LAWYERS OF THE YEAR

MASSACHUSETTS LAWYERS WEEKLY

Euripides D. Dalmanieras

FOLEY HOAG

Euripides D. Dalmanieras knew he was right.

But the Boston business litigator also understood he was facing an uphill battle in seeking to disqualify opposing counsel in a lawsuit between his client, Bryan Corp., and one of the close corporation's minority shareholders. After all, Massachusetts courts tend to look with disfavor on interfering with a client's choice of counsel.

The Boston firm Yurko, Salvesen & Remz had dropped Bryan Corp. as a client after taking up the representation of a minority shareholder who would sue the company over the distribution of profits. Dalmanieras cried foul, claiming Yurko Salvesen violated the duty of loyalty under Massachusetts Rule of Professional Conduct 1.7 by representing the shareholder.

In June, Dalmanieras received a resounding validation of his judgment call when the Supreme Judicial Court upheld the disqualification of Yurko Salvesen. The SJC in *Bryan Corp. v. Abrano* provided a stern lesson to all attorneys on conflicts of interest, holding that "a law firm may not undertake representation of a new client where the firm can reasonably anticipate that a conflict will develop with an existing client, and then choose between the two clients when the conflict materializes."

In its decision, the court insisted it was not adopting the so-called "hot potato doctrine," a rule adopted in other jurisdictions that generally limits a firm's ability to drop one client in order to keep a more lucrative client.

But some commentators argue that a reading of *Bryan Corp.* leads to only one conclusion: The hot potato doctrine now applies in Massachusetts.

***

Q. *Why was it important to disqualify Yurko Salvesen in your client's case?*
A. There were two primary reasons. One, my client, the company, was frankly offended as to what had occurred with the dual representation, and they were unaware of it when it was going on. The second reason was we believed that [the firm] was able to obtain information that it may have used against the company. We weren't sure about the full scope of what information they had, but we knew they had some information that we thought was improper for the company's former lawyer to use against the company.

Q. *What is the primary significance of the SJC's decision in* Bryan Corp.*?*
A. This is the first case in which the SJC addressed the duty of loyalty since 1982. These cases don't come up that frequently because, in my experience, lawyers follow and comply with the rules. I think what happened in this case was frankly a mistake in judgment by the other side. I don't think anybody was intentionally seeking to violate the rules.

The importance of the case is it's a reminder by the Supreme Judicial Court to all attorneys that we have to police for conflicts and potential conflicts before we take on a case. And if there are any doubts as to whether or not a material conflict will arise, we need to err on the side of caution and not take on that case.

Our opponents sought direct appellate review in the Supreme Judicial Court. We actually opposed the petition because our position was there was nothing really novel here. The rules have been essentially the same for a long time.

Q. *So when you moved to disqualify Yurko Salvesen, you didn't suspect the case might end up before the SJC?*
A. Not in my wildest dreams. The trial judge … ruled from the bench and granted our motion for the reasons stated in our motion. I took that to mean it was a straightforward kind of case.

Q. *Was part of your argument that the state courts should adopt the hot potato doctrine?*
A. We did urge the Superior Court to adopt it, and we urged the SJC to adopt it. The SJC opted not to adopt it formally. It ruled that the existing framework of case law and rules adequately dealt with the situation. But whether you apply that doctrine or the rules, it gets you to the same result.

Q. *Although the SJC said resolution of the case didn't require application of the hot potato doctrine, some argue that the case represents the implicit adoption of the rule. Do you agree with that analysis?*
A. I think that's right. I don't think the court wanted to adopt a colloquial-sounding doctrine. But the rules do say you're not supposed to take on an engagement unless you believe you can conclude the engagement and no conflict of interest will arise. I think the court wanted to avoid the appearance of making new law and just relied on rules as written. Ultimately, it's six of one, half a dozen of the other.

PHOTO BY MERRILL SHEA

Q. *Are there any lessons you take away from the case?*
A. It reinforced advice I got years ago when I started practicing, and that is if you believe you have a meritorious argument, but [think] a motion or request for relief represents a long shot, it's still worth making your argument to the court because you just might get the relief you're seeking.

The reason I say that in this context is that motions to disqualify are disfavored by courts in Massachusetts. They should be. There should be a high burden to disqualify another lawyer for allegedly violating the Rules of Professional Conduct. If that wasn't the burden, these kinds of motions would be wielded more frequently.

But in this case, we thought that there was a clear violation of the rules and there were potential ramifications to our client of not moving to disqualify. Some people said it was a longshot. I didn't think it was a slam dunk either. In the end, it was an argument worth making. We protected our client's interests.

— Pat Murphy

> "The case is a reminder by the Supreme Judicial Court to all attorneys that we have to police for conflicts and potential conflicts before we take on a case."

Hugh J. Gorman III and Jeffrey J. Pyle

PRINCE, LOBEL, TYE

The preliminary injunction they obtained in Suffolk Superior Court on May 10 against the state's Supplier Diversity Office is working as intended, Jeffrey J. Pyle and Hugh J. Gorman III report happily.

The injunction forced the state to revert to a definition of "minority" that excluded Portuguese-owned businesses from receiving preference in bidding on state contracts.

Pyle and Gorman's client, Janet Butler, owner of Federal Concrete, knows of an African-American-owned company that has received a huge uptick in business as a result of the injunction, now that it is no longer being crowded out from bidding on state contracts by Portuguese-owned businesses, according to Gorman.

"And there are many other examples," he adds.

Nevertheless, the Boston lawyers say their fight is not over.

***

Q. *What developments have there been in the case since May?*

PYLE: We got a motion to intervene by three businesses owned by persons of Portuguese origin. They filed that motion in June, and the court allowed them to intervene. After that, these three businesses brought what they called counterclaims against Federal Concrete, suing it for tortious interference with contracts, breach of Chapter 93A and unfair competition. The grounds for those claims were that Federal Concrete had gone to court and had obtained the preliminary injunction decertifying Portuguese-owned businesses as minority business enterprises.

GORMAN: Basically, the grounds were: "You sued us, you prevailed, and now we can't illegally benefit from being illegally certified as minority contractors anymore, so we want to sue."

Q. *That seems like a bit of a novel theory.*

PYLE: And one that isn't often brought because it runs straight into the teeth of the anti-SLAPP law. The anti-SLAPP law provides that you cannot bring a claim based on somebody's exercise of his right to petition the court for redress of grievances, unless the petitioning activity has no plausible basis in law or fact.

Our argument was that the judge already found necessarily that there was a likelihood of success on the merits of our claims, so our claims couldn't possibly be devoid of legal or factual merit, and Judge [Joseph F.] Leighton [Jr.] agreed. He allowed our motion to dismiss under the anti-SLAPP law on all counts.

GORMAN: The other aspect of the anti-SLAPP law is when you prevail you're entitled to your attorneys' fees and costs. We are pursuing those as well. There's a hearing on that in early January.

