

Positive Directions

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Over the past few years I have used the words “tumultuous” and “uncertain” to describe the times we have been living in. In looking back at 2010 and looking ahead towards 2011, our sense is that things have started moving in a positive direction. While we are by no means where we would like to be in this ever-changing global economy, there is a greater promise of stability now than there has been over the past few years. We are working continuously to help our clients take advantage of opportunities and deal with challenges. Many of our clients have been taking advantage of an improving business climate to acquire new companies; others are choosing to sell their companies and grow in different directions; some clients have needed guidance and assistance to move their lives in more positive directions, planning for the future with updated estate plans or changed family status; some have left jobs and some have taken new jobs; we’ve helped them all along the way.

Within Burns & Levinson we have continued to move in a positive direction. This year our Boston and Providence offices were expanded with six new attorneys, strengthening our business litigation, intellectual property and private client groups. We opened a small New York City office; our Boston based lawyers can now meet with New York based clients in our Rockefeller Center location. Continuing to build for the future, we have upgraded our entire computer system this fall; while it might not be readily apparent to you, the updated software and hardware enables our attorneys and staff to work more efficiently. With multiple regional offices, Blackberries and other PDA’s and the recent introduction of iPads, our attorneys are able to effectively support their clients no

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matter where the client (or the attorney) is located. This helps us in our goal of providing the most sophisticated and attentive legal services in a caring and cost effective way.

Looking ahead we are all still facing opportunities (a.k.a. challenges.) Not everyone has the job of choice; not everyone is working; companies are still facing competition from abroad and from within; the face of the government has changed and no one yet knows how this will affect the business community; tax laws may change – but they may not. To make sure that you are continuing to move in a positive direction in 2011 you need advisors and counselors you can count on. At Burns & Levinson we are pleased to help you meet those challenges both today and into the future. Our clients are amazing – and we will continue to strive to provide them with amazing service.

Thank you for your on-going support and we wish you the best in 2011.

Sincerely,

David P. Rosenblatt

Amazing Clients[®]

PLATFORM 

Virtual Events Propagating Education and Innovation

Robert Rosenbloom, President and CEO of PlatformQ

We truly live in an age of wonders. It is an age when technology and social transformation are combining to produce a wave of learning and innovation on a previously unimagined scale.

Robert Rosenbloom, the President and CEO of PlatformQ, is riding the crest of that wave at the helm of a digital media company that produces virtual events connecting literally thousands of the world’s greatest young minds and established experts from around the country and even the globe.

Right now, PlatformQ is primarily focused on producing large-scale, digital,

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Marital Agreements

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On July 16, 2010, the Supreme Judicial Court of Massachusetts (SJC) ruled in *Ansin v. Cravin-Ansin* that marital agreements are enforceable in Massachusetts, if certain conditions are met. A marital agreement – or postnuptial agreement – is an agreement between spouses who plan to continue their marriage that alters or confirms the legal rights and obligation that would otherwise arise under the law governing marital dissolution. In other words, it is a contract that provides how finances will be handled going forward in the marriage and in the event of a divorce. In some respects, a marital agreement is similar to a prenuptial agreement, except that it is

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New Law Regulates Construction Contracts on Private Projects

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A new law that became effective in Massachusetts on November 8, 2010, makes Massachusetts part of a growing majority of states that regulate various aspects of the payment process for construction services on private projects. Known as the "Prompt Pay Act," and codified at Mass. Gen. Law c. 149, § 29E, the Act applies to all private construction projects that exceed \$3 million in value, except for residential projects of four or less units. The Act establishes strict maximum timelines for review and action upon a contractor's applications for payment and the making of payment, as well as for review and action upon proposed change orders. Project owners are now required to process payment applications no less than once per month and must make payment within 45 days of receipt of a complete application for payment. Payment applications not acted upon (e.g., either approved or rejected) may be considered *presumptively approved*.

