VIEWPOINT

Massachusetts Appeals Court Associate Justice Peter W. Agnes Jr. spoke at the Massachusetts Bar Association Presidents' Dinner on Nov. 17 at the University of Massachusetts Club in Boston.

Included here are his full comments. An abbreviated version ran in the January issue of Lawyers Journal.

President Campbell, past presidents, distinguished guests, thank you very much. It is an honor for me to appear before you tonight because it provides me with an opportunity to say thank you to a special group of leaders who have been instrumental in shaping my career. Each of you have served an organization — the Massachusetts Bar Association — which gave me, as a young attorney, a chance to rub shoulders with the giants in our profession, to learn what it means to be a member of a profession, and to become involved in significant projects and activities which brought me to the attention of others who helped to advance my career.

It is no exaggeration to say that I would not be here tonight as a justice of the Appeals Court if I had not enjoyed the relationship I have had for more than 30 years with the MBA.

I came of age as a lawyer when President Bill Bernstein appointed me to chair the Criminal Justice Section in 1983. He and President Mike Greco, among others, supported my efforts to establish the disciplinary rule that forbids prosecutors from calling defense counsel to appear as witnesses before the grand jury in connection with their representation of a client without prior judicial approval. The rule was instrumental in preserving the attorney-client relationship, which is essential to effective advocacy.

As I looked last evening at the list of past presidents since Bill's service, I can think of so many important issues each of you faced and addressed during your presidency which contributed to improvements in the administration of justice and better access to justice for our citizens. It also reminded me that the MBA allowed me to play a small part in working with many of you on some of these issues. I'll mention just a few.

President John Callahan played an enormous role in correcting the shortcomings in our municipal police training program in the aftermath of the 1988 death of a police recruit from Pittsfield, Tim Shepard. In the weeks before the presidential election that year, I found myself temporarily in charge of police training in Massachusetts. The death of cadet Shepard became a national story. I was able to lead a successful reform that abolished so-called "modified stress" training and the military-style approach to police training and introduced a more community-oriented approach in large part because of John Callahan's stature and support.

As all of you know, the second phase of the modern court reform movement that culminated in the adoption of comprehensive legislation this year creating two new positions — chief justice of

the trial court and court administrator in place of the current CJAM — began long before the governor's bill was introduced. MBA Presidents [Leo] Boyle, [Daniel] Crane, [Elaine] Epstein and [Michael] Mone, labored mightily before, during and after their years of service to the MBA to set the stage for this current phase of court reform. And, it was the voice of the MBA this year — articulated so well by [MBA COO and Chief Legal Counsel] Marty Healy — that guided the leaders of the House and the Senate to come to terms on the bill signed by the governor. As you know, Marty is an influential voice because he is a person of integrity and a respected agent of the premier law reform organization in Massachusetts — the MBA.

When judges are attacked for making unpopular decisions or accused of unwarranted leniency because of decisions made to release people on bail, impose sentences involving short periods of incarceration or probation, or, as we have recently seen in the pages of *The Boston Globe*, find people not guilty after a jury-waived trial — no voice has been louder or clearer in support of an independent judiciary and no individual has fought harder to correct the mischaracterizations in the press about judicial decisions than President Ed Ryan.

The current imbroglio over the disposition of operating under the influence cases tried without a jury is a complex story — far more complex, by the way, than *The Boston Globe* chose to make it — and I won't attempt to offer a comprehensive response tonight. However, it is instructive to examine the literature on the meaning of proof beyond a reasonable doubt.

What is beyond a reasonable doubt, if you will, is the proposition that the standard of proof beyond a reasonable doubt describes a state of belief that cannot be expressed as a probability. In fact, as you know, we tell juries in criminal case that a "strong probability" of guilt does not satisfy the standard of proof beyond a reasonable doubt. As John Henry Wigmore said in his great treatise on the law of evidence, "No one has yet invented or discovered a mode of measurement for the intensity of human belief." And yet, the justices of the Supreme Judicial Court have decided to collect data about the acquittal rates of certain judges in these cases.

