engaged in “bullying” tactics with the wife’s counsel, at one point offering to pay the wife’s counsel \$25,000 in “fees” to accept an unfavorable settlement, and later billing more than \$6,000 to oppose the wife’s motion for \$8,000 in counsel fees. According to the judge, these and other bills demonstrated that the actual goals of the

guardian and his attorney were to “get rid of” the ward’s wife and “to make sure they spent every last dime they could before they would no longer have control of the ward’s assets.”

The judge also noted that the guardian, despite having no previous experience with guardianship matters, increased his hourly fee to \$400 from his usual \$100-\$300, even though he intended to retain counsel (at a rate of \$600 per hour) to perform the necessary legal work in the case. The guardian charged in quarter-hour increments and did not discount for “ministerial tasks” or delegate them to associates or staff at lower rates; thus, the ward was charged \$400 per hour for such tasks as traveling to file pleadings in court, reviewing mail, and attending the ward’s funeral.

The court ruled that the guardian incurred these fees while failing to understand and use the “substituted judgment standard” for guardianship, meaning “what the ward would have done if he was competent.” Instead of that standard, the guardian testified he did what was “in the best interest” of the ward, which is a different standard.

The judge further determined that, in the end, the guardian’s strategy was unsuccessful, as the wife ultimately settled for more than she would have received under the ward’s will.

### ***King*: Success, but “Duplication of Effort” and “Unnecessary Overlawyering.”**

Unlike in *Simon*, the attorneys facing the fee challenge in *King* were successful; indeed, their client, the decedent’s daughter, prevailed at trial and promptly filed a motion seeking an award of fees and costs from the will’s contestants (other children and grandchildren who were excluded from the will) under the fee-shifting statutes M.G.L.c. 231, § 6F and M.G.L.c. 215, § 45. The prevailing daughter sought \$806,189.97 in fees and costs on the basis that the contestants had engaged in “a two and a half year campaign to punish ... [her] for her father’s generosity,” and should be ordered to “bear the financial burden that they willfully imposed on ... [her] by persisting in their unsubstantiated and baseless claims.”

The motion judge found that the prevailing daughter should have anticipated a will contest in the case, in light of the size of the estate and the changes the decedent made to his estate plan (leaving the \$1.2 million estate to the daughter). The judge determined that a reasonable fee to defend such a will contest would be \$200,000 to \$300,000. Because the contestants were “excessively zealous in litigating their case,” the judge ruled that they should be liable for the difference between the total fees sought (\$710,321.50) and a “reasonable” fee (\$200,000). Accordingly, the motion judge ordered the contestants to pay \$510,321.50 in fees, plus \$64,000 in costs, billed by the prevailing daughter’s counsel.

(cont. page 6)

## Courts Question Counsel Fees cont.

On appeal, the SJC held that the motion judge should have considered the reasonableness of the \$710,321.50 in fees initially billed by the daughter’s counsel before using it as a basis for the fee award. The SJC discussed the multiple factors to be considered in determining the reasonableness of an award of attorney’s fees. The factors include:

“the ability and reputation of the attorney, the demand for his services by others, the amount and importance of the matter involved, the time spent, the prices usually charged for similar services by other attorneys in the same neighborhood, the amount of money or the value of the property affected by controversy, . . . the results secured [as well as] the necessity of the services, the extent to which duplicate or redundant effort was involved, and the conduct of the party seeking the award of fees.”

In addition, in considering the reasonableness of the fee charged, here, the SJC noted that “a total of eighteen attorneys and paralegals were representing [the daughter], a remarkable number especially when one takes into account the motion judge’s view that the theories advanced by the contestants were not ‘overly complex.’” The SJC drew attention to a “duplication of effort” and “a fair amount of billing for the time of two or more attorneys who were attending the same hearing.” Moreover, some of the pretrial litigation activity, such as a motion on expert testimony and

motions for reconsideration, was “unnecessary lawyering” in view of the overall value of the estate.

Practitioners searching for guidance in the *Simon* and *King* decisions should consider the courts’ emphasis on reasonableness as the standard for payment of fees to attorneys – whether they are in a fiduciary or an adversarial role. The *Simon* Court ruled that the guardian is entitled to “reasonable” expenses and counsel fees and ultimately found reasonable fees for the guardian and his counsel for their 83-day representation of the ward to be \$21,227.04 and \$115,517.72, respectively – roughly 27 percent of the amount they billed. In *King*, in rejecting an award that had already been cut by 28 percent by the lower Court, the SJC noted that the “reasonable” fees paid to opposing counsel are to be awarded on “strictly conservative principles.”

Article by Ben N. Dunlap, Esq.  
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