Requests for increases in the contract sum and the contract time (i.e., proposed change orders) are also subject to strict new timelines. Such requests must now be approved or rejected within 30 days of submission or commencement of the work that is the subject of the request. As is the case with monthly payment applications, a contractor is entitled to consider its request *presumptively approved*, and eligible for inclusion in the next monthly payment application, if the owner fails to take appropriate action on the request within the 30 day timeframe.

The Act also seeks to establish performance standards for the review of payment applications and change order requests tasks that are

typically delegated to an owner's architect or engineer. Persons reviewing such documents are now required by law to include an "explanation of the factual and contractual basis" for any part of a payment application or proposed change order that is rejected. Further, all such rejections must include a certification as having been made in good faith.

The Act also broadly limits the use of "pay-if-paid" and "pay-when-paid" clauses, which have been commonly used by contractors to limit exposure to economic risks in the event of delayed payment by their clients or upper-tier contractors. Now, such conditional clauses are void and unenforceable, unless (1) the party withholding payment did not pay due to a failure of performance by the lower-tiered contractor or supplier and the entity did not cure its failure timely; or (2) the party withholding payment becomes insolvent and the party attempting to enforce the conditional payment provision has (i) filed a notice of contract under the mechanics' lien law prior to the submission of its first payment requisition; (ii) filed a statement of account and commenced a superior court action within the timeframes permitted by the mechanics' lien law; and (iii) employed all reasonable legal remedies to obtain payment.

Continuing contract performance terms are also limited in the Act. Contract provisions that require contractors to continue performance if payment of approved sums is not made more than 30 days after the due date, are now void and unenforceable unless there is a dispute regarding the quality of construction performed or the contractor has defaulted under the contract.

The Prompt Payment Act will require project owners, architects, contractors, and subcontractors to revisit their standard contract clauses and conform legal documents and business practices with the Act. ❏

Ring In The New, But Don't Forget To Comply With What Was New In 2010

RENEE
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As we welcome in the new year, and put the effects of the economic downturn behind us, we should not forget the myriad changes in laws impacting the workforce which took effect in 2010. Three in particular changed an employer's practices in obtaining, maintaining and using personnel records and information:

1. All employers, regardless of size, were required to have by March 1, 2010, a Written Information Security Plan (WISP) addressing how personal information is to be kept, accessed and transmitted (including encryption requirements). Personal Information protected by this law is a Massachusetts resident's first and last name (or first initial and last name) together with that individual's social security number, bank account number, credit card number or other financial account number. For all employers, payroll, health insurance and retirement plan

information (including beneficiary information) fall under the data security laws. In preparing a WISP, employers must consider hard copies of documents, e-mails and information in portable devices, such as back-up disks, PDAs, and smart phones. Failure to comply with the new Data Security laws carries potential penalties of treble damages under the consumer protection laws in the event of identity theft or a breach of data security.

2. Employers with 20 or more employees are required to notify employees when adding negative information to personnel records. Effective August 1, 2010, employers must provide to an employee a copy of any information that may negatively impact that employee's employment, including potentially leading to disciplinary action, within 10 days of placing such information in the personnel file. The definition of "personnel records" is very broad and could be read to encompass e-mails and text messages commenting on a subordinate's performance. Although employees cannot sue employers directly for violations of this statute, the Attorney General may fine the employer between \$500 to \$2,500 for each violation. Additionally, an

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Virtual Events Propagating Education and Innovation PlatformQ

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interactive learning events - such as virtual medical conferences and one-stop college fairs - for medical associations and universities. But their services are potentially of interest to many regional, national or global groups that can benefit from having the features of on-line virtual worlds at their disposal.

"We are not just replicating physical events. We are offering the capabilities of streaming video and 3-D technologies in a way that engages thought leaders and experts with an interactive audience," says Rosenbloom.

In fact, his company's virtual events offer a number of features to facilitate the fun of digital synchronous, interactive learning:

- Both live and on-demand streaming media presentations;
- Real time interactive question and answer sessions with recognized experts;
- Web-based panel discussions and webinars;
- Virtual booths and resource centers super-stocked with electronic information;
- Networking tools for video chats, instant messaging, and multi-modal communication; and
- 3-D environments that foster easy but stimulating virtual navigation.