One of the most satisfying projects I have contributed to is the *Massachusetts Guide to Evidence*, now in its third edition. A new and updated guide will be published next year. Here, again, special credit is due to MBA and its past Presidents [Marylin] Beck, [Kathleen] O'Donnell and [Warren] Fitzgerald who helped me persuade the justices of our Supreme Judicial Court that Massachusetts evidence law was inaccessible and a confusing miasma of statutes, decisions, and rules that should be codified (as 48 or so other states have done) or at least better organized. The SJC didn't respond to my advocacy, but they did heed the call when it came from the MBA, the BBA and the Massachusetts Academy of Trial Lawyers.

[Former SJC] Chief Justice Margaret Marshall showed her leadership skills by establishing an Advisory Committee on the Law of Evidence not to draft rules but to draft a "guide." A diverse committee of talented judges and lawyers was appointed. It was and still is ably chaired by my colleague, [Appeals Court Judge] Marc Kantrowitz. Many said it couldn't be done. After all, a very distinguished committee of lawyers and judges proposed rules of evidence for Massachusetts in 1978, following an SJC directive and years of labor, only to see their work shelved by a one-page order by the Court in December 1980. With the guidance and support of

Chief Justice Marshall, we did it. In one compact volume, all of our decisional and statutory law is organized along the lines of the Federal Rules of Evidence, and the language of the federal rules is used whenever possible.

Today, not only is the guide available as a resource, but it has been cited more than 150 times by the SJC and the Appeals Court as an authoritative source of Massachusetts evidence law. It has become, in the words of a great judge and evidence teacher, the Hon. William Young, the "gold standard."

I could go on and on by listing important public policy initiatives that owe their genesis or success to the efforts of an MBA president and the influence of this great organization. President David White, for example, will always be remembered as a champion of sentencing reform and smarter sentencing by judges. His efforts have contributed to Gov. Patrick's decision to file important reforms of some of our mandatory sentencing laws. His efforts are also contributing to a change in outlook by legislative leaders. Change will come and our sentencing laws will become more progressive and sentencing will continue to get "smarter" due in large part to President White's advocacy and leadership.

President Ed McIntyre will always be remembered as a champion of greater civility and professionalism in our relationships with each other as lawyers and judges. President McIntyre is and always will be a voice for the small firm and solo practitioner who constitute the bulk of this great organization's membership.

My colleague and Past President Mark Mason will always be remembered as a champion of greater access to justice, especially to ADR services. He ably led the Trial Court's ADR committee and has been a strong proponent of access to justice initiatives.

President Valerie Yarashus gave me an opportunity to work with President Richard Campbell and a distinguished task force to ensure that peremptory challenges, an option of vital importance to civil and criminal litigators, are not abandoned and are exercised in a way that does not unlawfully discriminate against potential jurors. All litigators will benefit from her vision and the work of the task force.

And President Denise Squillante played an instrumental role in promoting and managing the adoption of major reforms in the law and procedure in the Probate and Family Court Department, including historic changes to our alimony laws and the debate over the future of the Probation Service. She also led a very successful centennial celebration with events throughout the commonwealth, culminating in an historic address by Supreme Court Justice Stephen Breyer to one of the largest audiences of lawyers and judges ever assembled.

And I would be remiss if I did not single out President Campbell for his stout defense of judicial independence and his vision of what it will take to complete the professionalization of our court administration. The judiciary could not have a better partner than President Campbell at this critical moment.

But I didn't accept President Campbell's special invitation to appear here tonight simply to say thank you. So give me just a few moments to address another topic — the future of the judicial department. And, here I must emphasize that the observations I make are my own.

We face challenges that we have not faced before. I place governance at the top of the list. The law that comprises the second phase of court reform (the first phase being the Cox Commission all the way up to the abolition of criminal and civil *de novo* in the 1990s) is done, but the really hard work is only beginning. The choice of a new chief justice and court administrator will shape our future for decades to come. We have an outstanding group of justices on our Supreme Judicial Court, which is led by a chief who is admired and respected by all of us.

