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SPECIAL FEATURE

Tips for Managing Transition to New Outside Counsel

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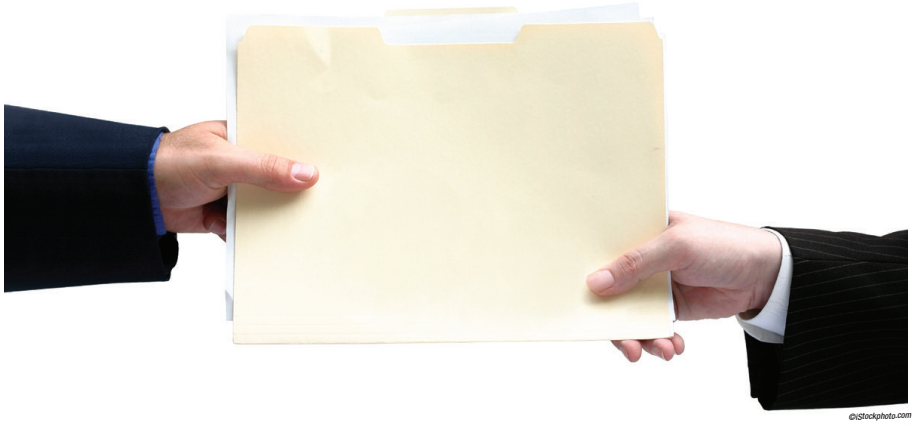

The Massachusetts Supreme Judicial Court's recent opinion in *Global NAPs v. Awiszus* (457 Mass. 489) has garnered wide attention across the bar, from employment attorneys to legal malpractice attorneys to in-house counsel.

For employment lawyers, the case is significant because the court held that the Massachusetts Maternity Leave Act does not guarantee the job of a woman whose maternity leave exceeds the eight weeks permitted by the statute, even when her employer has voluntarily agreed to the extension.

For legal malpractice attorneys and in-house counsel, the decision illustrates the risks faced by a company when new lawyers are engaged to take over a case. After all, *Global NAPs* reached the SJC only because both the company's trial counsel and its newly retained appellate counsel failed to timely appeal the million-dollar-plus judgment against the company for violating the MMLA.

Thus, what began as an MMLA case ended as a legal malpractice judgment. Ultimately, Global NAPs succeeded in holding its lawyers responsible for what can only be described as a massive fumble at the hand-off between trial and appellate counsel. Not every company can hope to be so fortunate.

We begin with a "slow motion" deconstruction of how the fumble occurred in Global NAPs. Whose hands were sweaty and why was the ball dropped? Finally, we offer a practical checklist for in-house counsel to insure that successive representation by outside counsel is as fumble-free as possible.

How the ball was dropped

In May 1999, Global NAPs, a telecommunications company, hired Sandy Stephens as a housekeeper for its president, Frank Gangi. Although Stephens cleaned Gangi's personal residence, she was on the company's payroll, bringing her within the ambit of the MMLA, which does not generally apply to domestic employees.

When Stephens became pregnant, Global NAPs informed her that she could take more than eight weeks of maternity leave if she delivered her child by Caesarean section, but never told her that if she did so, she would not be guaranteed a return to her position.

Stephens took the extra time offered by Global NAPs.

However, when she called the company to arrange her return to work she was told she had been fired. The expected lawsuit followed, in which Stephens claimed that her firing violated the MMLA, while Global NAPS maintained that Stephens' leave, which exceeded eight weeks, was not protected by the MMLA.

The jury agreed with Stephens, and awarded her compensatory damages of $1.37 million (quite an amount for a housekeeper), in addition to punitive damages of $1 million. The jury found both the company and Gangi liable for these damages. (The trial court later subsequently vacated the verdict against Gangi.)

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While any number of factors might account for the substantial verdict against the company, lawyers for Global NAPs alone were responsible for fumbling the next play, a missed appeal deadline.

After the jury's verdict, Global NAPs' general counsel called trial counsel to inform her that the company had hired appellate counsel and that she should assist them "in any way [appellate counsel] requested." A series of post-verdict motions ensued.