Q. *But in the meantime, businesses are benefiting from the injunction?*

GORMAN: Janet Butler, who owns Federal [Concrete], is very courageous to step up and do this. She did it certainly for her own benefit to benefit her company because she's a certified [Women Business Enterprise], but she also knew that it would have far-reaching implications for other legitimate and properly certified WBEs and [Minority Business Enterprises].

The set-aside program is not a handout; it's a hand up. It gets you into the game. It gives you the opportunity to participate. It gives you the opportunity to bid on public construction projects and, because of the set-aside, perhaps be awarded jobs that you might not otherwise get. Once you're there, you still have to perform. You still have to deliver.

This really righted a wrong. Whether it was for political expediency or other motives, the [Portuguese Business Enterprises] just were not entitled to this certification, and they benefited from the certification for a number of years on millions and millions of dollars of projects that should have been rightfully awarded to legitimate, properly certified WBEs and MBEs. They squeezed them out.

Q. *And yet, it seems the state hasn't abandoned the idea of recertifying Portuguese-owned businesses as MBEs. There are still draft revised regulations on the Supplier Diversity Office's website, for example.*

PYLE: The draft regulations have been on the Supplier Diversity Office's website since shortly after the lawsuit was brought; they've never come down. The court's preliminary ruling was based in part on the court's finding that there wasn't any showing of discrimination against people of Portuguese origin. So, reading between the lines, you can infer that the rulemaking has been brought to a halt as a result of this lawsuit.

The commonwealth has taken the position that it is entitled to include Portuguese origin as one of the categories of minority business, but in no filed court pleading has it identified any evidence that that group has suffered discrimination in the construction industry in Massachusetts. That is what is required under the 14th Amendment. You can't use ethnicity as grounds for providing governmental benefits except as a remedial program.

To be a remedial program, the state has to identify discrimination against the group to be benefited before it enacts the program. And the benefit has to be narrowly tailored only to the groups that have suffered that kind of discrimination. From the very first [U.S. Supreme Court] case that examined this issue [*City of Richmond v. J.A. Croson Co.*], the court held that the random inclusion of groups that may never have suffered from discrimination in construction in Richmond, Virginia, rendered that city's program unconstitutional. We think that the same applies here.

HUGH J. GORMAN III

JEFFREY J. PYLE

PHOTO BY MERRILL SHEA

Q. *The state is also conducting a "disparity study." How might that affect things?*

PYLE: The commonwealth announced that it's putting out a disparity study that will include people of Portuguese origin. We don't know when the results of that disparity study will be available. Last spring, they had anticipated spring of '17.

I will note, you have to have statutory authorization for everything you do, and the statute that governs the construction affirmative marketing program, Chapter 7C, Section 6, does not include people of Portuguese origin within the definition of "minority." The examples it gives tend to exclude people of European origin from groups that could be benefited by such a program. The statute speaks of western hemisphere Hispanic and Cape Verdean. It doesn't speak of people from the Iberian Peninsula or any other part of Europe.

These [PBEs] are very highly capitalized businesses in some cases, which is evidence that they don't need a set-aside program. But what the commonwealth's motivations are as far as its actions in the future, I can't speculate.

— Kris Olson

> "This really righted a wrong. Whether it was for political expediency or other motives, the PBEs just were not entitled to this certification."

Rebecca A. Jacobstein

COMMITTEE FOR PUBLIC COUNSEL SERVICES

Luke Ryan

SASSON, TURNBULL, RYAN & HOOSE

The efforts of Northampton's Luke Ryan and CPCS lawyer Rebecca A. Jacobstein to probe the depths of the misconduct of former Amherst drug lab chemist Sonja Farak — and whether the actions of the Attorney General's Office, intentionally or not, obscured the scope of Farak's misdeeds — built to a crescendo the second week of December.

One by one, past and present members of the AG's Office took the witness stand in front of Hampden Superior Court Judge Richard J. Carey in Springfield, where they were quizzed about their response to Ryan's Nov. 1, 2014, letter, alerting the office to newly discovered, undisclosed evidence.

What had been described as "assorted lab paperwork" in police reports related to Farak's arrest actually included documentation of Farak's own mental health treatment, which chronicled on-the-job drug use dating back much further than had previously been acknowledged.

Anyone hoping that the proceedings in front of Carey would produce a smoking gun of prosecutorial misconduct or otherwise connect the dots in something resembling a straight line is likely disappointed.

One then-inexperienced assistant attorney general testified that she never personally looked at Farak's file while handling her first attempt to quash a subpoena. Instead, she relied on her superiors' assurances when she told Judge C. Jeffrey Kinder that all relevant material had been turned over.

The AAG who assigned her the task of quashing the subpoena contradicted her testimony.

And on it went, with witnesses giving at-times conflicting accounts about what was or wasn't said to whom, when and why.

Ryan, Jacobstein and their fellow defense counsel, along with their adversaries, will now file briefs in February, and Carey will be tasked with sorting it all out and deciding whether the clients of the defense lawyers should have their convictions vacated and their indictments dismissed.

As to the larger mess related to the Amherst Drug Lab, that may take years to untangle completely.

***

Q. *Is there a way to sum up what was learned in Carey's courtroom?*

RYAN: I think it is now undisputed that the government possessed some evidence that I and other attorneys attempted to obtain in 2013, that our efforts were thwarted, and that a number of our clients and a broad range of defendants suffered adverse consequences.

There were a number of different accounts that participants in this gave [at the December hearing] as to why this happened, but I think an important takeaway from all of this is that it did happen.

JACOBSTEIN: What the judge has to decide is, when they sent a letter to the court saying that everything had been turned over … whether they intentionally lied about it or only sort of intentionally lied about it.

RYAN: The hope here was that this investigation would not only identify people who did wrong or made mistakes or were negligent or were grossly reckless with important jobs, but also exonerate the people who did nothing wrong who had clouds of suspicion hanging over them.

Q. *What testimony did you find most surprising?*

RYAN: It was somewhat shocking to me that … not a single lawyer from the Attorney General's Office ever reviewed the physical evidence in the case while it was pending against Sonja Farak. ... All this assorted lab paperwork fit comfortably in a banker's box; it was less than 300 pages. It was a couple of hours of work at most.

In terms of dropping the ball, you could start with the fact that nobody looked at the evidence, [yet they] went into court and made representations that … it was just irrelevant. I don't know how you can go before a judge and say it's irrelevant evidence if you haven't looked at it.

JACOBSTEIN: Along those same lines, at some point everyone was clear that there was more than assorted lab paperwork in there, and no one updated the police reports or the search-warrant return or anything.

Q. *What lessons will you take away from this battle?*

RYAN: It's an adversarial system, and the government in this adversarial system has an obligation to turn over things that would make the government's job harder. Entrusting that to the government is fraught with danger. There's a danger that people will intentionally not supply it. There's a danger that people won't be diligent in looking for it. There's a danger that people will be diligent in looking for it but just won't understand the case well enough to know it when they see it. So, a lesson that comes out of this is that it is very dangerous for prosecutors to have anything really short of an open file with defense attorneys.