But what our branch of government has not done well is groom people to assume leadership roles. With a few notable exceptions, we are an organization of generals and privates. Generals don't usually consult with privates. Just as the SJC will make important choices about leadership at the top, we need to devise structures that will give folks at the bottom of the chain of command a meaningful, advisory role in shaping policy.

We also need to reach out beyond our ranks and propose collaborations and joint efforts with the executive and legislative branches. Courts are first and foremost gateways to justice, but in this era of diminishing public resources, we must become gateways to government. We need to make greater use of technology to make it possible for a person who visits a courthouse to address all of his or her related issues with agencies and departments in the executive branch.

Second, I believe there is another phase of court reform that we began, but that we have virtually abandoned. In 1993, the Trial Court and the SJC adopted a policy statement that embodies the vision expressed by Harvard Law School Professor Frank Sander in a series of seminal papers describing the multi-door courthouse, an idea he introduced at the 1976 Pound Conference.

As he explained it, "[t]he idea is to look at different forms of dispute resolution — mediation, arbitration, negotiation, and med-arb (a blend of mediation and arbitration). I tried to look at each of the different processes and see whether we could work out some kind of taxonomy of which disputes ought to go where, and which doors are appropriate for which disputes." This concept involves much more than a willingness to offer court-connected ADR services to litigants. It's a paradigm shift.

I worked on that policy statement with then-CJAM John Fenton and I followed up with service as the first chair of the SJC Committee on Dispute Resolution. We made great progress, culminating in the adoption by the SJC in the first set of comprehensive ADR rules and the establishment of a framework for a comprehensive array of court-connected ADR services. Based on the policy statement and the rules, our system is committed, at least on paper, to develop an approach to dispute resolution that offers the participants, at no extra cost, the most appropriate process to match their needs — litigation being only one method. This is a truly revolutionary idea.

Unfortunately, today, the reality is that court-connected ADR is available in some courts as an

adjunct to adjudication, not an alternative of equal quality, and not available as an array of options to every litigant without additional cost. If you can afford to pay for ADR services, you have wonderful choices in the private marketplace. However, if you are forced to bring your dispute to court, your options are a fair trial and sometimes, but only sometimes, limited ADR options.

Now, I know you folks get it — you understand that to be successful, you must offer the client the service that best suits his or her needs. That's why so many law firms have evolved into multi-service centers offering not only representation in court, but representation in a variety of other dispute resolution forums, strategic advice and the capacity to reach out to consultants and experts in other fields when it will benefit the client.

The court system, on the other hand, has not honored its commitment to its 1993 policy statement. We're becoming like the post office — for those who want a trial, we'll do a reasonably good job of providing one. But that is not, in my opinion, what our "customers," the citizens of the commonwealth, want and need in many cases. I predict that unless we truly commit ourselves to Frank Sander's vision — the vision of our own 1993 policy statement — our caseloads will decline and an even higher percentage of our civil litigants will be poor and unrepresented. And, I should add, I refuse to accept the proposition that fiscal constraints are an impediment to the realization of this vision. It's not how much money we have to spend, but rather what we choose to spend it on.

Third, and finally, we must confront the new reality of how the Judicial Department will fulfill its mission to provide the citizens of the commonwealth with access to justice in an era of diminishing resources. Today I read that the governor and Secretary of A&F Gonzalez predict that 40 percent of the FY2013 budget will be consumed by the cost of health care. Despite prudent fiscal management by our governor and Legislature, a "rainy day" fund that has been brought back to a $1.3 billion level and continues to be replenished, and the expectation that revenues will grow, due in part to modest job growth and one-time revenues from casino gambling, yesterday the executive branch informed municipal leaders that there is a "budget gap" for FY2013, which begins July 1, 2012.

In other words, today the prediction is that in the next fiscal year, projected revenues will not be sufficient to offset projected costs given our current level of spending. We do not yet have an estimate of what the gap means in dollars. However, in view of the fact that spending on the courts has declined significantly over the past four years — $605 million down to about $540 million — that we have not hired anyone for four years, and that there is no expectation of an increase in federal aid to the states, there is reason to be concerned about how much revenue will be made available in FY2012 and beyond to fund the court system.

