It's Confidential — Privilege Law in Massachusetts: CLE, page 25

• Massachusetts Bar Association •

Lawyers Journal

www.MassBar.org

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A worthwhile invitation

President's View

by Warren Fitzgerald

I'll tell you frankly that I didn't fully comprehend the honor of being president of the Massachusetts Bar Association until I got here. For many years, I knew that being a member of one of the true professions meant more than going to work every day. I saw that the bar associations played important roles in providing access to justice and supporting the profession. I was aware of and participated in many MBA programs, committees and projects. And I aspired to this prestigious position. But I really didn't realize until this year the magnitude of the contribution which the members of the MBA make to the public, our justice system and our profession. To view it in its totality is awe-inspiring.

The role which the MBA plays both within the profession and the public, is of course, defined by the contribution of each of its members. By that measure, the breadth and depth of the MBA's undertakings are remarkably impressive. This year's Annual Conference theme, "Shaping the Future of the Legal Profession," is not a promotional catch phrase for a three-day event. Rather, it is a simple but fully accurate description of what the MBA is doing every day.

We serve the public, those who would be our clients as well as those who may never be. Our work in preserving access to justice, protecting the rights and liberties of individuals and giving a voice to the silent is necessarily at the core of our mission. We work with our courts and Legislature to protect and improve the ability of people to obtain justice. We assist with the representation of the defenseless. We take our message into the community and into the schools so that the importance of basic

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Fingerprint identification and its aura of infallibility

by Andrea R. Barter, Esq.

A burglary went wrong in 1910. The result was not only the murder of the homeowner, but the first American arrest, conviction and death sentence based on the analysis of fingerprints, ushering in a new era of law enforcement. Since then, the legal system has treated fingerprint comparisons as invaluable and essentially infallible.

But critics of fingerprint analysis say that the courts have gotten it wrong for nearly 100 years — fingerprint analysis does not deserve its aura of invincibility, as demonstrated by several recent high-profile cases.

In 2004, senior FBI fingerprint examiners misidentified Oregon attorney Brandon Mayfield as the source of fingerprints on evidence from the terrorist bombing in Madrid, Spain. The FBI initially blamed the mistake on the quality of the digital image supplied by Spain, then blamed the error on the suggestive effect of the computer database match, the inherent pressure of working on an extremely high-profile case, and verifying examiners' knowledge of the previous examiner's qualifications and conclusions.

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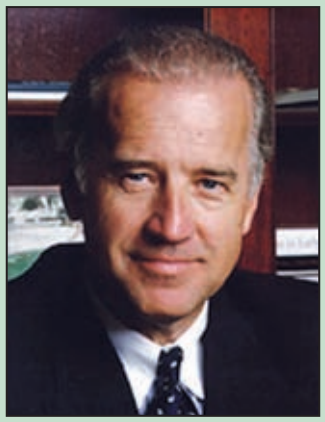
Sen. Biden to deliver AC06 keynote address

See story, page 6.



Nominating Committee issues report for 2006-07

MBA Leadership

Led by past President Kathleen O'Donnell, the Massachusetts Bar Association Nominating Committee has issued its report for the 2006-07 nominations for MBA officers and regional delegates. The committee is composed of O'Donnell, past presidents Marylin Beck, James Dilday, Richard Van Nostrand and Joseph Vrabel, and Marsha Kazarosian and Edwin Wallace.

Mark D. Mason automatically succeeds to the office of president on Sept. 1, 2006. Pursuant to Article VII, Section 2 of the MBA Bylaws, the committee has filed with MBA Secretary Denise Squillante the following list of other officers for 2006-07:

President-elect: David White-Lief, Boston

Vice president: Valerie Yarashus, Boston

Vice president: Denise Squillante, Fall River

Treasurer: Robert Lucas, Wakefield

Secretary: Edward McIntyre, Clinton

In addition, the following nominations were filed for the 2006-07 Regional Delegates:

Region One (Barnstable/Dukes/Nantucket): Paul Farrell

Region Two (Plymouth County): Sara Tresize

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Judge John McCann explains use of TV in the courtroom during Job Shadow Day.

See page 16.

Member Spotlight

From left, MBA President-Elect Mark Mason, Community Service Award recipient George B. Crane and Michael McCarthy, Berkshire County Bar President.

Attorney **George B. Crane** received the MBA Community Service Award on Jan. 21. MBA President-Elect Mark Mason presented the award to Crane, a member of the Berkshire County Bar Association.

Crane, a Pittsfield solo practitioner, has volunteered on the Pittsfield School Committee and the board of directors for Elder Services of Berkshire County.

Crane's other volunteer efforts include serving as a member and on the board of the Brien Center that provides mental health and substance abuse counseling; serving as president and a board member for the Berkshire Music School; and as the current president of the Berkshire County Bar Advocates.

Crane also volunteers with Lawyers Concerned for Lawyers and speaks on recovering from alcoholism.

Mason said Crane is "equally committed to his community and to his profession." A life member of the MBA, he recently celebrated his 50th year practicing law. Over that time, Crane committed his practice to the defense of indigent defendants in criminal matters. He is a longstanding Bar Advocate for CPCS and a mentor for attorneys learning criminal defense law.

MBA welcomes new members

Robert Aghababian
Kimberly F. Airasian of Massachusetts Superior Court
John Andrews of Andrews & Updegraph PC
Karen L. Argetsinger of Karco Paralegal Services
Joseph D. Aufiero of Cardozo Law School
Joseph J. Balliro Jr. of Balliro & Mondano
John F. Bellofatto
Jamie A. Bennett of Wilmer, Cutler, Pickering, Hale and Dorr LLP
Daniel A. Berman of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo PC
Michelle J. Blair of Blair Legal LLC
David S. Bradley
MaryJane L. Brady of Brady & Monac PC
Rebecca W. Brodie of Brodie & Brodie
Stanley A. Brooks of Stanley A. Brooks, Attorney at Law
Ellen A. Bruce of UMass Boston Gerontology Institute
Lavinia Bullock of Lavinia Bullock, Attorney at Law
Scott J. Burke of Healy & Healy PC
John P. Calhoun of Nixon Peabody LLP
Karen L. Carlo
Rachel E. Carlson of Suffolk University Law School
Natasha Cenatus of Cenatus Law Firm
Charles E. Chambers Jr. of Goodwin Procter LLP
Jacqueline D. Chappell of Blais Parent & Quinn
Steven A. Ciulla of the Law Office of Steven A. Ciulla
Maryann Civitello of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo PC
Rafael Clemente of Fidelity Investments
C. Michael Clifford of Law Offices of Charles A. Clifford
Alexander Paul Cloherty of Blumkin & Cloherty
Adebola O. Coker of Dechert LLP
Laura E. Coltin of Nixon Peabody LLP
Michael F. Connolly of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo PC
Stephanie M. Connon of Liberty Mutual Insurance Co.
Catherine M. Cooper of Cambridge Galaher
Teresa Corbett of the Law Office of Attorney Joseph P. DiBlasi
Mark J. Corbett Jr.
Justin A. Coussole of Donovan & O'Connor LLP
Paul J. Coutinho of Plumbers & Gasfitters Local 12
Holly K. Coutinho
Lorri S. Covitz of Lorri S. Covitz PC
Erinn E. Crete of Contract Employee
Michael A. Cuches of Jeffrey Allen & Associates PC
Jessica A. Cunningham of Messing Rudavsky & Weliky PC
Maureen E. Curtin
Jamie L. Curtis
Joshua Davis of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo PC
Chad D. DeForce of the Law Office of Chad D. DeForce LLC
Peter Delis
Lauren B. DeMino of Exemplar Law Partners LLC
Alexis N. Depetris of Sullivan & Worcester LLP
Pamela J. D'Esopo
Beth A. Devonshire
Vito DiGregorio
Justin S. Du Clos of Correira & Associates
Marc K. Duffy of U.S. District Court, District of Massachusetts
Timothy P. Duggan of Boston Police Department
Elaine M. Eliopoulos of the Law Office of Elaine E. Eliopoulos
Samuel E. Feigin of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo PC
Kristen E. Ferris of Keches & Mallen PC
Mahmood Firouzbakht
Patrick G. Fitzgerald of Middlesex District Attorney's Office
Marylyn E. Flores
Clay Forney of New Center for Legal Advocacy Inc.
Thomas Frisardi of Davis Malm & D'Agostine PC
Ann L. Geiger
Doris W. Gelbman
Kenneth F. Gilmore of Thomas Kalperis International
Geoffrey B. Ginn of Law Office of Ilya Fuchs PC
David A. Giordano of Wilmer, Cutler, Pickering, Hale and Dorr LLP
Lisa F. Glahn of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo PC
Loretta M. Glover
Marshall Goldberg of Tofias PC
Stanford N. Goldman of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo PC
Brian C. Goodwin of Suffolk County District Attorney's Office
Jay R. Green of Berkshire County District Attorney's Office

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Delegates begin 2006 with productive meeting

The Massachusetts Bar Association (MBA) 2005-06 House of Delegates convened for a third time on Jan. 19 at Regis College in Weston. The productive meeting provided important updates, discussions and debates related to an assortment of agenda items.

MBA President Warren Fitzgerald began the meeting with his report. He officially introduced Executive Director Marilyn J. Wellington, Esq. to the group and offered praise for her efforts since joining the MBA in December. Wellington presented her first official report to the group later in the agenda.

House of Delegates

Fitzgerald announced this year's Nominating Committee, charged with producing a report for the 2006-07 officers and regional delegates. Past President Kathleen O'Donnell chairs this year's committee. Fitzgerald then provided brief updates on the MBA Task Force on Diversity led by MBA Vice President Valerie Yarashus and the Lawyers in Transition Committee chaired by MBA Secretary Denise Squillante. He then shared recent activity of the Judicial Independence Committee chaired by Ed Ryan, who was on hand to discuss such happenings.

MBA General Counsel Martin Healy shared a brief update on legislative activities. Healy announced that Massachusetts Senate President Robert Travaglini would be this year's recipient of the Legislator of the Year Award to be presented at the association's Annual Dinner on Friday, March 24. He also encouraged delegates to participate in the March 7 Walk to the Hill event at the Statehouse. "This is always a well-attended event and offers a key opportunity for practitioners to show their support for increased funding for legal aid," he said.

Healy continued by updating the group on the MBA's involvement on the House of Representatives' subcommittee on Shared Physical and Legal Proposal. He explained that he, Pauline Quirion and Fern Frolin expressed the MBA's longstanding opposition to the proposal at a recent meeting. Healy added that he and other MBA representatives met with Supreme Judicial Court Chief Justice Margaret H. Marshall to discuss the Evidence Proposal unanimously endorsed by the House of Delegates last spring. "I am confident that we will be able to make the law of evidence more accessible," said Healy.

A major portion of the January meeting centered on two opinions presented by Ethics Committee Chair Andy Kaufman. The delegates granted permission for both opinions presented by Kaufman to be published. They are as follows:

Opinion 2006-1: While there is no outright bar to Massachusetts lawyers' drafting wills naming themselves as fiduciaries and, as such, retaining themselves as counsel to the fiduciaries, ethical rules require that these steps be taken only when in a client's best interest.

Opinion 2006-2: A request that a judge instruct jurors that they are free to speak to participating lawyers after the case is concluded would be improper if the proposed instruction does not describe completely the restrictions contained in Rule 3.5 (d).

Delegates were then called upon to vote on legislation brought forth by the Family Law Section Council and approve award nominees presented by the Access to Justice Section Council. As a result, the delegates voted to approve proposed legislation amending G.L. c.46 pertaining to the issuance of a certificate of change of name to parties who have changed their names in accordance with the certificate of marriage. Then, the group approved the slate of nominees to receive Access to Justice Awards at the 2006 Annual Conference Luncheon on March 24. Pauline Quirion led the Family Law conversation, while Jacquelynne Bowman offered the Access to Justice awardee nominations.

Photo by Tricia Oliver

MBA Past President Marylin Beck offers her viewpoint on one of the many topics up for debate at the Jan. 19 meeting.

Photo by Tricia Oliver

Andy Kaufman, chair of the MBA Ethics Committee, presented two opinions on which the delegates voted to have published.

Photo by Tricia Oliver

MBA Executive Director Marilyn Wellington delivers her first official report to the House of Delegates.

The next MBA House of Delegates luncheon and meeting will occur during the MBA's Annual Conference on Thursday, March 23, at 12:30 p.m. and 1:30 p.m. respectively.

A worthwhile invitation

Continued from page 1

freedoms will be better understood and remembered.

We seek continually to improve the provision of justice by our judiciary. We educate as to the importance of the independence of the judiciary and are quick to defend this vital element of our democracy when necessary. We foster an appreciation for the high quality of our judges and invite evaluation of them so that the public's interaction with our courts is and appears as fair and just as it can be. We work with our jurists to improve the manner in which the system dispenses justice to make it more readily available to all.

The freedoms of our citizens and the justice provided by our courts would not continue without a qualified, educated, trustworthy legal profession. We provide education to the youngest as well as the most experienced members of the bar. We equip lawyers with the tools needed to effectively practice and enjoy this profession. We work to effectively and fairly regulate our profession. We strive to include within the profession lawyers who will help us best represent the diverse public which we all serve. We explore new avenues by which the practice of law can be undertaken in an ever-changing world.

The MBA does these things and much, much more. Join me at the Annual Conference and see what the most dedicated volunteers in the legal profession and the most committed and professional association staff in the country are doing. You too will be inspired.

First Trial Court Orientation draws 90, next one planned for June

by Bill Archambeault

Judges, clerks and court officers gave 90 new attorneys insight into navigating their way through the courts at the Massachusetts Bar Association's first Trial Court Orientation on Feb. 1.

The daylong forum, which was held at the John Adams Courthouse in Boston, featured officials from the District Court, Probate and Family Court, Juvenile Court and Boston Municipal Court and featured remarks from Hon. Margaret H. Marshall, chief justice of the Supreme Judicial Court, Hon. Sean M. Dunphy, chief justice of the Probate and Family Court, and Hon. Martha P. Grace, chief justice of the Juvenile Court.