Participants can also post and share massive amounts of electronic information, including PowerPoint presentations, medical studies, scholarly articles, videos, lists, databases and other useful electronic files. "Plus, if you miss the event, you can view it on-demand and download important information, resources, brochures, documents and materials," Rosenbloom adds.

But the best part may be the cost to users - it is all FREE! Participants can save not only the costs of travel, lodging and meals, but the expense of conference registration fees that otherwise go to pay for hotels, caterers and event planners.

"There is no cost to the users because the on-line presentation expenses are underwritten by sponsors, such as Intel, HP, Microsoft, GE Healthcare, IBM and pharmaceutical companies like Abbot, Sanofi Aventis, Roche and Siemens," Rosenbloom explains.

He asserts that "we provide a solution for the rising cost of physical conferences that is particularly useful in an economy where travel budgets and expenses are being cut to the bone." Rosenbloom adds that "we set up expert presentations, handle the production work, and drive the marketing programs for our various events, which makes it easy for participants to engage."

Currently, more than 300,000 participants per year are engaging in virtual events produced by PlatformQ, and that number is rising quickly. "We now have more than 35 employees and we expect to have more than 50 by year end," says Rosenbloom, noting that PlatformQ started with just a handful of employees in 2007. In 2010, the company saw revenues increase more than 100%, and is projecting similar growth for 2011.

Last year, PlatformQ produced more than 25 major virtual events, featuring more than 750 live video-based sessions, and they produced



ROBERT
ROSENBLOOM

President and CEO of PlatformQ

more than 150 virtual campus events for their CollegeWeekLive property as well.

Rosenbloom points to his company's production of CardioCareLive in conjunction with Johns Hopkins University as an example of innovative, collaborative work in continuing medical education. The program features interactive, educational programming that showcases the latest developments in the study of atrial fibrillation, acute coronary syndrome, mitral valve issues and other relevant cardiac concerns. The virtual nature of the event also facilitates the participation of busy primary care physicians, endocrinologists, and other specialists outside of the cardiology field who find the information helpful to their practices, but might not otherwise attend.

"Through CardioCareLive, healthcare practitioners are able to learn about the latest clinical developments for treating patients with cardiovascular disease from the leading cardio experts in the field, and via streaming video, directly pose questions to them based on real-life experience. It is clear that people are much more unafraid of asking questions on-line, and the result is a more frank dialogue and a greater exchange of ideas," Rosenbloom says.

He adds that PlatformQ works with the licensing authorities on testing and certifications, so participants can take on-line tests after the sessions to get necessary continuing medical education credits. That kind of capability is another reason PlatformQ also hosts conferences for oncology, infectious disease care, life sciences and clinical diagnostics.

Similarly, in the field of higher education, there is nothing quite like CollegeWeekLive, which is a live, virtual college fair attended by colleges across the country and students from around the globe. At this event, students and their families can get help from admissions representatives, financial aid experts, college faculty and even representatives from the Department of Education's FASFA division, who answer questions about their government's various financial aid programs.

"We also have experts on screen helping students to find the right college or prepare for the SAT," says Rosenbloom, noting that Dr. Gary Gruber and Ted Fiske, authors of *Gruber's Complete SAT Guide* and the *Fiske Guide to Colleges*, have appeared at the virtual event.

The results are stunning. "More than 250,000 students registered for our on-line programs last year, including the virtual open houses for colleges," says Rosenbloom, adding that PlatformQ's virtual events have reached students not only in rural and urban America, but in Africa, Asia, India, South America and Europe. Students from over 140 different countries participated in PlatformQ's CollegeWeekLive program in 2010.