Q. *How likely is Carey's decision to be the final chapter in this saga?*

RYAN: I think everybody understands that the facts that he finds and the legal rulings that he makes will likely be the subject of an appeal, and I think it's likely that Rebecca and I have a significant amount of time left in this case here. Getting to the end of the day [on Dec. 16] felt like a significant achievement. But I don't think we're quite near the finish line.

Q. *Even beyond Farak, there was a larger issue of mismanagement and insufficient resources and supervision at the Amherst drug lab. How is that likely to play out?*

RYAN: This was a lab that was perpetually underfunded; that was on the chopping block; that analysts were in a position where they didn't have adequate resources, where they had to, in order to justify their existence, churn out a lot of samples, and so they cut corners left and right.

When [accreditors] looked at that lab in 2002, [and] in 1986, they identified these really serious flaws with how they were doing business, and everybody just kind of ignored them. And they partly played a role in how a chemist could be there for close to a decade, abusing and stealing drugs at the lab.

It's relevant because when they gave Sonja Farak immunity, one of the things she said is that she was tampering with samples assigned to other chemists, and that she was engaging in practices at the lab that really increased an already significant everyday risk of contamination. And so that's the danger.

— Kris Olson

PHOTO BY MERRILL SHEA

> A lesson that comes out of this is that it is very dangerous for prosecutors to have anything really short of an open file with defense attorneys."

Shana I. Kaplan

HARTLEY, MICHON, ROBB

Last winter, Shana I. Kaplan might have said her Supreme Judicial Court clerkship after law school was the most noteworthy accomplishment of her legal career.

Today, however, the Boston employment lawyer can boast of victory at the very court where she got her start, in a case that's not only highly consequential, but one that's left many employers stunned.

Kaplan served as appellate counsel for software executive Anthony Leness, who was fighting his former employer's attempt to strip him of severance benefits for alleged misappropriation of confidential information that the employer, EventMonitor, didn't discover until he had left the company.

EventMonitor learned that, shortly before it terminated Leness in 2007 without cause, he had copied and retained proprietary information, including customer lists and business plans, in clear violation of his employment agreement.

The employer also discovered he had taken steps to cover his tracks, including using a personal credit card to pay a web storage company to hold the data and installing a "cleaning" program on his company laptop to scrub evidence of what he had done.

When EventMonitor made the discoveries, it sued Leness for breach of contract. The company also argued that it should be able to classify his termination as "for cause" due to "defalcation" of data under an after-acquired evidence doctrine recognized in other jurisdictions (his contract barred severance pay in the event of a for-cause firing).

Kaplan, however, was able to convince the SJC that while Leness' retention of the proprietary information technically may have been a breach of his employment agreement, absent evidence he disclosed the information to third parties, it wasn't a material breach that should void his severance.

She also convinced the court that, for similar reasons, his conduct didn't constitute defalcation, rendering Event Monitor's after-acquired evidence argument moot.

When the SJC announced its decision in *EventMonitor, Inc. v. Leness* last February, employers were taken aback to learn that an employee could commit such blatant misconduct and still get all his severance and accrued vacation pay.

But Kaplan suggests that employers that have an issue with the ruling need to do a better job drafting their employment agreements.

"The terms of a contract can be drafted to reflect whatever it is the parties want it to reflect," Kaplan says. "That's the point of contract law. As a general rule, if there is something important to an employer to protect, it behooves them to use contractual language and the terms of the contract to try to protect that."

* * *

Q. *Why is this case important beyond whatever personal impact it will have on your client?*

A. It reaffirms the general principle that words of a contract really do matter. When people are entering into an employment relationship and trying to work out details of how that's going to go, it's tempting to rush into an agreement. But this case really teaches that it's important to understand the terms of your contract and to negotiate where appropriate, because at the end of the day contractual terms are going to govern the rights and obligations of the parties.

It also teaches that courts will carefully scrutinize employers' efforts to avoid contractual obligations, and they're not going to rewrite the terms of an agreement or attach significance to terms where it's not called for.

Q. *What was the biggest challenge the case presented for you, and how did you overcome it?*

A. Not letting the other side set the agenda. There are a number of issues that can arise in an appeal, and it's easy to fall into the view of the case the other side might wish to argue. The important thing is to keep in the mind's eye the view of the case you want to portray.

To us, this was a case about the employee's rights under the contract. We really focused on that instead of the issues that the employer might have focused on, like the after-acquired evidence doctrine, which, in our view, didn't need to be reached. Some interesting issues might have arisen in connection with that doctrine, but your goal is to present your case in a way that's most compelling for your side.

Q. *Your client's contract mandated that he return all proprietary information upon termination. Yet he did not do so. So how was he not in violation of his agreement?*

A. The case shows that an employer isn't going to be excused from paying severance simply because an employee may have engaged in some hyper-technical breach. The central purpose of the provisions of the contract concerning confidentiality according to the court was to protect confidentiality. …The court emphasized that in the five years that have passed since this first came up, the employee hasn't abused or disclosed anything, had no malicious or nefarious purpose, had cooperated and returned all company equipment, and hadn't deprived the employer of any use of the documents.