Ultimately, the trial court decided it would grant a new trial on damages unless Stephens accepted a reduction of damages awarded by the jury. She did and filed a notice of acceptance of remittitur.

Apparently unbeknownst to Global NAPs' attorneys, the 30-day deadline for appealing the verdict began to run on the day Stephens filed the notice of acceptance of remittitur. Instead of appealing, Global NAPs filed a motion for reconsideration, and did not file its appeal until after the trial court denied the motion, 10 days too late.

It seems clear that the company's outside counsel wrongly assumed that the motion for reconsideration tolled the appeal time — which is not the case in Massachusetts.

The court dismissed the appeal, finding that neither trial nor appellate counsel could show excusable neglect for the late filing, "in light of well-known case law holding that the filing of a motion for reconsideration does not toll the time period for filing a notice of appeal."

As a result, Global NAPs was left holding the bag for Stephen's judgment, in the final amount of $1.01 million — a judgment that the SJC later held Global Naps should not have had to pay.

Who caused the fumble, and, more importantly, how might it have been avoided? In the subsequent legal malpractice case brought by Global NAPs against its attorneys, trial counsel argued that she was not responsible for the missed deadline because Global NAPs told her to take her marching orders from appellate counsel, who never directed her to file the notice of appeal.

Obviously, there was a lack of communication about deadlines, duties and respective responsibilities among outside counsel. It also appears that in-house counsel may not have taken steps that would have better protected the company during the hand-off.

Global NAPs is a quintessential finger-pointing case of blame. Trial counsel would say: It wasn't my job, no one told me to file the appeal. Undoubtedly (although not in the record) appellate counsel would say: We expected trial counsel to file the appeal. Regardless of who was to blame, the company suffered the consequences.

Managing transitions to successor counsel

The need to engage successor counsel occurs in any number of circumstances, not only when hiring appellate counsel after an unfavorable verdict. Transitions can occur when a government or internal investigation evolves into litigation, or when outside counsel changes firms, or when a conflict of interest emerges, or simply when current counsel isn't meeting her client's needs.

How should in-house counsel effectively manage the risks that come with switching horses mid-stream?

Old and new outside counsel should meet face-to-face with in-house counsel. While attorneys may not want to take the time, in-house counsel should demand it. The conversations can be protected by Massachusetts law under a joint-defense privilege, and a personal meeting to discuss the representation is the best way to begin a transition process and to insure it is done smoothly.

In-house counsel also should request that withdrawing counsel provide the file to successor counsel at that meeting, and, to the extent necessary, an index describing what is included in the file, and, what, if anything, has been withheld.

Whenever possible, in-house counsel should bring successor counsel into the case before informing current counsel of the change. Most lawyers act professionally in such circumstances and will cooperate with the transition. For those who do not, however, it is wise to have your successor counsel ready to hit the ground running.

Although engagement letters are typically authored by the attorney and sent to the client, in-house counsel should scrutinize and revise them when necessary to specifically describe the scope of the engagement.

In-house counsel should also request that withdrawing counsel provide a written memorandum of both the substantive issues in the matter and the procedural status of the matter, including a "to-do" list that identifies the task, the deadlines, and the lawyers responsible.

Finally, in-house counsel must make clear when responsibility has formally passed to new counsel. That date is crucial. Even though new outside counsel is being hired, in-house counsel should make clear that the company expects withdrawing counsel to calendar and meet all deadlines.

An attorney is expected to protect the client's interests until formally withdrawing from representation.

As the SJC observed in *Global NAPS*: "Once an attorney has been recognized as the representative of a party on the record, he shall be presumed so to continue, until his authority his revoked, and his appearance withdrawn, and due notice thereof given." Nonetheless, in-house counsel still should make crystal clear who is in charge of what and when any change of responsibility will occur.

In football, practice, practice, and more practice decreases the risks of a fumble. In-house attorneys, however, do not have the luxury of rehearsing for transitions amongst outside counsel, especially when the need to do so arises unexpectedly. But careful planning and forethought can still reduce the risk of damaging fumbles when transitioning a case to new attorneys.

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