The Courts

The orientation will be offered again June 27 and feature speakers from the Superior Court, Land Court and Housing Court. Details, including the location, have not been announced.

Jennifer Griffis, of Griffis & Telci LLP in Boston, said she attended the program to get a general overview of the courts and tips from clerks. Griffis, who was admitted to the Massachusetts bar in 2004, said she found the tips given by Judith M. Brennan, clerk-magistrate of Essex County Juvenile Court, particularly useful.

Pamela S. Milman, who was admitted to the Massachusetts bar in 2004 and now owns Education Consulting, Advocacy & Legal Services in Lynnfield, was also interested in getting tips "from the people behind the desks," as well as doing some networking. She said Marshall's appearance was a highlight.

"To get this kind of an audience with Chief Justice Marshall was impressive," she said. She added that the program was "well done" and that she found the scheduling tips very practical.

"It was geared toward attorneys practicing five years or less," she said, "and it was priced for that." (The program cost $15 for law students, $25 for members and $35 for nonmembers, which included lunch and an evening reception.)

She also noted, "I have never been to a seminar or conference that kept to the clock as well as this one."

Sophia C. O'Brien, chief probation officer for Middlesex County Probate and Family Court in Cambridge, said she hoped the insight was useful for newer attorneys who are still getting familiar with how the courts work.

"I think the more information they have about the culture of each court, the better able they'll be to navigate the court system and serve their clients," O'Brien said. "Sometimes, when you're new, it can be intimidating and overwhelming. The more information they have, the more confident they'll be. I'd hope that through these kinds of sessions, we'll get the message across that court employees are accessible."

In the midafternoon, MBA President Warren Fitzgerald introduced Massachusetts Supreme Judicial Court Chief Justice Margaret H. Marshall to the audience.

"You know from her writings that she is a brilliant constitutional jurist," Fitzgerald said. "She is exquisitely talented as a leader and a consensus builder. Chief Justice Marshall is deeply committed to improving the legal profession."

Photo by Jeff Thiebauth

SJC Chief Justice Margaret H. Marshall gave the new attorneys guidance for the beginning of their legal careers.

Marshall asked the new lawyers for their help in ensuring a fair and impartial legal system and the administration of that system.

"One of the things that means for me is that if you come into a courthouse in Massachusetts, you should be able to receive the same fair and impartial administration of justice," she said.

Marshall also highlighted the state's efforts to improve scheduling and backlogs.

"To the degree that the courts are responsible for that, we are working enormously hard to change that. It's terribly important to the people we serve that you help us achieve those time standards," she said. "You are the person who's protecting your client and should be fighting for justice for your client in a timely basis."

Marshall also told the lawyers that while being in a courtroom will likely become commonplace for them, they should remember that it can be a terrifying experience for clients who are unfamiliar with the legal process.

Marshall said that she had originally planned to become an art historian, but that now, "I cannot think of a better profession to be a part of. I cannot think of a more important profession."

MBA benefits help manage, advance your career

The Massachusetts Bar Association offers you an unparalleled package of benefits, programs and opportunities.

Member Benefits

Keeping Current

Each year, members receive preferred pricing on more than 90 **Continuing Legal Education** seminars concentrating on recent cases, new legislation, emerging legal trends or new rules of practice and procedure. Through these programs, practitioners are able to keep current in all areas of law, as well as their chosen specialties.

Each month, members receive a copy of ***Lawyers Journal***, especially produced for the MBA members and covering professional news and association happenings.

Each week, **e-Journal** is sent to members electronically, providing more pressing news to members right at their desktops.

In addition, members automatically receive a subscription to the MBA's two quarterly publications — ***Massachusetts Law Review*** and ***Section Review***.

Plus, members have unlimited access to the Web-based **Casemaker Online Law Library**, a powerful search engine built into an extensive library of case law, rules, opinions and other information relevant to the practice of law.

Career Advancement

Newly practicing lawyers have the opportunity to pair up with more seasoned attorneys as part of the **Mentor Program**. In addition to participants' ongoing interaction over the phone, programs are arranged several times a year to address issues facing newer attorneys.

Also, members can offer their expertise or find a job with the MBA's **Online Legal Career Center**, providing the combined resources of nearly 100 legal career centers across the nation powered by LegalStaff.com. And, numerous **networking opportunities** allow practitioners to stay well connected with their peers across Massachusetts.

Attorneys looking to increase their referrals and expand their client base may elect to participate in the MBA's **Lawyer Referral Service** (LRS). In order to qualify for referrals from the LRS, attorneys must be a member of the MBA, in good standing with the Board of Bar Overseers and carry an appropriate level of professional liability insurance coverage.

Helping you manage the work-life balance

In addition to professional member benefits that allow practitioners to keep current and advance their careers, the MBA also offers discounts on key services that add a level of convenience to the office and home.

MBA Insurance provides a full range of insurance products specifically designed for attorneys, including professional liability, health, life, disability, dental, long-term care and personal automobile.

Significant discounts on car rentals, credit card and other financial products, overnight package delivery, magazine subscriptions and entertainment, among other services, are also offered to members.

Detailed information on each of these benefits can be found at www.MassBar.org/membership/mba_benefits, Or call the Member Services Center (617) 338-0530, which is available to answer any questions you may have.

Trial lawyer's depression has improved, but still dreaming of elusive ZZZ's

Q: Although my depression has let up considerably, I still suffer from insomnia. I'm often able to doze off at bedtime (sometimes in the living room before I even hit the bed), but I usually re-awaken an hour later and hours go by as I lay awake, frustrated and wondering how I'll get through the next day's trial work. My prescriber has given me Trazodone for sleep — it seemed to work briefly, but not any more, and he tells me that most sleeping pills can be addictive. Must I just bear with the insomnia?

Lawyers' Concerns

A: Your doctor is correct in cautioning you about most prescription sleeping pills, which are benzodiazepines and potentially addictive. In addition, it's true that many people find whatever kind of medication they take loses its helpful effect after a while. Pharmaceutical approaches to insomnia tend to be more helpful (and less habit-forming) when used for brief periods of time than a regular regime.

Although, as is often said, "No one ever died from insomnia," the good news is that there are very effective non-pharmaceutical ways to overcome even long-standing sleep problems. These include:

- Stimulus Control: Make the power of conditioned responses work for you by teaching your brain to associate the bed only with sleep (the bed, not the living room couch). OK, sex too. Don't use your bed as a venue for snacking or heavy conversation. Don't bring your laptop into bed. If it's clear that you are not sleepy, leave the bedroom until you are.

- Exercise: Your body temperature will rise during exercise. When it drops about four hours later, it'll be easier to fall asleep. Exercise may improve your mood as well, and reduce anxieties that could impede sleep.

- Circadian Rhythm: Your daily sleep/wake cycle may be off, as if you were experiencing jet lag (symptoms of which can include fatigue, loss of concentration, headaches, feeling out of sorts and the inability to fall asleep at the desired time). In this case, scheduled exposure to bright light can make a significant difference.

- Relaxation: Both specific techniques (such as Herbert Benson's "Relaxation Response" or progressive muscle relaxation) and relaxing activities like long hot baths can help create more sleep-friendly conditions.

- Cognitive Behavior Therapy: You may be amplifying your insomnia through counter-productive thoughts, such as when you tell yourself that you'll be too exhausted for court the next day. Self-statements of a less dire nature are likely to be both more accurate and more compatible with unwinding and falling asleep.

This is just an overview, and an incomplete list. For more information, recommended books include *Say Goodnight to Insomnia* by Gregg Jacobs, Ph.D. and *The Insomnia Answer* by Paul Glovinsky, Ph.D. and Art Spielman, Ph.D. To see a sleep disorder specialist, a number of hospitals offer sleep clinics, including the Sleep Disorders Center at Beth Israel Deaconess Medical Center, where Dr. Jacobs developed his program. If LCL can help, for example, by identifying resources or via any of the self-help books in our lending library, give us a call.

Questions quoted are either actual letters/e-mails or paraphrased and disguised concerns expressed by individuals seeking assistance from Lawyers Concerned for Lawyers.

Questions for LCL may be mailed to LCL, 31 Milk St., Suite 810, Boston, MA 02109; e-mailed to email@lclma.org *or called in to (617) 482-9600. LCL's licensed clinicians will respond in confidence. Visit LCL online at www.lclma.org.*

Sen. Biden keynote speaker for Annual Conference 2006

by Bill Archambeault

U.S. Sen. Joseph R. Biden Jr. will give the keynote speech at the Massachusetts Bar Association's Annual Conference 2006 on Friday, March 24.

Biden will speak at the Annual Dinner on Friday, March 24, at this year's Annual Conference, "Shaping the Future of the Legal Profession," which runs March 23 through 25 at the Marriott Copley Place Hotel.

AC 06

"We are thrilled to welcome Senator Joe Biden to provide the Annual Dinner keynote address. As a leading voice on the judiciary, foreign relations, crime prevention and terrorism, Senator Biden is always at the center of the most significant activity in Washington. His dynamic speaking style guarantees a fascinating evening," said Warren Fitzgerald, MBA president.

A senior member, and former chairman, of the Judiciary Committee, Biden took part in the recent Supreme Court confirmation hearings for U.S. Chief Justice John Roberts Jr. and Associate Justice Samuel Alito Jr.

Biden has played a key role in writing the major crime laws of the last 20 years, including the 1994 Crime Bill and the Violence Against Women Act.

U.S. Sen. Joseph R. Biden Jr.

Biden has served as either the chairman or ranking member of the Senate Foreign Relations Committee since 1997 and has helped shape U.S. foreign policy for more than 30 years.

Originally trained as a trial attorney, Biden practiced law in Delaware from 1968 to 1972, when he was elected to the Senate. He received his law degree from Syracuse University College of Law in 1968. Since 1991, has been an adjunct professor at the Widener University School of Law, where he teaches a seminar on constitutional law.

Also, Massachusetts Senate President Robert E. Travaglini will receive the Legislator of the Year Award at the Annual Dinner on Friday, March 24. Massachusetts Supreme Judicial Court Chief Justice Margaret H. Marshall's annual address to the MBA at the closing luncheon will be on Saturday, March 25, at 12:30 p.m.

Journalist Bill Kovach announced as Bench Bar Forum keynote speaker

In addition to Biden, another featured speaker has been added to the Annual Conference lineup. Noted journalist Bill Kovach will be the keynote speaker for Saturday's Bench Bar Forum.

The overarching theme of this year's Bench Bar Forum, which Leo Boyle and Judge Cynthia Cohen co-chaired for the planning committee, will be "Covering Justice: The Media and Public Perception of the Legal System."

Kovach, the founding director and chairman of the Committee of Concerned Journalists, will be the featured speaker. Kovach has been a journalist and writer for 40 years, serving as chief of *The New York Times* Washington bureau, editor of *The Atlanta Journal-Constitution* and curator of the Nieman Fellowships at Harvard University.

Kovach's professional affiliations include serving on the advisory board of the Center for Public Integrity. His writing has appeared in *The New York Times Sunday Magazine*, *The Washington Post*, *The New Republic* and many other newspapers and magazines.

Other media speakers include David L. Yas, publisher of *Massachusetts Lawyers Weekly* and Rachelle Cohen, editorial page editor of the *Boston Herald*.

The first Bench Bar Forum session, moderated by Hon. Gordon L. Doerfer of the Appeals Court, will discuss the "Public Understanding of the Role of Judges." Michael S. Greco, American Bar Association president and an attorney with Kirkpatrick and Lockhart, will moderate the second panel on the "Public Understanding of the Role of Lawyers." Associate Justice John M. Greaney of the Supreme Judicial Court will moderate the final panel on "Improving Public Understanding of the Legal System."

Thursday features new "Lawyers in Transition" program

In addition to programming for law students and new lawyers on Thursday, "Lawyers in Transition" is a new track this year that is aimed at professionals who have put their career on hold, either to start or take care of their family, because of a sabbatical or to make career changes.

It will feature a program called "Re-imagining the Practice of Law" by Northeastern University School of Law professor David Hall, former dean and provost. Following the program, Hall will sign his book, "Spiritual Revitalization of the Legal Profession: A Search for Sacred Rivers."

Thursday's "Lawyers in Transition" track will also feature: Barbara Bowe of Lawyers Concerned for Lawyers leading a program "Coping with Stress/Work/Life Balance"; *Massachusetts Lawyers Weekly* Publisher David L. Yas and Lisa Terrizzi, formerly of Harvard University's human resources department, on "Nontraditional Legal Paths"; and a Lawyers in Transition forum led by MBA Secretary Denise Squillante.

Friday programming highlights Rouse, other Superior Court justices

A highlight of Friday's programming will be a forum on the Superior Court's "Firm, Fair Trial Date Initiative."

The forum, moderated by Superior Court Chief Justice Barbara J. Rouse, will give an overview of changes in Superior Court practice relating to the initiative undertaken this year. Topics will include bench expectations in pre-trial conferences, calendaring of trials, new standing order on trial continuances and motion practice.

The forum will be followed by a brief Q&A period with a panel of Superior Court justices, including: Rouse, Hon. Nonnie S. Burnes, Hon. John C. Cratsley and Hon. Stephen E. Neel.

In addition, the Alternative Dispute Resolution Standing Committee is sponsoring a 45-minute briefing on Friday. The briefing will address the issue of Massachusetts attorneys representing parties in out-of-state arbitrations and whether doing so constitutes the unauthorized practice of law.

Saturday program features small firm/sole practitioner programming

Saturday's programming features a new track geared toward small firm and sole practitioners, with programs on: "Setting Fees & Attracting Clients"; "Handling Retainers and Collecting Fees"; "High Tech Trends in Office Efficiency"; and "Work Smarter, not Harder."

"This new track is exciting because it features timely, practical tips that registrants can put to immediate use in their practice," said MBA Director of Programs and Services Lisa Ferrara.

For updates, visit www.massbar.org.