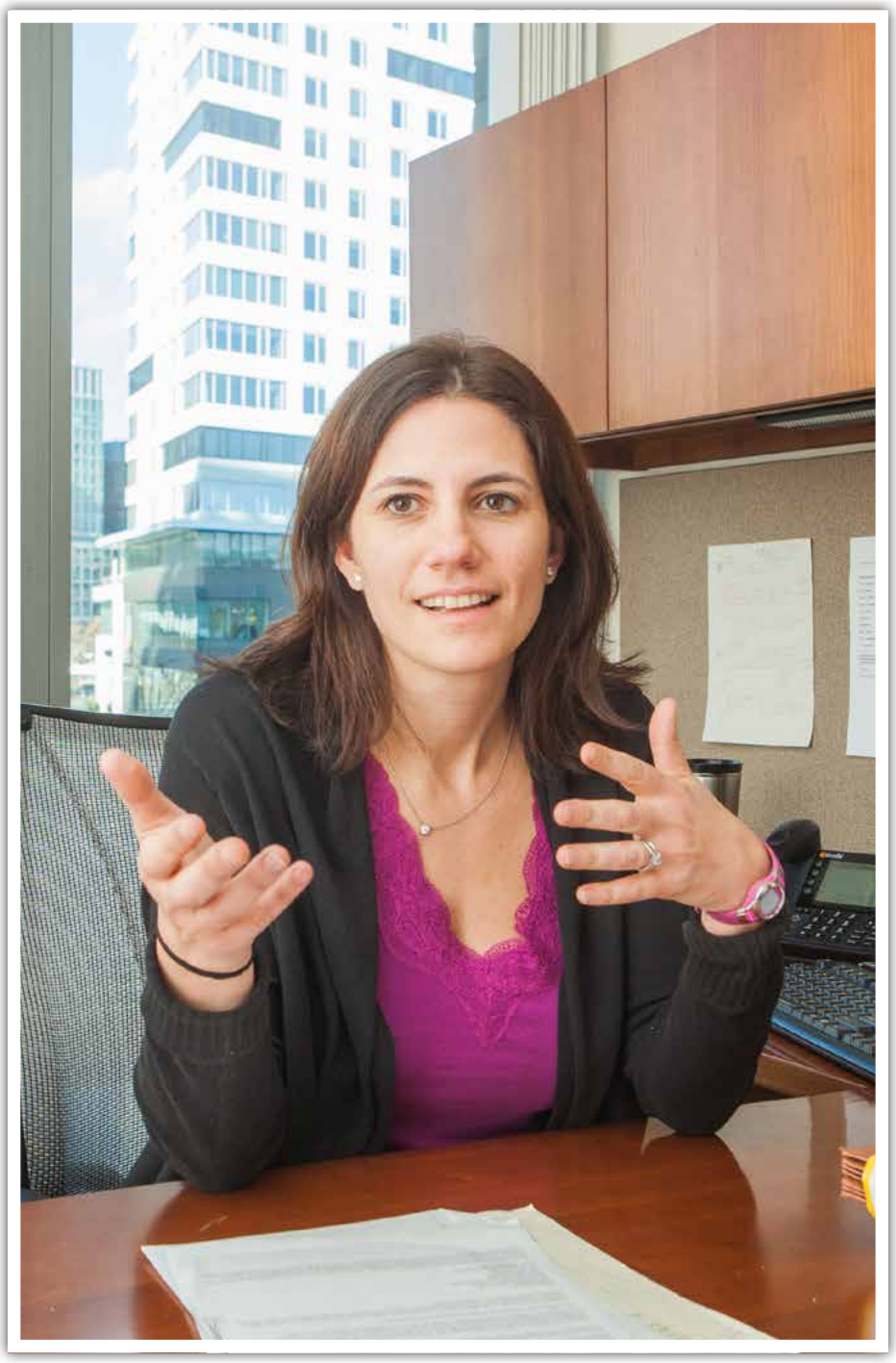

PHOTO BY MERRILL SHEA

Q. *Still, one might view this as a lucky fluke for your client in that he gets a year's pay plus triple his accrued vacation time only because his employer discovered his actions after he left rather than before. From an equitable standpoint, how is this fair to the employer?*

A. I don't think the result would have been any different regardless of the timing of discovery of his retention of information. This wasn't a material breach, and there was nothing that rose to the level of cause as defined under the agreement. I don't think it's inequitable because this was the deal. If the employee is terminated for reasons other than cause, these are the benefits he receives.

Q. *What do you find most rewarding about practicing employment law?*

A. I've always enjoyed working with individuals, and I think people's careers or their jobs are so much a part of who they are. ... There are also so many issues that arise, and opportunities to learn about so many different kinds of work that I just think it's an interesting area to be in.

— Eric T. Berkman

> "This case really teaches that it's important to understand the terms of your contract and to negotiate where appropriate, because at the end of the day contractual terms are going to govern the rights and obligations of the parties."

Benjamin H. Keehn

COMMITTEE FOR PUBLIC COUNSEL SERVICES

Benjamin H. Keehn, a public defender with the Committee for Public Counsel Services, achieved just about the closest thing to total victory that a criminal defense lawyer can hope for when he argued *Caetano v. Massachusetts*.

Keehn's client, Jamie Caetano, had obtained a stun gun for the purpose of defending herself against an abusive former husband. Later, Caetano was arrested when police, investigating a shoplifting report, found the stun gun in her purse. Caetano argued that it was for self-defense and that she had a constitutional right to carry the weapon. But because Massachusetts law bans stun guns outright, the Supreme Judicial Court upheld her conviction.

However, the U.S. Supreme Court unanimously reversed the SJC, claiming that the SJC's reasons for upholding the outright ban — including, for example, the argument that stun guns are not protected because they were not in common use when the amendment was enacted — were insufficient.

Subsequently, Keehn didn't just get prosecutors to drop the charges, he got a judge to formally find her not guilty and also approve a petition to seal her record.

Winning at the nation's highest court and wiping his client's record completely clean certainly make *Caetano* a highlight of Keehn's career, even if it fell a speck short of being a perfect experience.

"The Supreme Court decided the case on the briefs, on the petition and the opposition, which doesn't happen every day," Keehn says. "I guess that was the only regrettable aspect of the case, which I'm not really complaining about, but I did not get to go to Washington to argue the case."

***

Q. *The incident in which your client used her stun gun to scare off her abuser was separate from and preceded her arrest for possession of the gun. How was that important piece of context discovered and incorporated into the case?*

A. As any appellate lawyer will tell you, your appeal is only as good as your record. The record in this case was astonishingly complete, and that is attributable entirely to Paul J. McManus, now [Boston Municipal Court] Judge McManus. He was the trial lawyer who was assigned to represent the defendant in Framingham District Court. It was the record of the trial that Paul created that made it so clear ultimately to the Supreme Court that this was a "lawful use of arms for self-defense" case.

At the trial she testified truthfully about the circumstances under which she came to own the stun gun and that she had in fact displayed it to fend off her abuser. She was outweighed by her abuser by a lot, and he had really done a number on her repeatedly in the past. The picture that one gets was all undisputed and was all thanks to Paul McManus.

Q. *Do you think Massachusetts' stun gun ban would have struck you as blatantly unconstitutional in another context?*

A. Yes. It should be repealed because it's clearly unconstitutional under the Second Amendment. The problem is the statute completely bans stun guns; therefore, it's inevitable that it's going to sweep too broadly and criminalize the behavior of someone who is using an arm for lawful self-defense, which is what the Second Amendment protects.

But you're right: This obviously would have been a different case if a defendant was accused of committing an armed robbery and using a stun gun to commit the crime. That's not OK, and there's nothing in the Second Amendment that would permit it. This case makes absolutely clear that if it doesn't extend to victims using arms to defend themselves, then it doesn't do anything.

Q. *You obtained a very favorable settlement for your client. But if you believe Massachusetts' stun gun ban is unconstitutional, why not continue to press the case in an attempt to overturn the law? Was that even a possible outcome?*

A. The actual per curiam decision is extremely narrow. It simply says that the reasons the SJC gave for deciding that stun guns do not count for Second Amendment purposes were wrong, and it vacated the SJC's decision basically and told them to do it over. At that point, the prosecution made clear that they wanted to end the case. So at that point I made a decision that it would be in my client's best interest to try to resolve the case favorably rather than what could have happened, which is that we would have had a further argument before the SJC as to whether there was some other reason why the statute could withstand Second Amendment scrutiny. That wasn't a battle that my client needed to fight.

But I do think, and I hope, that as a result of this decision the Legislature or the attorney general or whoever is the appropriate party will repeal the existing statute and enact something that passes constitutional muster. There wouldn't be a case if there was a statute on the books that regulated stun gun possession.