There are forces affecting future budgets for the Judicial Department that are very difficult to control, and some are simply beyond our control. In my view, at a minimum, we need a comprehensive planning process, with participation from organizations like the MBA and experts outside the Judicial Department, to design models for how to operate a system of justice with even less revenue that what is available to us this year.

Yet, as difficult as it may be to secure adequate funds for the courts, I wish to bring my remarks tonight to a close by urging you to support the proposition that funding for the courts in FY2013 must include funds for an increase in judicial compensation. In the tradition of Jack Webb's "Joe Friday," here are the facts and just the facts:

- A Massachusetts trial judge earns $129,500 per year; Massachusetts judges and clerks have had one pay raise in the past 13 years (2006) and receive no cost of living allowance.
- Massachusetts now ranks 47th out of 50 in terms of judicial salaries in the nation, adjusted for inflation, according to the January 2011 ranking by the National Center for State Courts. Among the states. In real dollars, some comparisons include California at $179,000, Pennsylvania at $164,000, New Jersey at $165,000, Rhode Island at $145,000, Virginia at $158,000 and Illinois at $178,000.
- In August 2011, as you may be aware, a state commission in New York decided to increase the salaries of its judges by 27 percent over three years. This action followed a decision by the New York Court of Appeals on Feb. 23, 2010 (*Maron v. Silver*) in which New York's highest court held that the independence of the judiciary was threatened by the Legislature's repeated refusal to vote on judicial compensation proposals, and that its continued refusal to act was a violation of the separation of powers. As a result of this, the salary of general jurisdiction trial judges in New York will increase to $174,000. The raises in New York will take effect in the spring unless both branches of the Legislature vote them down.
- In Massachusetts, the legislatively created Compensation Commission (known as the Guzzi Commission), comprised of persons outside of government, conducted a thorough study of public sector salaries and the salaries of judges around the nation and submitted its report on June 20, 2008, in which it concluded that "[t]he evidence presented to and gathered by the Board makes a compelling case for increasing the salaries of Massachusetts judges" and recommended trial judges salaries be increased to $160,000.
- Among Massachusetts public employees (and I'll exclude the recently departed executive director of the Chelsea Housing Authority), there are thousands of people who earn more in annual compensation that the chief justice of the Supreme Judicial Court, and their titles include sergeant, lieutenant, captain, major, chief, program coordinator, nurse, lecturer, assistant professor, associate professor, professor, director and district attorney, to name only a few. Incidentally, I applaud the decision by public employers to pay these folks an honorable salary. But it is more than a bit ironic that the only group of public employees who are guaranteed an "honorable salary" in the Massachusetts Constitution of 1780 are the judges.
- Finally, the annualized cost of the Guzzi Commission-recommended salary adjustments is $26 million, which includes all judges, clerks and registers and their assistants. And our view, by the way, is that the salaries of judges, clerks and registers and their assistants should remain linked together. Phasing it in over two years would thus cost about $12 million per year.

So how do we get there from here? Here, I will speak for the Massachusetts Judges Conference,

which represents about 85 percent of the state's judges.

First, the MJC asks you to take a stand and say that honorable salaries for judges, at the level recommended by the Guzzi Commission ($160,000 per year), should be treated as a core element of court funding for FY2013;

Second, the MJC asks you to take a stand and say that honorable salaries for judges, at the level recommended by the Guzzi Commission ($160,000 per year), should not be bargained away, under any circumstances, for any other element of court funding; and

Third, the MJC asks you and the MBA to work with us in developing a strategy to take this issue to a broader audience of government leaders, leaders of the business community, the media and others to establish an effective coalition in support of a compensation increase for judges, clerks and registers in the upcoming fiscal year.

On behalf of my president, Judge James Collins, who served with distinction in the Massachusetts House for 14 years before assuming the duties of a Juvenile Court justice, and who could not be here tonight because he is chairing the MJC's annual business meeting, I salute each and every one of you for your extraordinary service to the legal profession and thank you and the MBA for your commitment to the public interest and your unfailing support for the Massachusetts judiciary.