FULL PUBLIC NOTICE FOR REAPPOINTMENT OF A BANKRUPTCY JUDGE

The current term of office of Joan N. Feeney, United States Bankruptcy Judge for the District of Massachusetts, is due to expire on October 5, 2006. The United States Court of Appeals for the First Circuit is considering reappointment of Judge Feeney to a new term of office and has determined that she appears to merit reappointment subject to public notice and opportunity for public comment. Upon reappointment, the incumbent would continue to exercise the jurisdiction of a bankruptcy judge as specified in title 28, United States Code; and the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 101-102, 98 Stat. 333-346. In bankruptcy cases and proceedings referred by the district court, the incumbent would continue to perform the duties of a bankruptcy judge that might include holding status conferences, conducting hearings and trials, making final determinations, entering orders and judgements and submitting proposed findings of fact and conclusions of law to the district court. Members of the bar and the public are invited to submit comments for consideration by the Court of Appeals regarding the reappointment of Bankruptcy Judge Feeney to a new term of office. All comments will be kept confidential and should be directed to: Susan J. Goldberg, Deputy Circuit Executive, John Joseph Moakley United States Courthouse, 1 Courthouse Way, Suite 3700, Boston, Massachusetts 02210. The Deputy Circuit Executive will then submit the comments to the Court of Appeals for its decision. Comments must be received no later than Friday, March 24, 2006.

Nominating Committee issues report for 2006-07

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Region Three (Bristol County): Charlotte Glinka

Region Four (Berkshire/Franklin/Hampshire): Veronica Fenton

Region Five (Hampden County): Mary Jo Kennedy

Region Six (Essex County): Robert Holloway, Steven Wollman

Region Seven (Middlesex County): Michael Fee, Martha Rush O'Mara, Kimberly E. Winter

Region Eight (Norfolk County): Fern Frolin, Chris Milne

Region Nine (Suffolk County): John Affuso, Anthony Benedetti, Alice Burkin, John Carrol

Region Ten (Worcester County): James Van Buren, Elizabeth Morse

Other nominations may be submitted for officers by petition pursuant to Article VII, Section 2 of the MBA Bylaws. Questions should be directed to Marilyn J. Wellington, Esq., executive director of the MBA.

ARTICLE VII, Section 2 — Nominating Committee

Section 2. Nominating Committee. On or before January 20th in each year, the President and the Executive Director shall appoint a Nominating Committee of seven (7) members of the Association, consisting of the immediate past president, who shall act as chair, the two (2) most recent past presidents, should either or both agree to serve, two (2) members who have recently served on the House of Delegates and two (2) members who have not served on the House of Delegates within the past five (5) years. Not later than March 10th, the Nominating Committee shall file with the Secretary one or more nominations for President-Elect, two or more nominations for Vice President, one or more nominations for Treasurer, one or more nominations for Secretary and one or more nominations for each Regional Delegate. The President shall appoint a replacement for any person who chooses not to serve. The Nominating Committee may not nominate one of its own members to any such office nor may a member be nominated or run as a petition candidate for more than one office. The Nominating Committee's report, together with a copy of this Article VII, shall be mailed to all members of the Association entitled to vote not later than March 25th. Other nominations may be made for Officers by a petition signed by at least one hundred (100) members of the Association entitled to vote for Officers, and for Regional delegates by a petition signed by at least fifty (50) members of the Association entitled to vote from the region. All petitions shall be filed with the Secretary not later than April 10th. A member's region shall be where he or she maintains his or her principal office.

BC hosts regional European Law Moot Court Competition

The MBA welcomed the European Union Law Moot Court Society to Boston for the only American regional round of this international competition. Hosted by Boston College Law School and professor Thomas J. Carey Jr., approximately 80 students, scholars, practitioners of European Union Law and European Union officials participated.

B.C. Law School Professor Thomas J. Carey Jr., center, his wife Ann (second from left), and moot court participants at the closing celebration sponsored by the MBA.

Members of the University of Cologne team won the regional round held in Boston.

The competition, now in its 16th year, has become the second-largest moot court competition in the world. Elite students from Europe and the United States simulated arguments in the European Court of Justice, with the arguments conducted in both English and French.

Teams from Ireland, England, France, Italy, Germany, the Netherlands, Finland, Switzerland and Cambridge, Mass. competed, with the University of Cologne, Germany winning the regional round.

At the end of March, the winning team proceeds to the finals in Luxembourg, where they will present before the European Court of Justice.

The preliminary rounds of oral argument took place at Boston College Law School all day on Friday, Feb. 10 and were followed by a reception at Barat House on the law school campus. The semifinal arguments were held the morning of Saturday, Feb. 11, at the historic John Adams Courthouse in Boston's Pemberton Square. The final argument was held in the Supreme Judicial courtroom.

The MBA co-sponsored the event and hosted a celebration and farewell dinner for the judges and competitors on Saturday evening.

For more information about the competition, please go to http://www.elmc.org/society/history.htm.

Volunteers sought for Elder Law program in May

Public Service

This May, in celebration of Law Day, the MBA and the Massachusetts chapter of the National Academy of Elder Law Attorneys will once again present the Elder Law Education Program.

During the month, MBA members throughout the state will volunteer their time to speak at their local senior center or council on aging. Last year, more than 140 centers participated in the program, providing attorneys with many opportunities to connect to their communities while providing seniors with valuable information on legal issues affecting their lives.

We are currently seeking elder law attorneys to volunteer to make presentations in their communities. As a presenter, you will be matched with a center in your geographical area and provided with presentation materials on an assigned topic. If you are interested in volunteering, please call (617) 338-0695 or e-mail *communityservices@massbar.org*.

Mass. Bar Foundation honors Judge Nancy Gertner at 2006 Annual Meeting

Over 150 Foundation Fellows, grantees and colleagues joined in the celebration at the Massachusetts Bar Foundation's 2006 Annual Meeting, held Jan. 26 at the Social Law Library at the John Adams Courthouse in Boston. Speeches were given by U.S. District Court Judge Nancy Gertner and by the Irish Immigration Center's executive director, Sister Lena Deevy. Special guest Massachusetts Chief Justice Margaret Marshall urged all to encourage a new generation of lawyers to be actively involved in bar activities.

Bar Foundation

Gertner was presented the 2006 Great Friend of Justice Award. As MBF President Francis A. Ford of Worcester noted, "Judge Gertner's extensive career in public service, lifelong commitment to equal justice and commitment to improving the administration of justice exemplify the mission of the MBF and the spirit of this award."

Gertner also delivered the evening's keynote address. She emphasized the importance of an independent judiciary and encouraged all members of the legal community to participate in the debates surrounding and protecting this necessary component of our society and government. "We have to begin to talk to the public…we have to work at being valued," she said.

The grantee address by Deevy provided a firsthand view of the myriad of ways in which MBF funding helps individuals across the state every day. In 2005, the Irish Immigration Center assisted over 7,000 immigrations from all over the world. Said Deevy, "We remain committed to advocating strongly for immigrants' rights and providing a safe haven for people to get help and find their own voice."

U.S. District Court Judge Nancy Gertner is congratulated on her 2006 Great Friend of Justice Award by MBF President Francis A. Ford.

The MBF 2006 Executive Committee of Larry Johnson, Pamela Marsh, Carol Witt and Francis Ford, with Supreme Judicial Court Chief Justice Margaret H. Marshall, at the MBF Annual Meeting in January.

The meeting also featured the recognition of over 80 new life members of the MBF Society of Fellows, a review of the year's grant making activities and elections of new officers and trustees. The 2006 officers are: Francis A. Ford, Esq., president; Carol A. Witt, Esq., vice president; Lawrence M. Johnson, Esq., treasurer; and Pamela B. Marsh, Esq., secretary. The 2006 trustees are: Francis A. Ford, Esq.; Hon. Anne Geoffrion; Keyburn P. Hollister, Esq.; Wendy Sibbison, Esq.; and Anthony K. Stankiewicz, Esq.

MBA President Warren Fitzgerald introduced Marilyn Wellington, the MBA's executive director and longtime MBF Fellow. Fitzgerald offered gratitude in his remarks when he said, "Thank you, Judge Gertner, for making the Constitution what it was meant to be. Thank you, Sister Deevy, for making America what it was meant to be. And to my fellow Fellows, thank you for making the legal profession what it was meant to be."

Looking to the year ahead, Ford said, "I am honored to serve another term as president of the Massachusetts Bar Foundation. Working together, I know we will have another productive year as we ensure equal access to the legal system for our most vulnerable citizens and as we continue to support the hardworking men and women of the judiciary through our efforts to advance the administration of justice."

Following the meeting, guests enjoyed a reception sponsored by US Trust. Robert Brink, executive director of the Social Law Library, provided private tours of the newly renovated courthouse.

For more information about the MBF, visit www.MassBarFoundation.org.

MBF seeks proposals for IOLTA Grants Program

Through the 2006/2007 IOLTA Grants Program, the MBF expects to award approximately $3 million to nonprofit organizations for law-related programs that either provide civil legal services to the state's low-income population, or improve the administration of justice in the commonwealth. The deadline for application submission is Friday, March 10.

Application materials are available at www.MassBarFoundation.org. For additional information, please contact the MBF Grants Office at (617) 338-0534 or e-mail at *foundation@massbar.org*.

Law students: Apply to the MBF for $6,000 summer stipends

The MBF's Legal Intern Fellowship Program (LIFP) will award four stipends of $6,000 each to law students who intern during the summer months at nonprofit organizations providing civil legal services to low-income clients in Massachusetts. Founded in 1996, the LIFP seeks to encourage careers in the law that further the goals of social justice while contributing valuable legal support to organizations serving the state's indigent population.

Applications to the LIFP are due on March 17. All application information is available at www.MassBarFoundation.org.

Lawyers Weekly, MBA honor lawyers, judges, media for "Excellence"

by Bill Archambeault

A dozen lawyers, judges and journalists were honored Feb. 16 at a celebration of "Excellence in the Law," which was jointly sponsored by *Massachusetts Lawyers Weekly* and the Massachusetts Bar Association.

Held at the State Room, located at the top of 60 State St. with 20-foot-high windows overlooking Boston, the dinner celebration was hosted by *Lawyers Weekly* Publisher David L. Yas with a comedic touch.

But Yas turned serious when he told the audience, "We think lawyers receive enough criticism and it's time to shine the light on the excellence of the profession."

MBA President Warren Fitzgerald, in his introduction, said: "We honor the leaders who continue to set the highest standards of excellence in the profession."

The event began with a special tribute to Superior Court Judge Robert H. Bohn Jr., who died in November after a 13-year struggle with cancer. Bohn served as an associate justice on the Superior Court since 1989. Superior Court Associate Justice John C. Cratsley presented the tribute, acknowledging Bohn's family at the head table.

Hon. Robert H. Bohn Jr.

"How do we measure the life of Judge Robert Bohn?" Cratsley said. "Not by reading the appellate decisions, and not by searching for accolades from the bar… and hardly at all by scrutinizing his press coverage. A judge like Judge Bohn never shied away from difficult cases. What he did, day by day, was what was truly important to him."

Cratsley recalled how his colleague had insisted on decorum and civility in the courtroom no matter how controversial the case, how he maintained a full schedule despite going for cancer treatments almost every Friday and how he devoted his time to students in Lawrence one day a week.

"Judge Bohn set a fine example for all of us for community service," which, Cratsley said, helped define Bohn's legacy.

"We say it so often in court, but it means so much tonight," he said, "Thank you, judge. Thank you."

Next, Fitzgerald introduced Emily Rooney, host and executive editor of WGBH-TV's award-winning "Greater Boston" show, noting, "Emily Rooney's journalistic expertise shines through on 'Greater Boston.'"

In accepting the award, Rooney said, "In truth, many of the stories that we touch involve the expertise that you all have. It's meaningful, not only to me as a journalist, but to the audience we serve. Without the impact of all of you, 'Greater Boston' wouldn't be the in-depth program that it is."

Fitzgerald also introduced Probate & Family Court Judge Paula M. Carey, recipient of the 2006 Daniel F. Toomey Excellence in the Judiciary Award.

"She is universally respected and appreciated," Fitzgerald said, adding that Chief Justice for Administration and Management Robert A. Mulligan had told him that "there is certainly no jurist more deserving of this award than Judge Carey."

In her remarks, Carey told the audience, "I can think of no greater honor than to be here tonight and to share recognition with lawyers who work hard every day representing clients, all toward achieving justice in our courts. I am truly humbled by the experience."

Carey spoke about the importance of maintaining judicial independence.

"Judges are accountable to explain their decisions and make those explanations available to the litigants, the public, and

Photo by David Spink

Probate & Family Court Judge Paula M. Carey talked about the need for judicial independence during her acceptance speech for the Daniel F. Toomey Excellence in the Judiciary Award as MBA President Warren Fitzgerald listens on.

Photo by David Spink

Gloria C. Larson, of counsel at Foley Hoag in Boston and a Lawyer of the Year recipient, talks with WCVB-TV midday anchor Susan Wornick and "Greater Boston" host Emily Rooney, the Excellence in Legal Journalism awardee.

yes, even the media. In providing those explanations, we are constrained by our Judicial Code of Conduct and are often limited to our written decisions and our oral rulings in the courtroom. I would like to thank the MBA for its new committee (on judicial independence), chaired by Ed Ryan, who have mobilized to help some of my colleagues where we cannot help ourselves. We appreciate that you are there to respond when we can't."

Yas concluded the evening by presenting Lawyers Weekly's 2005 Lawyers of the Year to: Howard M. Cooper, Rosemary J. Cooper, Paul T. Dacier, Robert A. George, Christine M. Griffin, Patrick T. Jones, Gloria C. Larson, Barry S. Pollack, Michael C. Wilcox and John P. Zanini.

Photo by David Spink

Catherine and Tim Bohn accept the commemorative award in honor of their late father Judge Robert H. Bohn Jr. following a special tribute delivered by Judge John Cratsley.

Excellence in Legal Journalism Award

Emily Rooney

Host and executive editor, "Greater Boston"

WGBH-TV's "Greater Boston" was launched in 1997 with Emily Rooney as host and executive editor. She has won a number of awards for her in-depth analysis of the issues, including the National Press Club's Arthur Rowse Award for Press Criticism, a series of New England Emmy Awards and Associated Press recognition for best news/talk show for "Beat the Press" and "Greater Boston."