PHOTO BY MERRILL SHEA

Q. *Was there an important lesson to be learned from working on this case?*

A. It was an excellent reminder that the only thing that matters ultimately is the client's best interests. The fact is that this conviction was unjust and impacting my client's ability to get her life on track. She's had her difficulties, not just with her ex, but like all my clients she's indigent, she had housing issues, and having a felony conviction made it very difficult for her to go in the direction she was trying very bravely and steadfastly to go. It was more important for me to get her record clear than get this statute declared unconstitutional by the SJC or a federal court. And that was an important reminder for me: to listen to your client. She was absolutely right about what ultimately mattered.

— Brandon Gee

> "This case makes absolutely clear that if [the Second Amendment] doesn't extend to victims using arms to defend themselves, then it doesn't do anything."

Joshua S. Levy

ROPES & GRAY

Joshua S. Levy represented the United States for seven years as a prosecutor in the economic crimes unit at the U.S. Attorney's Office in Boston. Now, as Levy likes to say, he represents the United States one person at a time as a white-collar defense lawyer at Ropes & Gray.

"I find that equally rewarding," the Boston lawyer says of having crossed over to the other side. "And I think it's the highest calling of a lawyer to represent someone who has the weight of the federal criminal justice system bearing down on them when you know that person is innocent."

In his defense of real estate developer Dustin DeNunzio, Levy had to contend not only with the accusations and resources of the federal government, but also the glare of the media spotlight in a case related to casino magnate Steve Wynn's plans to build a $1 billion casino in Everett.

DeNunzio and two co-defendants were accused of conspiring to defraud Wynn in a land deal by concealing convicted felon Charles Lightbody's alleged interest in the parcel. The Massachusetts Expanded Gaming Act has provisions aimed at preventing felons from profiting from the operation of casinos.

A federal jury acquitted all three defendants in April after less than six hours of deliberations.

Levy was joined on the case by Ropes & Gray partner Aaron M. Katz and associate Alexandra L. Roth.

***

Q. *Do you approach your work any differently when a case is receiving as much media scrutiny as this one did?*

A. We were certainly monitoring how much publicity it was getting. Your biggest concern with a case that's getting in the papers is tainting your jury pool. So we were mindful of that in the pre-trial proceedings, and we actually had some unfortunate headlines coming out of pre-trial motions that didn't cast our client in such a great light. But once the trial started, I was not concerned with the media coverage.

I've found over the years that what happens in the four walls of the courtroom is what the jury is focused on, and it wasn't a case of such notoriety that they were being bombarded by news coverage about it. Once the trial starts, nobody really knows what's going on unless you're in the courtroom every day and have a feel for it. So I wasn't too worried about the media coverage.

Q. *How would you summarize the defense's and the prosecution's theories of the case?*

A. The government's theory of the case was that Charlie Lightbody had a hidden interest in the ownership group that was selling the land to Wynn. And our fundamental defense was that Lightbody did not have a hidden interest; he was out of the deal before they signed the option agreement with Wynn, and that's the way that we drove our defense.

And the secondary aspect of our defense was that our client acted entirely in good faith throughout the process, relied heavily on a very respected Boston lawyer, and urged the Boston lawyer to make sure Wynn knew everything they needed to know about Lightbody and the fact that he had gotten out of the deal. … Not only did we have testimony to that effect, we had documents, contemporaneous emails from our client to his lawyer saying, "Tell Wynn about Lightbody." That is gold at a trial because you're not relying on someone's memory or having them impeached on the stand. You can't cross-examine a document; the document speaks for itself.

Q. *What would you count as your most persuasive argument to the jury?*

A. I think the case resulted in acquittal because of two reasons. One is that the government's theory defied common sense. It defied common sense because not only were our clients supposedly trying to defraud Steve Wynn, but this respected lawyer in Boston was in on it, another uncharged real estate developer was in on it, and that made no sense from a common-sense perspective that people would go out of their way to commit federal crimes to enrich somebody that the evidence showed they didn't even know.

So we have the narrative that didn't make sense, and then we hammered that narrative with a lot of detail — small detail, large detail — that supported our narrative that this guy was out. I'll give you one example. It was one of my favorite emails in the case. It wasn't that prominent, but it showed my client introducing Lightbody in April of 2013 to a guy whose father was at Mintz Levin, the law firm and lobbying shop that Wynn was using. I said to the jury, "It makes no sense he's being accused of hiding Lightbody from Steve Wynn, yet we have an email where he's introducing the very guy he's hiding to the Wynn people."

PHOTO BY MERRILL SHEA

Q. *What about this case highlighted your affinity for white-collar law?*

A. To be able to get a jury to see through all the smoke and focus on the facts and deliver an acquittal — frankly, it kept this man out of jail, and it was one of the best days of my career. … He's a guy who worked his tail off to get where he is in life. He has wonderful parents. This was a devastating chapter in his life. To be able to step into the breach … was incredibly fulfilling, personally and professionally.

— Brandon Gee

> "To be able to get a jury to see through all the smoke and focus on the facts and deliver an acquittal — frankly, it kept this man out of jail and it was one of the best days of my career."

Roderick 'Eric' MacLeish Jr.

CLARK, HUNT, AHERN & EMBRY

A little over a year after The Boston Globe published its December 2015 Spotlight Team report on chronic sexual abuse of students at the Rhode Island private school St. George's, Cambridge lawyer Roderick "Eric" MacLeish Jr. is satisfied with the case's resolution.

"St. George's is a much better place, and I wouldn't hesitate to send my own kids there now," says MacLeish, a St. George's alum. "It's almost like CCD classes in the Catholic Church cases. They are not going to knowingly put anyone in that school that is going to have predatory instincts toward kids."

The St. George's case moved the needle of progress by introducing novel and more compassionate ways of reimbursing victims abused by private school faculty during the 1970s and 1980s — and beyond, MacLeish says.

"We had a model program on therapy reimbursement," he says, crediting Ropes & Gray lawyers James P. Dowden and Dalila A. Wendlandt for establishing a $500,000 fund for MacLeish's clients and other St. George's alumni seeking therapy relating to the abuse.

The approach is being adopted by other private schools and institutions that MacLeish is dealing with now, he says.

Yet, to understand sexual abuse cases is to accept that there are no quick fixes. To advance an iota of change, the issue must remain front and center, and that is one of the reasons why MacLeish does what he does. Known for his role in the Roman Catholic Church abuse cases first reported by The Globe's Spotlight Team in 2002, MacLeish represented several victims in those suits and was portrayed in last year's Oscar winner "Spotlight" by Billy Crudup.

With St. George's and the Catholic Church cases behind him, MacLeish continues to handle matters advocating for the vulnerable, and it's apparent that more work needs to done.

With the St. George's case, private education "is just one more enclave where people who want to gain access to children — whether they are sociopathic or they're sexually attracted to children — are not going to be able to go for a while," he says. "Probably for a good long time, and that's just great. It's just one more place. But it's not like [sexual abuse] has all gone away. It never goes away."