Rosenbloom turns to Andy Merken of Burns & Levinson for necessary counseling in corporate law and he values the assistance that other members of the firm provide regarding employment law issues as well. "We needed a corporate structure that fit our unique situation, and we needed corporate lawyers who could think outside of the box," says Rosenbloom. "Andy and his team can do that, and they understand the needs of an early-stage, growing company that is creating a new market opportunity," he adds. "We truly enjoy working with Andy. He is incredibly responsive and creative, which is important to us." ■■■

- John O. Cunningham, freelance writer/editor

Marital Agreements

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entered into after the wedding rather than before. Yet, in many respects, a marital agreement is far different from a prenuptial agreement, most importantly with regard to the conditions necessary for enforcement. Given the different enforcement standards, a party contemplating a prenuptial agreement is advised not to be lulled into waiting until after taking marriage vows to sign the agreement.

In *Ansin v. Cravin-Ansin*, the SJC pointed out that before marriage, parties to a prenuptial agreement have greater freedom to reject an unsatisfactory premarital contract and refuse to marry. In contrast, the circumstances surrounding marital agreements, are “pregnant with the opportunity for one party to use the threat of divorce to bargain themselves into positions of advantage.” For that reason, a court will carefully scrutinize a marital agreement before determining whether to enforce it.

One aspect of scrutiny of a marital agreement relates to the required financial disclosure. The obligation to disclose financial circumstances is greater with respect to marital agreements than with prenuptial agreements because spouses (as opposed to fiancés) owe one another a duty of absolute fidelity. A court will only enforce a marital agreement when it finds that there was a full disclosure of all assets of both spouses, whether jointly or separately held. The SJC defined the disclosure requirement as “stringent.”

The SJC further ruled that a marital agreement must be found to be fair and reasonable, both at the time of execution and at the time of enforcement, which is a significantly stricter test than the relatively light standard applied to prenuptial agreements, which are enforced unless found to be unconscionable at the time of enforcement. In evaluating whether a marital agreement is fair and reasonable at the time of execution, a judge must consider the entire context in which the agreement was reached, giving greater latitude to agreements reached where each party was represented by an attorney of his or her own choosing. In determining whether a marital agreement is fair and reasonable at the time of enforcement, a judge will examine the same factors employed for evaluating a divorce agreement.

Another important aspect of *Ansin v. Cravin-Ansin* is the shifting of the burden of proof to the party seeking to enforce the agreement. If one spouse opposes the enforcement of the marital agreement, the spouse seeking to enforce it must prove that there was no fraud or coercion. Said another way, the spouse must disprove the allegation that he or she coerced the other spouse to enter into the marital agreement. This is a difficult burden indeed, and no such shifting of the burden of proof occurs when seeking enforcement of a prenuptial agreement.

A marital agreement can be a useful tool for a married couple with disputes they want resolved before continuing in the marriage. Entering such an agreement will hopefully prevent a divorce by relieving spouses of financial stresses that have impaired the relationship. What a marital agreement is not is a replacement for a prenuptial agreement not signed in a rush to get to the altar. If a prenuptial agreement is what you want – get a prenuptial agreement and get it signed before you say “I do.” ☐☐☐

Ring In The New, But Don't Forget To Comply With What Was New In 2010

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employer may not be able to use negative information to support termination of an employee if the employer has not complied with this notice requirement. Employers with fewer than 20 employees are not required to maintain a personnel record for its employees, but should consider timely documentation and communication of performance issues to allow for smoother and less risky employment terminations.

3. The Massachusetts Criminal Offender Records Information (CORI) law underwent some substantial changes. A key change in the law for most employers is that employers may no longer request any criminal record information on “initial” job applications. As of November 4, 2010, employers can no longer include such inquires in “initial” job applications and must refrain from asking any applicant to provide a copy of his/her criminal record. Although it is not clear what constitutes “initial” job applications, they at least include the very first applications and “screening” applications that applicants complete. It appears that a request for criminal record history of certain convictions, including for felonies, may be requested after an initial job application, for example after the completion of an initial job application and after an initial screening interview. The law still limits the type of criminal records information that can be used in making any decision to hire an employee.

Other employment law changes occurred in 2010 and many state and federal agencies have hired additional staff to enforce new laws as well as compliance with old laws. So, before you ring out the old year, make sure you are in compliance with changes and existing law so you can confidently ring in the new year. ☐☐☐



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Focus

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