Emily Rooney

In the last year, Rooney said "Greater Boston" has covered a host of legal issues, including three libel cases, that puts her in close contact with the legal profession.

"Our program is one of the only ones with the time and the opportunity to look at the issues," Rooney said before accepting her award. "I'm not a lawyer, but I have the privilege of talking to lawyers all the time. I feel especially privileged that so many lawyers have agreed to come on the program. They're the ones who educate our audience."

Prior to launching "Greater Boston," Rooney was director of political coverage and special events at the Fox network in New York from 1994 to 1997. Before that, she was the executive producer of "ABC World News Tonight" with Peter Jennings. From 1979 to 1993, Rooney worked at WCVB-TV in Boston, including three years as news director.

Daniel F. Toomey Excellence in the Judiciary Award

Judge Paula M. Carey

Probate & Family Court

Before the Hon. Paula M. Carey was appointed to the bench in January 2001, she was a partner in Carey & Mooney PC, where she specialized in domestic relations matters. She is a magna cum laude graduate of New England School of Law.

In 2004, Carey received the Massachusetts Judges Conference's "Probate & Family Court Department Judge of the Year" award.

Hon. Paula M. Carey

"I can think of no greater place to be than in a family and probate court," she said. "I'm proud to be a member of the Massachusetts judiciary."

Carey is a frequent lecturer and author for continuing education programs run by the MBA, the Boston Bar Association and MCLE.

She belongs to the MBA (serving on the Family Law Section Council), the Boston Bar Association, the American Bar Association, the Massachusetts Family and Probate Inn of Court and the Women's Bar Association.

"I think the world of the Massachusetts Bar," Carey said. "It's very humbling for me. I'm just a trial court judge that does my work every day without really knowing the effect I have."

Fingerprint identification, and its aura of infallibility

Continued from page 1

In 2004, a convicted murderer in Boston, Stephan Cowans, was exonerated by DNA; upon review, his fingerprint had been misidentified by police examiners. Had the true perpetrator not left recoverable DNA (widely considered the most powerful form of forensic evidence) at the scene, it is extremely unlikely Cowans would have been able to prove his innocence. He also proved that what had been presumed to be a correct latent print individualization was in fact an erroneous latent print individualization. A private consultant concluded that poor training of the department's fingerprint analysts was to blame.

And this December, evidence used to convict Terry L. Patterson of murdering a Boston police detective was ruled inadmissible. His conviction was based in large part on the expert testimony of a member of the Boston Police latent fingerprint section, who opined that four fingerprint impressions could be analyzed collectively because he believed them to be simultaneous impressions — a leap in logic not accepted in the scientific community.

If fingerprint identification is considered so reliable, why do so many questions remain?

According to internationally recognized latent print examiner Pat Wertheim of the Arizona Department of Public Safety, "There have always been misidentifications, but the defense community has not questioned it as strenuously nor sought outside experts, so they've gone undetected. This is not a recent proliferation, we are just more aware of them because now we are looking for them."

The methodology

The basic principle of fingerprint identification is that the patterns of friction ridges on fingertips, palms, toes and soles are unique and permanent to each individual. The prints are unique as to each finger and toe of each person.

The idea that each fingerprint is unique and can be used for identification was first proposed by English administrators in 1858. It was not until 1892 that a method for taking "rolled" fingerprints and a classification system based on three ridge shapes – arches, loops and whorls – was developed. The modern fingerprint indexing system is based on this system with some refinements.

According to Lisa Steele of Steele and Associates in Bolton and author of the amicus brief for several defense attorney groups in *Commonwealth v. Patterson*, since its early days, fingerprint theory has been expanded by police departments and examiners in police crime labs. Fingerprint theory has rarely been examined by scientists outside this field using blind and double-blind studies. In fact, until 1999, fingerprint theory was never skeptically examined by courts under either the *Frye* or *Daubert* standards.

Most examiners are now taught the ACE-V ("Analysis, Comparison, Evaluation – Verification") method of fingerprint identification. Level 1 starts with comparing the general pattern to see if there is broad agreement. For example, the same finger could not have made prints from different classes of patterns, such as an arch and a loop.

Next, in Level 2, the examiner looks for ridge characteristics of both prints that are of the same type and shape. Ridge endings, bifurcations, enclosures and so forth must be the same.

Next, the examiner makes a qualitative comparison of points of similarity. The exact number of points required for a match varies in the United States, but 10 to 12 points is considered standard.

In ACE-V, the final step is verification. The general rule is that all positive identification opinions must be verified by a second qualified expert. According to Steele, the second expert may repeat the entire process, but the comparison need not be blind. That is, the second expert may know from the outset that another examiner has already made the positive identification.

Examiners are taught this method, but after nearly a century of practice, no properly designed, controlled and conducted study of the accuracy of latent print individualizations exists, according to Lyn Haber and Ralph Norman Haber in their article, *Error Rates for Human Fingerprint Examiners.*

Which leaves the question: When there is an error, is it the method or the examiner?

"I can't see any distinction between the two," said Simon A. Cole, a frequently consulted fingerprint expert and assistant professor of Criminology, Law and Society at the University of California, Irvine.

"No one has shown me a latent print identification method that does not involve an examiner. In other words, 'the method' is to have an examiner make a determination. There is no method without an examiner. Talking about the error rate of a 'method' without an examiner is like talking about the crash rate of an automobile without a driver. Therefore, when an error does occur, there is no way of distinguishing between one attributed to 'method' or 'examiner,'" explained Cole.

Problems with Mayfield, Cowans and Patterson

Riddled with errors, Brandon Mayfield's misidentification as a terrorist bomber illustrates just how many problems can arise in only one investigation.

In May 2004, the Federal Bureau of Investigation arrested Mayfield, an Oregon attorney, as a material witness in an investigation of the terrorist attacks on commuter trains in Madrid. Mayfield had been identified by the FBI Laboratory as the source of a fingerprint, labeled LFP 17, found on a bag of detonators connected to the attacks. Two weeks after Mayfield was arrested, the Spanish National Police informed the FBI that it had identified an Algerian national as the source of the fingerprint. After the FBI Laboratory examined the fingerprints of the Algerian, it withdrew its identification of Mayfield and he was released.

According to the Office of the Inspector General (OIG), the unusual similarity between LFP 17 and Mayfield's fingerprint was a major factor in the misidentification that confused three experienced FBI examiners and a court-appointed expert. The OIG concluded that the examiners committed errors in the examination, and that the misidentification could have been prevented through a more rigorous application of several principles of latent fingerprint identification. Their concerns included:

- The enormous size of the Integrated Automated Fingerprint Identification System database and the power of the IAFIS program can find a confusingly similar candidate print, thereby elevating the danger of encountering a close non-match.
- Bias from the known prints of Mayfield — The examiners' interpretation of some features in LFP 17 was adjusted or influenced by reasoning "backward" from features that were visible in Mayfield's known prints.
- The examiners' reliance on extremely tiny, "Level 3," details, including shapes interpreted as individual pores, incipient dots between ridges and ridge edges. Because Level 3 details are so small, the appearance of such details in fingerprints is highly variable, even between different fingerprints made by the same finger. As a result, the reliability of Level 3 details is controversial within the latent fingerprint community.
- Failure to appropriately apply the "one discrepancy rule," in which a single difference in appearance between a latent print and a known fingerprint must preclude an identification unless the examiner has a valid explanation for the difference. Implicit in this standard is the requirement that the examiner have equivalent certainty in the validity of each explanation for each difference in appearance between prints.
- The FBI Laboratory's overconfidence in the skill and superiority of its examiners prevented it from taking the Spanish lab's report as seriously as it should have.
- The FBI's verification procedures require that every identification be verified by a second examiner. Under procedures in place at the time of the Mayfield identification, the verifier was aware that an identification had already been made, possibly introducing a bias that may prevent or discourage a verifier from challenging an identification.

According to Steele, the Mayfield case demonstrated that three senior officers in the FBI can make a ghastly mistake, and an outside examiner, who is very well regarded, can follow along and make the same mistake.

"But for the Spanish authorities, Mayfield might still be in jail. If this had been a U.S. case and we didn't have the Spanish saying, 'Stop: We have a better suspect,' I'm not as certain that a U.S. department would have been as confident going to the FBI and saying 'you are wrong,'" said Steele.

Cole believes the Mayfield cased demonstrates how unlikely it is that misattributions will be exposed. "In this case, a media leak in Europe forced the FBI to arrest Mayfield before they wanted to. Had that not occurred, the Spanish police might have convinced the FBI of the error before the suspicion of Mayfield was made public, and the FBI might still be claiming, as they were pre-Mayfield, to have never made a misattribution," said Cole.

Cowans' lucky break

In a high-profile case that concluded on Feb. 2, 2004, prosecutors agreed to vacate the conviction of Stephan

Cowans based upon DNA test results that showed he was not the person who left his fingerprints on a glass at the scene of a violent shooting incident.

Cowans was charged with shooting Sgt. Gregory Gallagher during a fight in 1997. Gallagher and another eyewitness identified Cowans as the assailant at trial. Two Boston fingerprint lab examiners testified that a fingerprint from a drinking glass used by the assailant matched Cowans'. He was sentenced to 35 to 50 years in prison.

The New England Innocence Project arranged for independent DNA testing of the glass, a sweatshirt and a baseball cap that were also found at the scene of Gallagher's shooting. Tests determined that saliva on the glass and sweat on the clothing came from the same person, but that person was not Cowans. Cowans was eventually freed.

An investigation of the misidentification by a private consultant concluded that poor training of the department's fingerprint analysts was to blame for the blunder. Finding that the examining officers were not prepared to do complex fingerprint analysis, the report said the unit did not train its officers to keep up with standard practices in fingerprint analysis and had low performance standards. Even the commander of the police department's forensic technology division admitted the unit had little or no protocol or standardization of procedures. Wertheim, stressing that his comments are only his opinion and not the position of his agency, attributes the results to dishonesty on the part of one or more of the fingerprint experts.

Cowans demonstrates the difficulty and extraordinary evidence required to convince criminal justice system personnel that a latent fingerprint individualization is erroneous.

Neither the verifying examiner nor Cowan's own experts detected the error. Revealing a practitioner error required: the sheer luck of the true perpetrator leaving recoverable DNA at the crime scene; the good fortune of that DNA being preserved after his conviction; the acceptance of biohazard duty in prison in order to pay for post-conviction DNA testing; the responsibility of the court in approving such testing; and the upstanding behavior of the commonwealth in ordering his immediate release.

"This suggests to me that Cowans is far from the only person wrongly convicted on fingerprint evidence; he was just the lucky one who was able to prove it," said Cole.

A novel approach

In 1995, opponents of fingerprint identification had reason to fear the camel's nose was under the tent when a novel application of ACE-V was employed to convict Terry L. Patterson of murdering a Boston police detective.

A member of the Boston police latent fingerprint section testified that four latent impressions found on the victim's vehicle were left by Patterson. Although no single impression, on its own, could reliably be matched to its allegedly corresponding finger, the fingerprint examiner based his testimony on the cumulative similarities observed between the impressions and their corresponding fingers. The examiner testified that the four impressions could be analyzed collectively because he believed them to be simultaneous impressions — impressions of multiple fingers made by the same hand at the same time.

The commonwealth argued that ACE-V is reliable when applied to simultaneous fingerprints, or impressions of multiple fingers left by the same hand at the same time.

Although a resourceful application of ACE-V, it had no verifiable basis in science. The Supreme Judicial Court ultimately recognized this and in December vacated the lower court's order that allowed ACE-V to be applied to simultaneous fingerprints.

Some fingerprint evidence involved with the Cowans case (this image has been adjusted by *Lawyers Journal* for printing purposes).

The case reaffirms the proposition that scientific reliability requires not just a method that has been established and verified, but that its application must also be scientifically verified and established.

Wertheim said the lesson is that "sometimes the courts may demand that fingerprint examiners be more conservative than we really believe we ought to be."

The psychology of fingerprinting

Print examiners generally assert their methodology is perfect: Errors are attributable only to the examiner. But the defense bar argues that because part of the methodology relies on subjective judgments by the examiner, human error is built into the methodology.

Basic fingerprint identification theory suggests that fingerprint analysis and matching are based solely on the information provided by the print. But motivation, peer pressure, emotional state and context are just a few examples of the many possible psychological factors involved in fingerprint identification.

"There are fundamental things that go on with how the brain takes shortcuts to reach results," said Steele. "They are not bad people or poorly trained, but the human brain will play all sorts of tricks on you… If your brain is so focused on one thing, you can miss a six-foot gorilla walking across a video screen. Part of the problem is human nature; we hit the same problem in witness identifications. They are motivated to pick the right person but often get it wrong. Psychology tells us factors about what makes it more likely an examiner will get it wrong, and one is biasing information."

She points to the psychological phenomena known as "confirmation bias." If the examiner has a prior belief or expectation that two fingerprints will, or will not, match, then two potential psychological biases arise. "Cognitive confirmation bias" is a tendency to seek out and interpret evidence in ways that fit existing beliefs. "Behavioral confirmation bias," commonly referred to as the self-fulfilling prophecy, is a tendency for people to unwittingly procure support for their beliefs. The danger of confirmation bias affecting an examiner's subjective opinion is rarely discussed in the fingerprint examination literature or in the court cases upholding admissibility of the technique.

Confirmation bias can cause examiners to overestimate the quality of a latent print or attribute a discrepancy to an explainable distortion when they have external reasons to expect a match. It can also cause them to underestimate the quality of an image or regard an explainable distortion as a discrepancy when they have external reasons to expect a non-match.

Steele argues that confirmation bias can play a significant role in distorting test results regardless of the validity of the underlying theory. Evidentiary matter may be presented to forensic scientists in a suggestive manner. The examiner may be given crime scene evidence, autopsy evidence and a fingerprint exemplar clearly labeled as the suspect's. This may be accompanied by a written or oral synopsis of the reasons the investigator believes the suspect is guilty or a description of a suspect's prior record for similar offenses. In high-profile cases, there may be immense public pressure to validate eyewitnesses statements or an admission with "neutral" scientific evidence. This suggestiveness, coupled with the understandable prosecution sympathies of many examiners, may skew subjective judgments.