***

Q. *You have successfully held accountable two communities that have protected people who abused children — the Roman Catholic Church and private education via St. George's. What's next?*

A. I'd say camps, particularly the very well-to-do camps where people would think that we couldn't possibly have had one of these guys in our midst. Well, it's actually just coming out that they did.

Also public education. There are 3 million teachers in the United States. There were 90,000 Roman Catholic priests, and I think less now. So public education is another area where for all kinds of reasons people have been reluctant to come forward.

Q. *Regarding the St. George's case, there's a faction that thinks the current administration is paying for the actions of its predecessors …*

A. I think that's partly true. I have a lot of cases against a lot of schools and have been doing this for a long time. Certainly what happened at St. George's, for the amount of people who were involved, was extraordinary. If you count the faculty and staff perpetrators, it was something like as many as 11. That's since 1970. If you include students as perpetrators, there were over 15. This was really significant and a large group of people in a pretty small school. Many of them were there for a long period of time. The current school administration was tarnished by what had gone on in the past. I think they learned a lot, and it ended in a positive way for everybody.

Q. *What are some of the challenges of taking these kinds of cases?*

A. The downside is that you see people that don't get better, people that you can't save, no matter what you do as an attorney. You can get them compensated. You can give them a voice, get them access to therapy, and get them on committees to try to have new procedures at the schools they went to. But some of them are just not going to get better. That has been the biggest challenge for me.

Q. *How do you prepare your clients for proceeding with an action?*

A. Sometimes it feels hollow for people when they receive a check. "Is that all I am worth?" You tell them that there is never enough money: "[Money] is not an adequate way of looking at what you lost." I keep doing it because cases like this help increase our understanding of the laws. There's a lot more we can do.

PHOTO BY MERRILL SHEA

For example, a lot of states have now criminalized teacher-student sex at all levels.

Q. *Massachusetts, too?*

A. No, not Massachusetts. Shame on the teachers' union. They oppose anything that would raise the age of consent from 16. So if you're a 17-year-old boy in school and your teacher is having sex with you, it's not criminal. It's arguably not even civil. So shame on the teachers' union for opposing it.

Q. *Any advice for lawyers looking to get in this area?*

A. Don't try to save your clients. Set proper boundaries. Have a really good support system. Prepare those you love that, sometimes when you come home, you may be incredibly depressed. Look at it as a case, not as a cause. Give people a voice. You're not necessarily going to change their lives, but you can work at the edges. Get clients some therapy; raise awareness. You're going to have to have a thick skin. It can be very combative. This is highly charged stuff. You can't screw it up; it's incredibly important to the clients.

— Claire Papanastasiou

> "St. George's is a much better place, and I wouldn't hesitate to send my own kids there now."

Robert J. O'Regan

BURNS & LEVINSON

Robert J. O'Regan dabbles in carpentry. He builds planters and bookcases, and he's trying to figure out how to make picture frames, though he says furniture is beyond his skill set. O'Regan says the hobby is satisfying because it allows him to put his hands on something, work with it awhile, and see a result.

That's also why he likes being a lawyer, and in 2016 he certainly saw results: a big victory in a divorce case before the Supreme Judicial Court over the summer and another win in an elder-abuse case at the Appeals Court in the fall.

In the SJC case, *Pfannenstiehl v. Pfannenstiehl*, O'Regan's client, Curt Pfannenstiehl, was the beneficiary of an irrevocable spendthrift trust that his wealthy father had set up on behalf of his children and grandchildren and any future issue. Curt had been receiving regular distributions that helped him sustain an affluent lifestyle. Then he filed for divorce, and the distributions mysteriously were cut off.

A Probate & Family Court judge valued Curt's trust interest and awarded much of it to his wife, Diane. The Appeals Court affirmed, calling the trust's spendthrift provision a "subterfuge" that was being used to mask Curt's income stream and shortchange his wife.

But in August the SJC reversed, finding that Curt's interest in the trust was too speculative to be deemed marital property.

On the heels of that win, in November O'Regan prevailed at the Appeals Court in a conservatorship case on behalf of Alice Migell, an elderly Newton widow whose son, Andrew, had transferred to himself millions of dollars in assets that she needed for 24-hour care. Thanks to O'Regan's efforts, Andrew must now return what he stole and fork over more than $500,000 in attorneys' fees.

O'Regan says each case was rewarding in its own way.

Of *Pfannenstiehl*, he says the lower courts' rulings represented a drastic change in the law that would have caused unintended consequences had they stood.

In *O'Regan v. Migell, et al.*, the victory was more personal.

"Mrs. Migell is comfortable, happy, taken care of and safe now," he says. "When we started, she was isolated, depressed, at great health risk and unhappy."

***

Q. *What would you say was the most challenging aspect of* Pfannenstiehl, *and how did you overcome it?*

A. The emphasis by the trial judge and the Appeals Court that the [family's] conduct should affect the legal interpretation of the trust instrument. Both decisions go into quite a bit of detail on the way the trust was managed and characterized the distributions as the family circling wagons around Pfannenstiehl family money. [However,] whether something is or is not an asset is a question of law defined by the instrument, not a question of fact based on how a judge feels people were behaving. So that's what we tried to focus on.

Q. *Taken purely at face value, Curt Pfannenstiehl seems like an unsympathetic party compared to Diane. After all, his wealthy family basically supported him, paying him nearly $200,000 a year to serve as an assistant bookstore manager at one of the private colleges it owned while providing a stream of trust distributions. And Diane gave up her military career under pressure from Curt's family just two years before her pension kicked in so she could provide full-time care to two children with disabilities. To what extent did that aspect of the case pose challenges for you?*

A. We get a lot of questions about that. But the SJC at oral argument focused on the definition of the interest Curt had under the instrument and the ability of beneficiaries to get distributions according to the terms of the instrument. There were only a few questions that got into the kind of conduct that had carried so much weight with the trial judge and the Appeals Court.

Q. *One could also look at the underlying allegations and determine that Curt's interest truly did have an ascertainable value. After all, there was a history of steady, consistent distributions that suddenly stopped on the eve of Curt's divorce filing, whereas his siblings continued to get their distributions. Why would someone be wrong for drawing such a conclusion — and for concluding that Diane should share in the trust as a matter of pure equity?*

A. The equitable division statute doesn't give that amount of discretion to trial judges. The statute doesn't let judges say, "I think it would be fair to give this ex-spouse this kind of property settlement just because she's no longer going to be a part of this wealthy family."

Part of the unfairness of life — in the court and outside — is that outcomes someone might say should go one way don't go that way. … And one of the limits on judges is that to allocate something [to the marital estate], it really has to be a property interest of one of the spouses.

Q. *The* Migell *case generated a lot of local media attention. Why do you think that was?*

A. Probably the timing of it. The mother was hospitalized, and around the time she'd be getting out, everything she had or would have inherited was taken away from her. And there was a nice house on Beacon Street in Newton. There's a sense that these sorts of things aren't supposed to happen in Newton, and the truth of the matter is they happen everywhere.