"Whatever psychological bias it is that leads examiners to corroborate one another's identifications must be pretty powerful because it impelled two FBI examiners to corroborate the Mayfield misattribution," said Cole. "It also impelled Mayfield's own expert to corroborate the misattribution, when his bias, if anything, might be presumed to tend the other way, toward the interest of his client."

According to Steele, it is easy for an examiner to interpret the observations to fit his or her expectations.

"At rock bottom, we want the right bad guy put away on the right evidence. We have to care about psychology because we need to know how the decision was made," said Steele. "If part of process takes place in your head, we need to know how that works. Most of this is first-year psychology. But we care because if you get the wrong answer, not only has a lot of money and time been wasted prosecuting wrong guy, but the right guy stays out there, possibly committing crimes," she added.

Arts and science

"One of the things we lack in fingerprints is an accurate and reliable way of determining error rate," said Wertheim. But part of the problem with the way critics attack fingerprinting is that "error rate" is a broad category that doesn't separate the error rate inherent in the methodology from the error rate of the individual practitioner.

"Even if you could establish an error rate in general, I believe our most vocal critics would concede that some experts make more mistakes than other experts. So even if we could calculate an overall error rate, it would be inappropriate to imply to the court that the error rate could be used as a predictor of a mistake in a specific case at trial," said Wertheim.

In defending fingerprint identification methods, he noted the confusion caused by referring to fingerprinting as a science. He explained that it is an applied science, with an artistic component to it.

"A lot of fingerprint critics try to define science in the narrow way that you might define mathematics or astronomy. There is a large area that we refer to as 'applied science' and in that, there is a subset of forensic sciences," said Wertheim. "You can't say it is not scientific simply because it doesn't follow the same rules as mathematics. Fingerprinting is an applied science, not an exact science, but it does have a scientific foundation and an identification or exclusion is a scientific conclusion."

Indeed, to date, there have been 42 *Daubert* challenges to fingerprints. None have been successful.

The International Association for Identification will hold its 2006 Annual Educational Conference in Boston, July 2-7.

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Legal professionals desiring a change can now post their resume online and choose to remain completely anonymous to prospective employers. You choose when to release your full resume. We give total control to the job seeker.

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Massachusetts Bar Association welcomes new members

Continued from page 2

Dennis I. Greene of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo PC
Lyba Greenwood of Wilmer, Cutler, Pickering, Hale and Dorr LLP
Elizabeth J. Grimes
Maxim Grinberg
Craig R. Gugger of Balas, Alphen & Santos PC
Peter A. Hahn of the Administrative Office of the Juvenile Court
Geri L. Haight of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo PC
Ian A. Hammel of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo PC
Robert W. Harnais of the Law Office of Robert W Harnais
Allyson C. Hawkes
Paul J. Hayes of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo PC
Kristina M. Hedin of the Law Office of Jose A. Espinosa
Kevin C. Heffel of Wilmer, Cutler, Pickering, Hale and Dorr LLP
Eric Charles Henry of Proskauer Rose LLP
Michael R. Hinkley
Lauren Holland
Karen G. Hong of Goodwin Procter LLP
Matthew P. Horvitz of Hinckley Allen & Snyder LLP
Timothy P. Houten of the Law Office of Timothy P. Houten
Jacqueline M. Hudkins of Donovan Law Office
David P. Hunt
Stephanie A. Johnson of Snow & Snow
Jessica K. Justason of CCH Insurance Services
Kenneth G. Juster of Chapdelaine & Co.
Amee K. Kantesaria of Mass. Mutual Financial Group
Joseph E. Keeney of Blank & Soloman
Victoria R. Kelleher of CPCS-Boston
Matthew P. Kelley of Cape & Islands District Attorney's Office
Christopher M. Kenney of Keches & Mallen PC
Howard Kirkpatrick
Richard B. Klibaner of Klibaner & Sabino
Christine A. Knipper of Cornell & Gollub
Julie Korostoff of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo PC
Grace V. Kosman of Centrulo & Capone
Jonathan L. Kravetz of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo PC
Priyadarshini Kumar of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo PC
Jennifer H. Lagerquist
Mary Lahay
Michael A. Lambert of Carrigan & Erickson
Gloria C. Larson of Foley Hoag LLP
Sarah Lashua
Lance I. Layne of the Law Office of Lance I. Layne
Mark Tan Lee of the Suffolk County DA's Office-Boston
Michelle E. Leinbach of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo PC

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Job Shadow day takes teens behind the scenes of the law

by Bill Archambeault

Gathered around the large oval table in Mirick O'Connell's 17th-floor boardroom overlooking downtown Worcester, a dozen teenagers asked Democratic gubernatorial candidate Deval Patrick why he wants to be governor and why he became a lawyer.

The high school students, from the Boys & Girls Club of Worcester, are some of the 30 youths who participated in the Massachusetts Bar Association's 2006 Job Shadow Program. The program was also held in Springfield and Boston. In Boston, students were paired up with individual attorneys and spent the day with them, visiting law offices and courtrooms. A few even managed to watch portions of trials.

Public Service

In Worcester, Mirick O'Connell associate Michael D. Badger guided the students on a day-long tour at Worcester Superior Court and Mirick O'Connell's offices, beginning with a 20-minute meeting with Patrick.

"What made you want to be a governor instead of a big-time lawyer?" one of the students asked Patrick.

"Because the same-old insiders aren't getting it done," Patrick told them. "I'm just tired of that. We're the only state in America where young people are moving out because they can't find an affordable place to live. We're not taking advantage of our young people, even those who want to step up.

"As a parent, I'm used to giving advice and having it ignored," Patrick said, telling the students that they shouldn't be talked out of taking school seriously. "It wasn't a popular thing to be interested in reading, doing your homework. But it counts. It matters as you try to build a better life."

He also explained that lawyers have the flexibility of putting their careers on hold to enter politics or business, then return to practicing law. He explained the need for better education and health care programs in the state, but what really grabbed their attention was mentioning the time, a couple of years ago, when he met controversial rapper 50 Cent backstage at a concert he'd brought his then-14-year-old daughter to see.

"I don't even like his music, but he's very disciplined about his music," Patrick said, praising the rapper's focus and hard work even though he doesn't approve of the messages he sends. "First of all, stay in school, but don't just put in the time, make it count."

Photo by Jeff Thiebauth

Democratic gubernatorial candidate Deval Patrick speaks with students at the start of their Job Shadow Day in Worcester.

Patrick said he had previous plans to meet with lawyers at Mirick O'Connell and appreciated the chance to speak to the students, even if most of them aren't able to vote.

"I know there is talent in that room," Patrick said on his way out of the meeting room, "and we've got to call that talent out and give them reason to hope."

Next on the agenda was a visit to Worcester Superior Court, which is preparing to move into a new building a few blocks down the street that's scheduled to open in 2007. Badger, who practices busi-

ness and employment litigation, introduced the students to Francis A. Ford, the clerk of courts and magistrate for Worcester Superior Court.

Ford, who is also president of the Massachusetts Bar Foundation (the philanthropic partner of the MBA), gathered the students in the crowded aisles of the clerk's offices, pointing out the building's shortcomings.

"It's old — you can see the paint peeling, the file cabinets overloading," Ford said.

He explained that Worcester Superior Court has 4,300 civil cases pending and 400 to 500 criminal cases pending. "It's kind of like shoveling against the tide," he told them.

Photo by Jeff Thiebauth

Worcester Judge John McCann explains how televisions mounted above the jury box are used in the courtroom.

Leading them down several hallways, Ford stood outside Courtroom 203, where the Joseph L. Druce trial in the murder of defrocked priest John J. Geoghan was held recently.

"It was a very odd case," he explained. "The defendant got on the stand and said, 'Yep, I killed him.' He's now doing a life sentence on top of another life sentence."

"The judge is now telling the jury what the law is," Ford continued in a low voice. "It's the only time you can't walk into a courtroom."

One of the students asked him, "Do you enjoy being a lawyer?"

"I love being a lawyer. In fact, I am going to be a practicing attorney again in a year," he said, explaining that he will retire soon as a court official and return to practice. "I'd encourage you to look into it. We can always use good ones."

Ford and Badger led the students into the courtroom next door, which was empty except for a half-dozen people — bailiffs, clerks, an assistant district attorney, a defense lawyer, a newspaper reporter — all waiting for a jury that had been deliberating for four days.

Judge John McCann, the regional administrative judge, entered the high-ceilinged room and welcomed the students, explaining the types — and volume — of cases he handles. During his talk, all eyes moved to the door when a bailiff brought in a young man in handcuffs. They walked behind and around McCann, who fell silent, until the bailiff escorted the prisoner through a door to the lockup facility.

McCann apologized, explaining that the elevator leading directly to the lockup room is broken.

"It's hard work," he said of being a judge. "It's sad, too, because I have to sentence people and I don't like to send anyone to jail."

Fortunately, he explained, he's able to put his day's work out of his mind when he goes home every day.

After a few questions, McCann explained the role of the jury, and the students had several questions.

"When you get picked for jury duty, do you have to do it?"

"If they didn't have an excuse, if they just didn't want to stay, do they have to do it?"

"Do they get paid?"

McCann answered the questions, then asked them, "Anybody sit on a jury before? No, you're all too young. Anybody sit in jury box before?"

McCann ushered them toward the front of the courtroom and watched them pile in.

"Feels different when you sit in a jury box, doesn't it?" he said, standing in front of the jury box.

One of the students was on crutches and had a little trouble getting seated. McCann explained that disabled jurors are actually encouraged to serve on juries. And diabetics, he told them, are allowed to keep snacks and bottles of soda or juice in the jury box with them.

McCann then asked the Assistant District Attorney Thomas E. Landry and the defense attorney, Leonard Staples, to explain their roles to the students. McCann explained some of the qualities he thinks make for good lawyers in his court: being prepared, speaking loudly enough to fill the large room and being civil.

"There's combat going on, but you have to be civil," he said.

He left the students with some advice gleaned from presiding over serious drug cases.

"I know you young people are exposed to it, and I'd just say, stay away from it entirely," he told them. "I see too many people when they're 25, 26, 27 when they're going away for 10, 15 years."

After a tour through the building's law library and its cramped rows of books, Badger told the students, "Everything that happens here is important to somebody."

Back at Mirick O'Connell's offices, the students took a lunch break before getting a tour of the firm.

Keishla Morales, a 16-year-old student at Woodard Day School in West Boylston, said she "thought lawyers were just laid back." The jury system surprised her the most.

"I never knew that if you became a juror that you got paid," she said. "And I thought a juror had to be a doctor or a teacher."

Rachaud Russell, an 18-year-old student at Doherty High School in Worcester, said he had thought about a legal career before, partly from talking to one of his basketball coaches, who is an assistant district attorney.

"I like what happens, how everything goes down," Russell said, in a shirt and tie. "You can put away people who should be put away."

The following people, including non-attorneys, participated in the MBA's Job Shadow Day Feb. 2:

Boston

Campbell, Campbell, Edwards & Conroy
Stephen Michel Key

U.S. Equal Opportunity Commission
Rosa L. Palacios

Massachusetts Executive Office of Public Safety
Susan Marjorie Prosnitz

Suffolk County District Attorney's office
Nurys Camargo
Cornell Mills
Jessica Sheenan
Kara Hayes
Stephanie Soriano

Ten Point Coalition
Michael Persons

ACLU Massachusetts
Sarah R. Wunsch
Anajali Waikar

Dan Marr Boys and Girls Club, Dorchester
Elliott Hassey

Worcester

Mirick O'Connell, DeMallie & Lougee LLP
Michael D. Badger
Betsy Landry
Elaine Apostala
Jeffery L. Donaldson
Ralph St. George
Amy Tuiskula

Worcester Superior Court
Judge John McCann
Clerk Francis Ford
Librarian Suzanne Hoey

Worcester Boys and Girls Club
Amy Mosher

Springfield

Springfield Boys and Girls Club
Michael Hanechak

Bulkley, Richardson & Gelinas LLP
Katherine K. Coolidge
Gastón de los Reyes
Seth M. Wilson
Joseph W. Dayall

Hampden Probate & Family Court
Judge David G. Sacks

Department of Environmental Protection
Christine LeBel
Jane Rothchild
Robert Bell
William Guazzo

Hampden County District Attorney's office
Eileen M. Sears
Danielle Lenore Williams

Egan, Flanagan & Cohen PC
Joseph A. Pacella

The MBA in Pictures

The panel from the CLE's well-attended "Apologies" program on Jan. 24, included, from left: Robert B. Hanscom, director of prevention and patient safety at the Risk Management Foundation; Ashley McCown, executive vice president of Solomon McCown & Co.; David L. Yas, publisher of Massachusetts Lawyers Weekly; and Scott L. Harshbarger of Proskauer Rose LLP.

Terence J. Welsh, president of the MBA Insurance Agency, presented a luncheon roundtable explaining the benefits offered through MBA Insurance. The CLE program, "MBA Insurance Benefits for Solo and Small Firm Practitioners," was held Jan. 25 at the MBA's Western Massachusetts office in Springfield.

Counterclockwise, from left, are: Hal Etkin, Esq., Springfield; Petra I. Cervoni, Esq., Springfield Housing Authority; Mary Eaton, Esq., East Longmeadow; Linda J. Moye, Esq., Law Office of Michael J. Williamson, Northampton; and Terence J. Welsh, president, MBA Insurance Agency.

The American Bar Association's Massachusetts Delegation, under the leadership of Kay Hodge, met at the MBA's Boston offices on Feb. 1. From left are ABA President Michael Greco and Robert V. Ward Jr., dean of Southern New England School of Law.

As part of Job Shadow Day Feb. 2., students from the Worcester Boys and Girls Club visited Worcester Superior Court, meeting with Clerk Francis A. Ford and Judge John McCann.

From left: Irish Immigration Center Director Lena Deevy; MBF President Francis Ford; Judge Nancy Gertner; MBF Vice President Carol Witt; MBF Executive Director Elizabeth Lynch; MBF Secretary Pamela Marsh; and MBF Treasurer Laurence Johnson at the January Massachusetts Bar Foundation Annual Meeting.

Massachusetts Bar Association welcomes new members

Continued from page 15

Anthony J. Lochiatto of Attorney at Law Anthony J. Lochiatto
William J. Logan of the Law Office of William J. Logan
Anthony M. Lombardi
Buffy Lord
William John Lyons Jr.
J.J. Kevin Mack
John F. Madaio of Loconto & Burke PC
Joshua F. Magri of Massachusetts Appeals Court
Ann-Ellen Marcus Hornidge of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo PC
Gerard M. Marino
Kellie Martin of Kellie Martin & Associates
Adam Martin of Corwin & Corwin LLP
Robert L. Marzelli of Billingham & Marzelli PC
H. Andrew Matzkin of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo PC
Douglas W. McCormac of South Coastal Counties Legal Services
Francis M. McCormick of Massachusetts Superior Court
Celia D. McLane
Maureen K. McNally of Fuller, Rosenberg, Palmer & Beliveau
Jill Brenner Meixel of Donnelly, Conroy & Gelhaar LLP
Christopher T. Mercer of Ropes & Gray
Aisha J. Milbury of Massachusetts Board of Bar Overseers
Brian M. Monahan of the Law Office of Brian Monahan
John J. Moore of Holliston Police Dept.
Amy L. Moore of Merrill Lynch
Devin Moriarty of the Law Offices of Moriarty and Connor
John N. Morrissey of John N. Morrissey, Attorney at Law
Olga A. Niese
Erin M. Nobles of Lubin and Meyer
Dyane L. Noonan of Wilmer, Cutler, Pickering, Hale and Dorr LLP
Erica J. Noviello of First State Management Group
Lauren A. O'Brien
Stuart A. Offner of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo PC
Mary A. Orciuch of Adams & Associates
Davina R. Owens
Yasamin Pakizegi
Curtis P. Patalano
Matthew J. Perreault
Stephanie P. Peters
James Petersen of the Berkshire County District Attorney's Office
Barry S. Pollack of Sullivan & Worcester LLP
Todd C. Pomerleau of Maine Supreme Judicial Court
Jeffrey R. Porter of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo PC
Sean C. Presnail
Mayelin Prieto-Gonzalez of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo PC
April R. Quire
Patrick J. Quirk of Nelson, Mullins, Riley & Scarborough LLP
Kathryn M. Ragucci of Corwin & Corwin LLP
Sarah S. Rama
Erika C. Reinders of Ropes & Gray
Jessica E. Rich of Mirick O'Connell
Michael S. Rich of Tennant & Ewer PC
Jeffrey S. Robbins of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo PC
Elizabeth Rodriguez-Ross of the Law Office of Joseph R. White
Stephanie E. Rosander of Kirkpatrick & Lockhart, Nicholson, Graham LLP
Emma K. Rothfeld
Chrisoula I. Roumeliotis
Sonia K. Ruas of Richard O'Neill Jr. & Associates PC
Stephanie U. Russell of Welch & Donohoe LLP
Susan M. Ryan
Michael Sacco of the Law Office of Michael Sacco PC
Susan M. Saliba of Edwards, Angell, Palmer & Dodge LLP
Arpiar M. Saunders of Saunders & Silverstein LLP
Sarah P. Schlegel of Glynn Law Offices
Sharon J. Schlesinger of Thermo Electron Corp.
Douglas K. Schnell of Skadden, Arps, Slate, Meagher & Flom LLP
Darah L. Schofield of Land Court
David A. Schuster of Baystate Financial Services
Anne B. Seggerman of Pro Mutual Group
Neetu Sehgal of Hines & Associates
Jennifer Rende Seltenrich of Michaels & Ward LLP
Christopher G. Senie of Christopher G. Senie, Attorney at Law
Anne C. Sessa of Doherty, Wallace, Pillsbury & Murphy
Jennifer L. Sheldon of Burns & Levinson LLP
Luke F. Shulman-Ryan of U.S. District Court-Springfield
Eric M. Sigman of Namgis Inc.
Daniel J. Singleton of Daniel J. Singleton, Attorney
Lawrence Slotnick of Lawrence Slotnick, Attorney at Law
Maxwell D. Solet of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo PC
Mandy L. Spaulding of the Law Office of Anthony T. Visconti
Lonna M. Steinberg of Massachusetts Appeals Court
Michael R. Sternberg
Christopher D. Strang of Corwin & Corwin LLP
Steven R. Striffler
Marylou Stroumbos
Catherine P. Sullivan of Sullivan & Sullivan
Sally H. Sullivan of Massachusetts Appeals Court
Jennifer L. Sullivan of Sullivan & Worcester LLP
Todd A. Sullivan of Hayes Soloway PC
Katherine A. Sullivan of Northeastern University School of Law
Ellen Sullivan-Labombarda of Centro Presente Inc.
Gillian M. Teixeira
Laura W. Tholen of FMR Co-Corporate Compliance
Jessica R. Thomas
Patrick C. Tinsley of Avery, Dooley, Post & Avery
Sean P. Tirrell of the Law Offices of William T. Kennedy
Jamie M. Tosches of the Massachusetts Attorney General's Office
Brendan F. Trainor
Sarah N. Turner of Shepherd Law Group PC
Kristina Vickstrom of American Veterinary Medical Frontiers Inc.
Kristin S. Vigneaux
Nona E. Walker of CPCS-Boston
William J. Walsh of the Law Office of William J. Walsh & Associates
Elizabeth H. Walston
Beverly Ward of Massachusetts Commission Against Discrimination
Julie L. Waters of the Law Office of Julie Waters
Mary S. Webb
Stacey L. Weego of Weego Law Office
Lesley E. Zorabedian of Rodman, Rodman & Sandman PC

"Shaping the Future," a look at U.S. chief justices: Part III

By Christopher R. Vaccaro, Esq.

This is the third of a three-part series discussing the contributions of the chief justices to this nation, summarizing their impact on the court and American history. As we look to learn from the "Shaping the Future of the Legal Profession" Annual Conference in March, some context for the rich history of the Supreme Court will provide a further appreciation of the past.

Since the establishment of the Supreme Court, 17 individuals have served as chief justice. All have contributed to the development of this nation and its laws.

In the early 1800s, the court's decisions elevated it to a status more equal to the legislative and executive branches. At the turn of the 20th century, the court vigorously acted to curb executive and legislative authority. During the 1950s and 1960s, the court expanded its involvement in civil rights cases and efforts to limit governmental power over individuals, often at the expense of federal and state legislatures. That trend has slowed. It remains to be seen how the recently appointed chief justice, John G. Roberts, will influence American history.

The Courts

This installation of "Shaping the Future" highlights the final seven Supreme Court justices, from Charles E. Hughes in 1930 to John G. Roberts Jr. today.

Charles Evans Hughes and the "Four Horsemen"

The 11th chief justice, Charles Evans Hughes, presided during the Great Depression in the 1930s.

President William Howard Taft appointed Hughes as an associate justice of the Supreme Court in 1910. But Hughes resigned from the court in 1916 to run as the Republican and Progressive presidential candidate against President Woodrow Wilson, losing the election to the incumbent by a slim Electoral College margin.

He returned to his law practice until President Harding appointed him secretary of state in 1921, a position that he held until 1925. President Hoover chose Hughes to replace retiring Chief Justice William Howard Taft in 1930.

Soon after Chief Justice Hughes took his seat on the court, the Great Depression descended upon America. Democrat Franklin D. Roosevelt was elected president in 1932, hoping to restore prosperity. The new president advanced legislation known as the "New Deal," authorizing federal regulation of the national economy to an unprecedented extent.

Conflict was inevitable between the Supreme Court and Roosevelt. When the new administration took office in 1933, the court was divided. Justices Willis Van Devanter, George Sutherland, James C. McReynolds and Pierce Butler were the ideological heirs to the notion that the Constitution limited Congress' powers and protected economic rights of businesses. These justices, sometimes referred to as the "Four Horsemen," often voted as a bloc. At the other end of the spectrum were Justices Louis Brandeis, Harlan Fiske Stone and Benjamin N. Cardozo, who were more receptive to federal regulation. Chief Justice Hughes and Justice Owen J. Roberts were the court's swing votes.

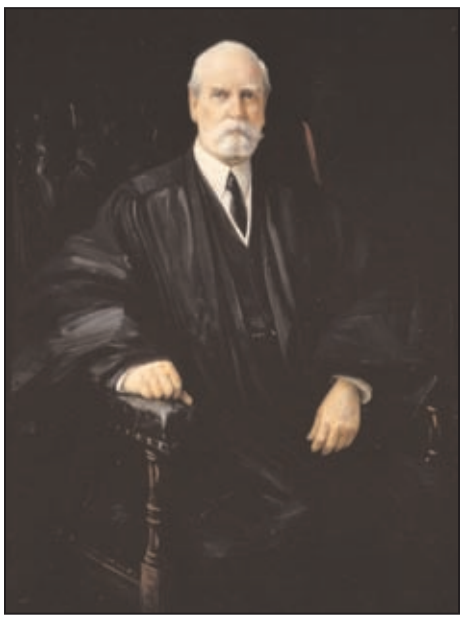
Constitutional challenges to the president's programs soon reached the Hughes Court, the most famous of which occurred in *Schechter Poultry Corporation v. United States*, 295 U.S. 495 (1935). Under the National Industrial Recovery Act, a showpiece of the New Deal, the president had approved a Live Poultry Code regulating wages, hours and ages of employees, proscribing certain trade practices and imposing reporting requirements on the poultry industry.

Writing for a unanimous court, Hughes found that NIRA conferred an unconstitutional delegation of legislative power to the president, and that the Live Poultry Code was an impermissible attempt to regulate local business. Answering the government's argument that NIRA was necessary to address the national economic crisis, the chief justice wrote, "Extraordinary conditions do not create or enlarge constitutional power."

The Hughes Court showed similar contempt for the president's Agricultural Adjustment Act, which sought to boost farm prices by taxing agricultural commodities and subsidizing farmers who reduced their cultivated acreage. The court held that statute unconstitutional in *United States v. Butler*, 297 U.S. 1 (1936).

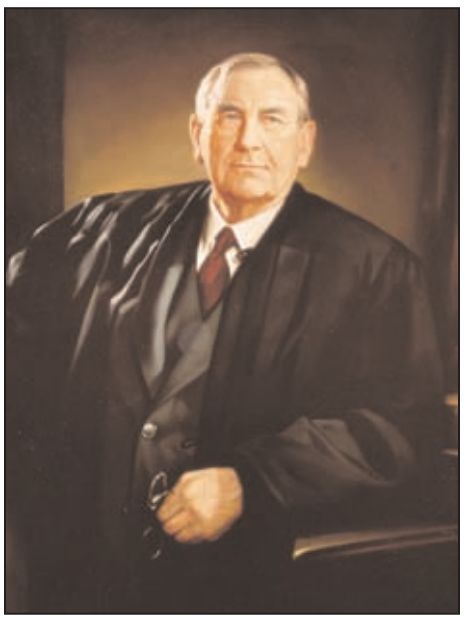
Following his landslide re-election in 1936, Roosevelt retaliated by submitting a judiciary reform bill to Congress that would add six new seats to the court. The president intended to fill the new seats with nominees sympathetic to his agenda. Members of Congress and the public denounced this controversial proposal. An adept politician himself, Hughes openly opposed the president's plan.

Interestingly, soon after submission of the president's judicial reform bill to Congress, the court began upholding New Deal legislation, such as the Wagner Act, a New Deal statute regulating labor disputes. That decision also expanded the scope of commerce subject to federal control. The



Collection of the Supreme Court of the United States

Charles Evans Hughes, painting by G. B. Torrey



Collection of the Supreme Court of the United States

Harlan Fiske Stone, painting by C. J. Fox

Four Horsemen's predictable dissent was futile. Soon after, the court upheld the Social Security Act, which provided old age benefits for workers and a special tax on employers and employees.

The court shifted further in June, when Justice Van Devanter retired and was replaced by Hugo Black. Additional retirements over the next two years enabled Roosevelt to appoint Stanley Reed, Felix Frankfurter and William O. Douglas to the Hughes Court, thereby enlarging the majority favoring the president's programs.

Hughes retired from the court in 1941 and died in 1948. By reconsidering his opposition to New Deal legislation, he defused a major confrontation between the executive and judicial branches of the federal government.

Harlan Fiske Stone and a famous footnote

Roosevelt chose Associate Justice Harlan Fiske Stone, a Republican, to replace Hughes in 1941. He would preside over the court during World War II.

Appointed as an associate justice in 1926, Stone was considered a noted jurist even while he served with some of the most influential jurists of the 20th century, such as Oliver Wendell Holmes Jr., Louis Brandeis, Charles Evans Hughes, Benjamin Cardozo, Hugo Black, William O. Douglas and Felix Frankfurter.

One of Stone's dissents, in *United States v. Butler,* is particularly memorable. A majority in *Butler* invalidated portions of the federal Agricultural Adjustment Act, enacted to support farm prices. Stone's dissent explained judicial review. He advised that courts should only be concerned with the legislature's power to enact statutes, not the wisdom of such statutes. Further, while the executive and legislative branches are subject to judicial restraint, the only check on the court is its own self-restraint. Finally, parties challenging unwise laws should seek recourse through the ballot, not the courts.

Stone followed similar reasoning in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), but with an important footnote that changed American constitutional law. The facts of *Carolene Products* were uninteresting. Congress had enacted the Filled Milk Act in 1923, prohibiting distribution of skim milk compounded with non-dairy fat or oil. The defendant advanced the usual arguments that had often prevailed; namely, that the statute was beyond Congress's power to regulate interstate commerce, an invasion of states' rights under the 10th Amendment, and a violation of the defendant's rights to equal protection and due process under the Fifth Amendment. Stone was unimpressed.

He noted that Congress could regulate the distribution of filled milk under the Constitution's commerce clause, subject only to Fifth Amendment restrictions against taking of private property without due process. He disagreed that the statute infringed upon the Fifth Amendment. Finally, Stone maintained that constitutionality is presumed for legislation that "rests upon some rational basis within the knowledge and experience of legislators."