Q. *Why is the* Migell *case important in a broad sense?*

A. If you're a child and you put yourself in the position of controlling your parents' finances and lives, you're accountable to make sure they benefit and not you. I think it's as simple as that. And the broader context is that we have a population of seniors and dependent folks with wealth the likes of which have never existed before. So the opportunity for abuse and exploitation is greater than it has ever been.

— Eric T. Berkman

PHOTO BY MERRILL SHEA

"Part of the unfairness of life — in the court and outside — is that outcomes someone might say should go one way don't go that way. … And one of the limits on judges is that to allocate something [to the marital estate], it really has to be a property interest of one of the spouses."

Jennifer Kate Rushlow

CONSERVATION LAW FOUNDATION

Last year, the Conservation Law Foundation's Jennifer Kate Rushlow was called on to argue before the Supreme Judicial Court on behalf of her organization as well as four youth advocates in a suit that accused the Department of Environmental Protection of failing to deliver on the promise of the state's Global Warming Solutions Act.

"That's something that's really noteworthy," Rushlow says of the plaintiffs in *Kain, et al. v. Massachusetts Department of Environmental Protection*. "This case was brought by youths who really felt like the impacts of climate change are going to be experienced by them in the future. So that's really significant. We've started to see a lot of interest from youth in climate change law and policy, and that's definitely an aspect of this case."

Passed in 2008, the Global Warming Solutions Act was a cutting-edge law that set some of the strictest standards in the country for greenhouse gas emissions. But five years later, climate advocates worried that DEP regulations required by the act were missing or insufficient. Their 2014 lawsuit was initially defeated in Superior Court, where a judge acknowledged that DEP regulations may not be sufficient to meet the greenhouse gas emission reduction targets set by the Global Warming Solutions Act, but nonetheless gave the department significant deference.

"It was clear that we had this great law on the books, but if it wasn't implemented, we were wasting a massive opportunity and putting ourselves at risk," Rushlow says.

The SJC vindicated the advocates' position in a unanimous decision in May.

"We felt we had a really strong case — stronger than the Superior Court decision reflected," Rushlow says. "We really felt that if we could get the panel to see that this was very clearly what the statute required, and what we were asking was actually very straightforward and also supported by the law, that we could be victorious."

The four youth advocates were represented by C. Dylan Sanders and Phelps T. Turner of Boston's Sugarman, Rogers, Barshak & Cohen. The Mass Energy Consumers Alliance joined them and the Conservation Law Foundation as a plaintiff. The Columbia Law School Environmental Law Clinic also was involved in the case.

***

Q. *After the elation of seeing the Global Warming Solutions Act passed, how discouraging was it to discover the follow-through was lacking?*

A. The passage of the act was something that a lot of advocates worked hard on, a lot of legislators worked hard on, and it did feel like a victory when it passed. And there were these very specific deadlines in the statute for when specific pieces of implementation were to occur. Specifically, the regulations were supposed to be issued in 2012, so they could take effect in 2014.

When we saw that regulations were nowhere to be found in 2012, we grew concerned. Then more and more time passed, and it was clear the Patrick administration was not doing what the statute required. That was very frustrating, and I will say litigation was not our first option for trying to get the law enforced. We did try conversation and engaging the administration on the issue, [but] it really became clear that litigation was the only way to solve it, ultimately.

Q. *What has happened since May?*

A. Quite a lot actually. One major thing that happened is Gov. [Charlie] Baker issued an executive order relevant to this issue in August that required the Department of Environmental Protection to move forward with promulgating the regulations, as required in the *Kain* decision by the SJC.

Pursuant to all that, DEP is now in the process of drafting regulations pursuant to the Global Warming Solutions Act. They are issuing draft regulations in just a couple of weeks, which will kick off a formal rulemaking process that they intend to conclude in February after public hearings. We're getting much closer to seeing those final regulations; it is expected that they will be finalized within a few months.

Q. *What are some of the most likely targets for increased regulation?*

A. There are several areas that have been identified. Those are transportation; gas leaks; the Sulphur hexafluoride regulations that were at issue in the lawsuit and will be revised to be compliant with the act; in-state power plants; and, finally, a policy called the Clean Energy Standard that is being proposed. Those are five different areas that are expected to be addressed in the regulations.

PHOTO BY MERRILL SHEA

Q. *How did your career path lead you to the Conservation Law Foundation?*

A. I always wanted to practice environmental law, so I went to law school with that intention. Coming out of law school I worked at Anderson & Kreiger, which is a small law firm that does environmental and land use work among other areas such as municipal law. I was there for three years as an associate and had a great experience, but was interested in focusing particularly on public interest issues and was excited to come to CLF to do that.

I really like the New England focus that CLF has as an organization, especially with federal law being so entrenched. Changing policy at the local, state and regional level is really rewarding, and we can see lasting impacts. New England has been able to set a great example for the rest of the country when it comes to environmental law and policy. The Global Warming Solutions Act is a great example of that.

Q. *Did the state's initial implementation, or lack thereof, of the GWSA threaten that reputation?*

A. Yes. There was a clear need to enforce that law, and CLF was the right group to do that.

— Brandon Gee

> It was clear that we had this great law on the books, but if it wasn't implemented, we were wasting a massive opportunity and putting ourselves at risk."

Kamee B. Verdrager

SOLE PRACTITIONER

It's rare enough when an attorney can claim credit for breaking new legal ground in a case. It's rarer still when that success is paired in equal measure with personal vindication, as it was for Kamee B. Verdrager in 2016.

Verdrager's epic battle with Mintz, Levin, Cohn, Ferris, Glovsky & Popeo reached a climax in 2016 with a showdown at the Supreme Judicial Court.

In May, the SJC revived Verdrager's gender discrimination and retaliation claims against her former employer. The lawsuit stemmed from a 2007 demotion at the firm and her ultimate termination in 2008 for searching the firm's document management system for evidence that might prove claims of discrimination.

The headline from the decision in *Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo* was the court's recognition that, under certain circumstances, state discrimination law protects from retaliation employees who engage in so-called "self-help" discovery.

While *Verdrager* became a leading case in the country on the issue of self-help discovery, the landmark decision also provides a treasure trove of guidance on a wide range of employment discrimination issues. For instance, the court reemphasized the principle that evidence of gender stereotyping — in particular, the poisonous view that women are not as committed to their work because of family responsibilities — may support an inference that an adverse employment action was based on impermissible grounds.

Now a sole practitioner based in Bedford, New Hampshire, Verdrager can truck out the law she helped to create in her case to win the cases of her clients, which include aggrieved employees in Massachusetts.

In the wake of her win at the SJC, Verdrager negotiated a confidential settlement of her claims against Mintz Levin.

While Verdrager fervently hopes that her case will prove to be a turning point in the war against gender discrimination in the legal profession, she confesses that attitudes at law firms are not always so easy to change.