However, Stone appended a footnote to this last statement warning that the "presumption of constitutionality" may be limited if the legislation (1) appears to be within a specific prohibition of the Constitution, such as the Bill of Rights or the 14th

Amendment, (2) restricts political processes that may bring about repeal of undesirable legislation, or (3) is directed at minority groups.

Later court decisions adopted this footnote, resulting in a dichotomy in the court's analysis of legislation. The court usually upholds commercial legislation if there is a rational basis for it. In contrast, if the legislation restricts basic freedoms, voting rights or identifiable minorities, the court generally disallows the legislation.

When Roosevelt promoted Stone in 1941, all of the justices had either been appointed by the president or were generally sympathetic to his policies. World War II raged in Europe and the Far East, and after the surprise attack on Pearl Harbor, the United States entered that horrific conflict.

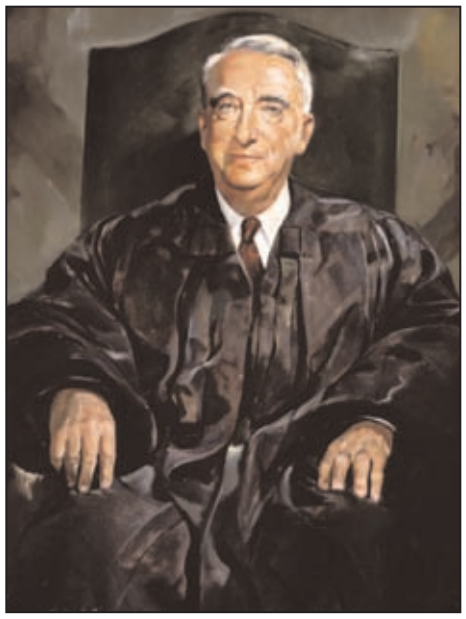
As news of Japanese triumphs and atrocities reached Americans, the president issued Executive Order No. 9066, authorizing military commanders to exclude "any or all persons" from such areas as they may designate. Congress approved the order in March. Although the order did not specify residents of Japanese descent, there was no secret as to whom it applied. The Western Defense Command quickly imposed a curfew on all Japanese-Americans and ordered them into detention camps in May.

Kyoshi Hirabayashi, a native-born American citizen and college student, refused to comply with the order and was sentenced to three months in prison. His suit reached the court in 1943. Chief Justice Stone's unanimous decision upheld Hirabayashi's conviction for violating the curfew in *Hirabayashi v. United States*. 320 U.S. 81 (1943). The decision avoided discussing the relocation order. Even Justices Black and Douglas, who later became champions for civil rights, approved the curfew under the circumstances.

The order's relocation requirement faced constitutional challenge in *Korematsu v. United States*, 323 U.S. 214 (1944). Toyosaburo Korematsu, another native-born American citizen, had disobeyed a military order excluding residents of Japanese ancestry from the West Coast. Black upheld the relocation order while conceding that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect." Stone joined Black's opinion.

The holdings in *Hirabayashi* and *Korematsu* represent a major breakdown in America's constitutional government. The breakdown, prompted by fear and racism during a vicious global war, is perhaps the most frightening because all three branches of the federal government sanctioned it.

Stone died in 1946 after 21 years on the court. Although the Japanese internment cases blemished the Stone Court, his decisions analyzing the constitutionality of legislation are important contributions to American jurisprudence.



Collection of the Supreme Court of the United States

Fred Moore Vinson, painting by W. F. Draper

Frederick M. Vinson and the twilight of the separate but equal doctrine

Frederick Moore Vinson was the 13th chief justice of the Supreme Court, and a close associate of President Harry Truman.

Following Harlan F. Stone's death, Truman appointed Vinson as chief justice in 1946. Vinson remained closely associated with Truman, and this relationship may have influenced his dissent in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), a seminal case defining constitutional limits on presidential powers.

Facing threatened labor unrest in the steel industry during the Korean War, in April 1952, Truman ordered the federal seizure of the nation's steel mills. The president took this action without congressional approval, claiming the authority to do so as commander in chief of the military. The steel industry challenged the seizure. Black, writing for a plurality, agreed with the steel industry, holding that even during wartime, the president cannot take private property without an act of Congress. The chief justice dissented, arguing that the president's seizure of steel mills was within the scope of his executive powers.

The Vinson Court expressed a willingness to reconsider cases involving alleged violations of the 14th Amendment's equal protection clause. *Shelley v. Kraemer*, 334 U.S. 1 (1948) involved a restrictive covenant preventing African-Americans from owning property in a subdivision. The restrictive covenant was a private agreement, and no state or local governments were parties to the restrictive covenant.

This case presented the issue of whether the equal protection clause prevented a state court from issuing an injunction enforcing the restrictive covenant. Vinson wrote the court's opinion, holding that a court's injunction was state action prohibited by the 14th Amendment.

The court again considered the equal protection clause in *Sweatt v. Painter*, 339 U.S. 629 (1950), in which future Supreme Court Justice Thurgood Marshall represented Herman Sweatt, an African-American who was refused admission to the University of Texas Law School in 1946 because of his race.

At the time, Texas had no law schools that accepted African-Americans. Rather than simply admitting Sweatt to the law school, the state opened a segregated "law school for Negroes." This law school was an understaffed, unaccredited and substandard fiasco. Sweatt pressed his case.

The chief justice wrote a unanimous opinion holding that the University of Texas Law School could not bar Sweatt from admission. In addition to discussing the separate law school's shortcomings in its faculty and library, the chief justice added that the exclusion of white students effectively denied Sweatt a substantially equal legal education. The decision indicated that the "separate but equal" doctrine adopted in *Plessy v. Ferguson* was vulnerable.

Vinson died in September 1953. Under Vinson, the court began, belatedly, to reconsider lamentable 19th century precedent that had hindered equal protection for racial minorities. His successor, Earl Warren, would lead the Supreme Court toward active participation in the civil rights movement.

Earl Warren, champion of equal protection

President Dwight D. Eisenhower appointed Earl Warren, the popular Republican governor of California, to the Supreme Court in 1953. Eisenhower reportedly came to regret this appointment. Warren led a Supreme Court that often struck down federal and state legislation and procedures and did not hesitate to overrule existing court precedent.

Warren quickly made a name for the Warren Court with his unanimous opinion in *Brown v. Board of Education*, 347 U.S. 483 (1954), holding that racially segregated public schools violated the equal protection clause, and specifically overruling the "separate but equal" doctrine endorsed in *Plessy v. Ferguson*. *Brown* showed that state laws mandating racial segregation would no longer be acceptable in public education.

The unanimous decision presented a united front against racial segregation. Although the *Brown* decision did not immediately end segregated schools in America, it established the basis for successful legal challenges to racially divided education over ensuing decades.

The Warren Court issued other historic decisions regarding civil rights, voting, legislative apportionment, criminal procedure,

Continued on page 22

Chief Justices and years of service in the position

Name	Born	Term as Chief Justice (Reason for Leaving)	Died
John Jay	12/12/1745	1789 - 1795 (resigned)	5/17/1829
John Rutledge	9/17/1739	7/1795 - 12/1795 (rejected)	7/18/1800
Oliver Ellsworth	4/29/1745	1796 - 1800 (resigned)	11/26/1807
John Marshall	9/24/1755	1801 - 1835 (died)	7/6/1835
Roger B. Taney	3/17/1777	1836 - 1864 (died)	10/12/1864
Salmon P. Chase	1/13/1808	1864 - 1873 (died)	5/7/1873
Morrison R. Waite	11/29/1816	1874 - 1888 (died)	3/23/1888
Melville W. Fuller	2/11/1833	1888 - 1910 (died)	7/4/1910
Edward D. White	11/3/1845	1910 - 1921 (died)	5/19/1921
William H. Taft	9/15/1857	1921 - 1930 (retired)	3/8/1930
Charles E. Hughes	4/11/1862	1930 - 1941 (retired)	8/27/1948
Harlan F. Stone	10/11/1872	1941 - 1946 (died)	4/22/1946
Fred M. Vinson	1/22/1890	1946 - 1953 (died)	9/8/1953
Earl Warren	4/19/1891	1953 - 1969 (retired)	7/9/1974
Warren E. Burger	9/17/1907	1969 - 1986 (retired)	7/25/1995
William H. Rehnquist	10/1/1924	1986 - 2005 (died)	9/3/2005
John G. Roberts Jr.	1/27/1955	2005 -	

"Shaping the Future," a look at U.S. chief justices: Part III

Continued from page 21

privacy rights and school prayer. In *National Association for the Advancement of Colored People v. Alabama*, 357 U.S. 449 (1958), the court unanimously held that a state could not force a political organization to disclose its membership, noting that freedom of association is protected under the due process clause of the 14th Amendment. The court unanimously held that a state could not redraw municipal boundaries to exclude minorities in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

The chief justice joined the majority in *Mapp v. Ohio*, 367 U.S. 643 (1961), holding that the Constitution prohibits states from unlawful searches and seizures, and requiring that evidence unlawfully obtained must be excluded from criminal trials. The court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963) required state prosecutors to provide legal counsel to indigent criminal defendants. Warren ruled in *Miranda v. Arizona*, 384 U.S. 436 (1966), a 5-4 decision, that police cannot question a criminal suspect in custody without first informing him of his constitutional rights to remain silent and to obtain legal representation.

The chief justice joined Justice Douglas' plurality opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965), involving a Connecticut law banning the use of contraceptives, even by married individuals. A divided court found that guaranties of freedoms in the Bill of Rights "have penumbras, formed by emanations from those guarantees that help give them life and substance."

Following this logic, the court noted that the Constitution protects individuals' rights to privacy, and that the marital relationship is within this protection. Accordingly, the Connecticut law was unconstitutional. After Warren's retirement, the court expanded this right to privacy to nullify statutes outlawing the use of contraceptives by unmarried individuals and to secure constitutional protections for abortion and homosexual conduct.

Many Americans disapproved of the Warren Court's decisions banning prayer in public schools. *Engel v. Vitale*, 370 U.S. 421 (1962) involved a New York policy encouraging a short, voluntary prayer at the beginning of each school day. *Abington Township v. Schempp*, 374 U.S. 203 (1963) was a challenge to a Pennsylvania law requiring public school students to participate in Bible readings, unless excused by their parents.

In both cases, the court found the school policies to be unconstitutional encroachments on the First Amendment guaranties against governmental establishment of religion. The court would later cite these cases in restricting religious expression on government property and at government-sponsored events.

Collection of the Supreme Court of the United States

Earl Warren, painting by C. J. Fox

Collection of the Supreme Court of the United States

Warren E. Burger, painting by G. Augusta

Warren retired in 1969, enabling President Richard M. Nixon to appoint Warren E. Burger as his successor. Warren died on July 9, 1974, roughly one month before the Burger Court issued its historic decision precipitating that president's resignation.

Critics have accused the Warren Court of "judicial activism" for its readiness to overturn legislation and prior court decisions. Such critics may question the propriety of un-elected justices nullifying laws passed by elected legislatures. However, few today would disparage the Warren Court's protection of equal rights for racial minorities after decades of institutionalized segregation in the United States.

Warren E. Burger, leading a divided court

Nixon selected Warren E. Burger as the 15th chief justice in 1969. The Burger Court was a fractured tribunal, with the justices often unable to render a decision without multiple opinions. However, the court acted unanimously in its most famous case, which hastened Nixon's resignation in 1974.

Nixon resented the Warren Court's decisions expanding constitutional protections for criminal suspects. The president hoped to reverse this trend by appointing Burger as chief justice. The results were mixed. Although a capable administrator, Chief Justice Burger was generally unable to forge a clear majority on important constitutional law decisions. This lack of consensus undermined the public's respect for the court.

New York Times v. United States, 403 U.S. 713 (1971), known as the "Pentagon Papers Case," exemplified divisions within the court. Classified Defense Department papers on the Vietnam War were leaked to the *New York Times* and *Washington Post*. The Nixon administration sought to enjoin publication. The court issued a *per curiam* opinion denying the injunction; however, a confusing array of concurring and dissenting opinions accompanied the opinion.

The justices issued another cacophony of opinions in *Furman v. Georgia*, 408 U.S. 238 (1972), which effectively invalidated all state death penalty statutes. Following the court's one page *per curiam* opinion, each of the nine justices issued a separate opinion. These concurrences and dissents covered more than 200 pages. Most states retooled their death penalty statutes after *Furman*, and in *Gregg v. Georgia*, 428 U.S. 153 (1976), the court ruled that the death penalty for a murder conviction was not a *per se* violation of the Eighth Amendment's prohibition on cruel and unusual punishment.

Disunity again reigned in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), challenging a Massachusetts law forbidding distribution of contraceptives unless prescribed by a physician to a married individual. William Baird, a birth control advocate but not a licensed physician, lectured to Boston University students and faculty regarding the use of contraceptives. After his speech, he offered the audience free samples of a vaginal contraceptive foam. At least one member of the audience accepted a sample. Baird was arrested and convicted under the Massachusetts statute.

Brennan wrote a plurality opinion, joined by Justices Douglas, Stewart and Marshall, overruling the conviction, because a state law denying contraceptives to unmarried individuals while allowing them to married individuals violated the equal protection clause of the 14th Amendment. Douglas concurred separately, asserting that Baird's lecture was protected speech under the First Amendment. Justice White's concurrence, in which Justice Blackmun joined, stated that Baird's conviction should be overturned because the statute required a physician's prescription for contraceptive sales even to married persons, which was an unconstitutional restriction on their right to use contraceptives.

Burger dissented, arguing simply that regardless of one's opinion on the right to contraceptives, Baird was not a licensed physician and, therefore, his conviction should be upheld. Newly appointed Justices Lewis F. Powell and William H. Rehnquist did not participate.

The court showed some consensus in *Roe v. Wade*, 410 U.S. 113 (1973), where seven justices, including Burger, subscribed to a remarkable opinion holding that pregnant women have a constitutional right to choose an abortion. White and Rehnquist dissented from the majority's decision. Abortion rights remain a hotly contested issue in America more than 30 years later.