***

Q. *Your 10-year legal fight with your former employer appears to have ended. Were there ever any dark days when you considered giving up the battle?*

A. There were more dark days than I can count. But I always felt I had this tremendous obligation to the women who came after me not to create bad law.

Q. *What advice would you have for professional women who find themselves in the position you were in?*

A. Honestly, I can't say I have advice for other women. These issues are not unique to me or to my former employer. We all have to recognize that. We all have biases — often that we are not aware of — and the trick for everyone is to be aware of and identify them so we're not making assumptions based on those biases.

There's the old adage that stereotypes are stereotypes for a reason. There's some truth to that. It is often true that women attorneys may not want to work full time after they have a baby. But it isn't always true and certainly wasn't true for me. It becomes a problem if we assume that women's professional ambitions have changed [because of childbirth], and we take away their opportunities because we're assuming.

Q. *Was it rewarding to proceed pro se and ultimately vindicate yourself?*

A. It was tremendously rewarding. It was a tremendous personal victory. I was able to accomplish this completely on my own, without any administrative support. When I worked on this appeal, I was juggling 4-month-old, exclusively-breast-fed twins.

This allegation that I wasn't a competent and capable attorney and that once I had children I was no longer committed or willing to work hard has been a source of significant pain for me.

To have accomplished what I accomplished on my own while juggling infant twins, I can't think of a more poetic way to end this. This should put to rest once and for all the notion that having babies is incompatible with getting the job done.

Q. *What are your proudest achievements in the case?*

A. Self-help discovery is obviously important to me. We need to have a level playing field, and employment law is one area where the playing field is inherently not level. The employers usually have insurance policies to front their litigation costs. And, at the same time, they have access to almost all of the documents. This case was important in leveling that playing field.

I am certainly happy that Massachusetts is one of the few jurisdictions in the country that have gone on the record to say that [self-help discovery] is potentially protected activity.

[I'm also proud of the court's] thorough discussion of stereotype evidence. I care very deeply about the issue of implicit or "unconscious" bias. The case is really important in discussing reflexive biases against women and provides a nice roadmap for the courts in evaluating this type of evidence.

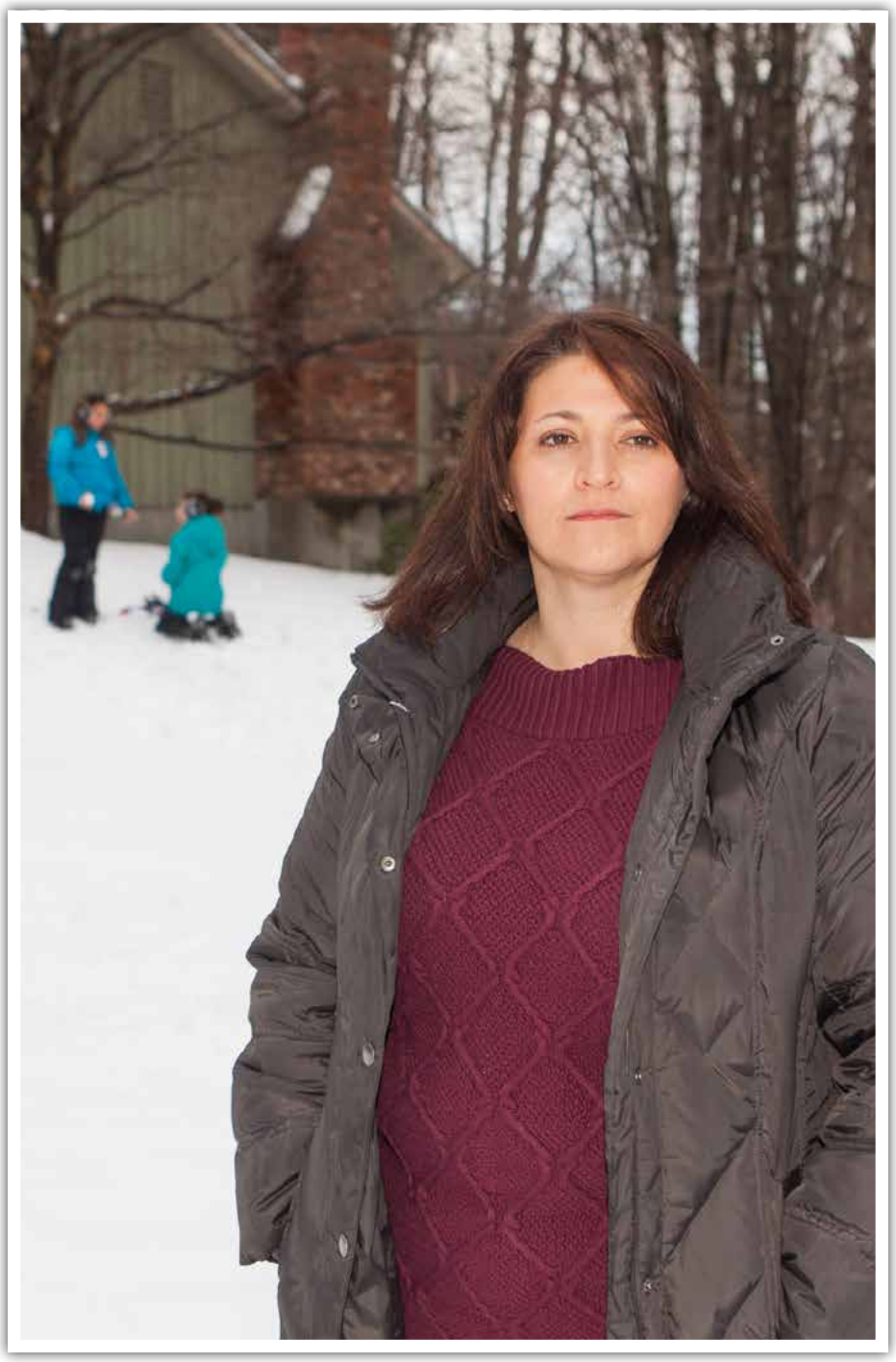

PHOTO BY MERRILL SHEA

Q. *Do you think the SJC's decision in your case has had an impact on the way Massachusetts law firms treat female attorneys?*

A. I hope so. We all know law firms have a problem. But I don't think they want to have a problem, they just don't know quite how *not* to have a problem. They're so used to doing things a certain way for so long that they're not really comfortable stepping outside of their practices to change it. I certainly think the decision has made them stand up and take notice.

Law firms really need to change the conversation and change their practices. It would be great if we could all stop pretending we don't know why so many women drop out of law firms.

One of the biggest issues is the work assignment process in which partners can assign work to whoever they want to. There are not a lot of checks and balances to ensure that the work is distributed equitably and that people are given equal access to opportunities.

The other major issue is the [performance] evaluation processes law firms choose to have. Bias almost always shows up in the evaluations. One solution could be as simple as law firms having dedicated professionals to review the evaluations and look for problems.

— Pat Murphy

> This should put to rest once and for all the notion that having babies is incompatible with getting the job done."