In the area of school desegregation, the Burger Court strove to maintain the unanimity displayed in *Brown v. Board of Education*. Burger's unanimous decision in *Swan v. Charlotte Mecklenburg Board of Education*, 402 U.S. 1 (1971) had far-reaching effects on local school districts throughout the nation. In spite of *Brown*, many districts had resisted school desegregation. By the 1970s, the federal courts were frustrated with this intransigence. Some courts ordered forced busing of students to achieve desegregation.

The chief justice ruled in *Swan* that courts have a broad range of remedial powers where local school districts allowed racially imbalanced schools and that forced busing was an appropriate remedy.

The court again issued multiple opinions in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), involving affirmative action policies at the University of California Medical School at Davis. Allan Bakke, a white man, had twice been denied admission to the medical school, which reserved 16 percent of its seats for minorities. Bakke's qualifications were better than those of accepted minority students. Bakke sued the university for violating his right to equal protection under the law.

Justice Powell was credited with authoring the court's opinion, which validated affirmative action programs but nevertheless ordered that Bakke be admitted to the med-

ical school. However, with various justices authoring disparate opinions that concurred with portions of Powell's opinions but dissented with other portions, it became virtually impossible to predict how the court would view affirmative action cases in the future. The issue remains divisive and unresolved.

The chief justice rendered his most historic decision in *United States v. Nixon*, 418 U.S. 683 (1974). During the 1972 presidential campaign, several individuals were apprehended breaking into the Democratic Party's offices at the Watergate Hotel in Washington, D.C. An investigation resulted in criminal indictments against several of Nixon's closest aides. The special prosecutor sought White House tapes by subpoena, but the president refused to comply, citing executive privilege.

The standoff quickly came to the Supreme Court. Aware of the looming constitutional crisis, Burger chose to write the opinion himself. Justice Rehnquist recused himself because he had been an assistant attorney general in the Nixon administration before his appointment to the court. The remaining seven justices subscribed to the chief justice's opinion, holding that executive privilege did not excuse the president from complying with the subpoena. On Aug. 8, with impeachment a virtual certainty, a beleaguered Nixon announced his resignation, which took effect the following day.

Burger retired from the Supreme Court in September 1986, whereupon Rehnquist replaced him. Burger died of congestive heart failure in 1995.

William H. Rehnquist and presidential politics

President Ronald Reagan promoted William Rehnquist to chief justice in 1986. Rehnquist would become deeply involved in presidential politics, both as the presiding judge at the impeachment trial of President William J. Clinton in 1999, and as a deciding vote in the court's 5-4 ruling that ensured President George W. Bush's election in 2000.

As an associate justice, Rehnquist resisted expanding the rights of criminal suspects and privacy rights and extending the equal protection clause to non-racial minorities. When the court considered whether a constitutional right to privacy protected consensual homosexual intercourse in *Bowers v. Hardwick*, 478 U.S. 186 (1986), Rehnquist joined a 5-4 majority upholding a Georgia law criminalizing that activity. However, the precedent was short-lived, and the court specifically overruled that case in *Lawrence v. Texas*, 539 US 558 (2003) by a 6-3 vote, finding that statutes banning consensual homosexual conduct violated the due process clause. Chief Justice Rehnquist joined the dissent in *Lawrence*.

Associate Justice Rehnquist's dissent in *Craig v. Boren*, 429 U.S. 190 (1976) displayed his unwillingness to apply the equal protection clause to gender-based discrimination. An Oklahoma statute established a higher drinking age for males than females. The court found this statute to be unconstitutional because the state had failed to prove that the disparate treatment of males and females was "substantially related" to the achievement of "important governmental objectives."

Rehnquist dissented, asserting that the statute need only be supported by a "rational basis" to withstand constitutional scrutiny. In 1996, Rehnquist again showed reluctance to hold gender-based discrimination to the same standard as racially-based discrimination when he wrote a separate concurrence in *United States v. Virginia*, 518 U.S. 515 (1996). A majority in that case ruled that the Virginia Military Institute could not exclude women.

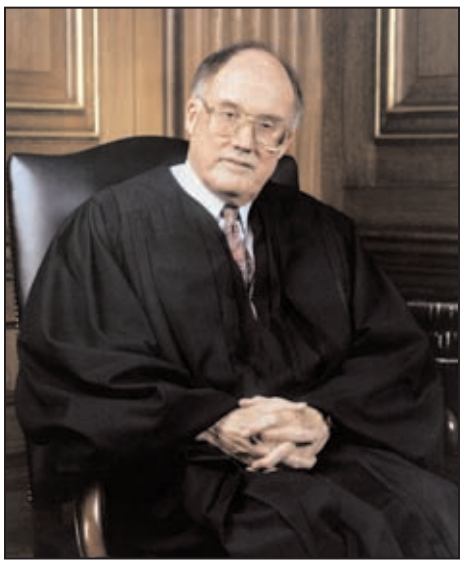
In 1999, Rehnquist became the first chief justice since Salmon Chase to preside at a presidential impeachment trial. The Monica Lewinsky affair and subsequent perjury charges against Clinton led Republicans in the House of Representatives to accuse the president of perjury and obstruction of justice, requesting impeachment. The Senate impeachment trial began on Jan. 7, 1999, with the chief justice swearing in all 100 senators. On Feb. 12, the chief justice tallied the senators' votes and ordered the president's acquittal.

The Rehnquist Court determined the contested presidential election of 2000, which pitted Democrat Al Gore Jr., the vice president, against Republican George W. Bush, the governor of Texas. Slim margins, hanging chads, court-approved challenges and deadlines for manual recounts triggered a series of maneuvers by both campaigns while Americans waited breathlessly for a final decision.

The nine justices of the Rehnquist Court would determine the election. The Rehnquist Court held a conservative faction, comprising the chief justice and Justices Antonin Scalia and Clarence Thomas, and a liberal faction comprising Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer.

Predictions that the conservative wing would favor Bush and that the liberal wing would favor Gore proved correct. The decision depended on the swing votes, namely Justices Sandra Day O'Connor and Anthony Kennedy, both of whom had been appointed by Republican presidents. The court ruled in favor of the Bush campaign in *Bush v. Gore*, 531 U.S. 98 (2000).

The Rehnquist Court's role in the 2000 election has been praised and criticized, generally along political lines. In any event, unofficial recounts have indicated that Bush won the Florida election by a margin of a few hundred votes.



Dane Penland, Smithsonian Institution, Courtesy of the Supreme Court of the United States

William H. Rehnquist

Steve Petteway, Collection of the Supreme Court of the United States

John G. Roberts Jr.

During the last several months of his tenure, Rehnquist suffered from thyroid cancer and was often unable to participate fully in the court's deliberations. He died on Sept. 3, 2005, in Arlington, Virginia. Immediately after his death, Bush nominated Judge John G. Roberts Jr., who had already been named to succeed O'Connor, who was retiring, as the new chief justice.

John G. Roberts Jr., the unfinished chapter

The Senate confirmed John G. Roberts Jr. as the 17th chief justice on Sept. 29, 2005, making him the first justice to be appointed to the Supreme Court since Clinton's selection of Breyer in 1994. It is too early at this time to characterize the Roberts Court, although many anticipate that Roberts will join Scalia and Thomas on the court's conservative wing.

On July 19, 2005, Bush chose Roberts to replace the retiring O'Connor as an associate justice, but after Rehnquist's death, the president nominated him for the chief justice position. After contentious hearings before the Senate Judiciary Committee, the nomination was approved for vote by the entire Senate and Roberts secured Senate confirmation on Sept. 29, 2005, with all of the Republicans voting for him and half of the Democrats voting against him. The division of the Senate votes reflected the partisanship that has taken hold over Congress in recent years.

An indication of how Roberts will approach issues involving conflicts between state laws and the federal government surfaced on Jan. 17, 2006, in *Gonzalez v. Oregon*, which determined the validity of Oregon's assisted suicide law. In 1970, Congress had passed the Controlled Substances Act in order to deter drug abuse. The attorney general issued regulations under the Act in 1971 requiring that prescriptions of certain drugs be used "for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice."

Oregon passed a law in 1994 allowing terminally ill patients to obtain a doctor's prescription for life-ending drugs. Conservative Republicans in Congress, including Sen. John Ashcroft, urged the Clinton administration to oppose physician-assisted suicides, but without success. After Bush's election, Ashcroft became attorney general, took the position that life-ending drugs did not serve a legitimate medical purpose and threatened physicians with the loss of their medical licenses if they prescribed such drugs. This position created a conflict between a state law enacted by an elected legislature and an interpretation of a federal regulation by a member of the president's Cabinet.

In a 6-3 decision, a majority of the court held that the Oregon law prevailed over the attorney general's interpretation. In arriving at this decision, the majority noted that the purpose of the Controlled Substances Act was to prevent illicit drug use and not to govern the practice of medicine generally.

The chief justice joined Scalia's dissent, which would have given more deference to the attorney general's interpretation and ruled against the Oregon statute. Roberts's subscription to this dissent shows that he may be inclined to side with federal regulators when their interpretation of federal law conflicts with state law. It may also indicate a personal dislike for physician-assisted suicides.

At 51 years old, Roberts is likely to have a lengthy tenure on the Supreme Court, and to have a lasting influence on American law. His success will be measured largely by his understanding of federal and state legislation and Supreme Court precedent, his regard for the Constitution's supremacy and his ability to build consensus among justices with differing views.

Member to Member

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March

Crisis in the Workplace: How to Deal with Troubled Employees

Thursday, March 16, noon-2 p.m.
MBA, 20 West St., Boston
Course #: LEG06 Luncheon roundtable (lunch provided)

This program will help you better understand the issues surrounding troubled employees. Whether it is substance abuse, domestic violence or psychiatric issues, troubled employees cannot help but bring their issues to the workplace. Employers need to be able to evaluate and effectively respond to the behavior of troubled employees. You will learn: how to spot troubled employee situations where employers should ask for help; When to seek outside help in evaluating employee situations; and when to call the police and when to consider handling the matter in-house.

Faculty: Dr. Bruce Cedar.

Current Issues in Massachusetts Workers' Compensation

Tuesday, March 21, 4-7 p.m.
Western New England College School of Law, Springfield
Course #: CLH06

This program will focus on current topics in workers' compensation practice., including discovery of medical evidence, litigation of complex medical and disability claims, pre-existing condition issues, evidentiary disputes, Social Security disability and Medicare concerns and other new issues.

Faculty: Charles R. Casartello Jr., Hon. Catherine Watson-Koziol, Hon. Steven D. Rose, Richard P. Bock, James D. Chadwell, Kimberly A. Davis-Crear, Peter J. Moran, James E. Ramsey, Earlon LaForest Seeley III.

Co-sponsors: Western New England College School of Law and the Berkshire, Franklin, Hampshire and Hampden county bar associations

Introduction to Land Conservation Law

Wednesday, March 29, 4-5:30 p.m.
MBA, Western Mass. office, 73 State St., Springfield
Course #: PRD06

In this seminar, you will learn about the Massachusetts conservation enabling legislation that allows a parcel of land to be protected from development in perpetuity, including what a conservation restriction is, how it works, who may hold a restriction, who may enforce a restriction and the practical effect of placing a restriction on a parcel of land. You will also learn about the estate planning and tax ramifications of conservation restrictions.

Learn from a national expert in the field of land conservation about this growing area of law.

Faculty: Elizabeth L. Wroblicka.

Co-sponsor: The Real Estate Bar Association

April

Winning at Arbitration

Monday, April 3, 12:30-2 p.m.
MBA, 20 West St., Boston
Course #: CLK06 Luncheon roundtable (lunch provided)

"Want to arbitrate?" is a common enough query, but before you say "yes," learn how to improve your presentation and your chances of winning.

At this luncheon, our panel will go over common mistakes made in arbitration and discuss practical tips for putting on a winning case. Learn what to do when the other side is not playing fair and how to protect yourself from surprises. This session will also touch upon the finality of an arbitrator's award and when there are grounds for an appeal.

Faculty: Paul R. Kelley, Hon. James W. Dolan (ret.).

Faculty Profile

Laredo's "confidential" course April 4

Marc C. Laredo is a partner at Laredo & Smith where he concentrates his practice in business litigation and general business law. In 2003, the *Massachusetts Law Review* published Laredo's article titled, "The Attorney-Client Privilege in the Business Context." Furthermore, Laredo's articles have been published in *Massachusetts CPA Review, Family Business, Banker and Tradesman* and *American Medical News*.

Marc C. Laredo

After earning his J.D. from the University of Pennsylvania Law School, Laredo served as assistant attorney general in the criminal bureau of the Massachusetts Attorney General's Office and is currently on the editorial board of the *Massachusetts Law Review*. He is actively involved in the MBA and is currently serving as the chair of the MBA's Lawyer Referral Service Committee. Laredo is also a former member of the MBA's Business Law, Civil Litigation and Criminal Justice Section Councils and its Multidisciplinary Practice Committee.

It's Confidential — Privilege Law in Massachusetts

Tuesday, April 4, 4-6:30 p.m.
MBA, 20 West St., Boston
Course #: CLL06

Privilege issues arise in an array of situations in both civil and criminal cases: at trial, in a deposition, responding to a discovery request or when planning strategy. In order to preserve a privilege, a proactive approach is often necessary. This seminar will focus on a variety of privileges, including the attorney-client, spousal, parent-child, peer review, doctor-patient, common interest and joint defense privileges. Our experienced panel will explain the concept of each privilege and provide practical tips for successfully asserting and defeating privilege claims.

Faculty: Marc C. Laredo, Hon. Nonnie S. Burnes, David A. Bunis, Paul R. Cirel, Thomas J. Gallitano, Sheila Sawyer.

Elder Law Update

Tuesday, April 4, 4-7 p.m.
Springfield Marriott, 2 Boland Way, Springfield
Course #: PLH06

This seminar will provide the most up-to-date information on the new federal Medicaid law. Our panel will provide information on the look back period, rules regarding annuities, rules regarding houses and disqualification periods, and an analysis of some techniques to preserve assets.

Faculty: Hyman G. Darling, Gina M. Barry, Carol C. Klyman.

Co-sponsors: The Massachusetts Chapter of the National Academy of Elder Law Attorneys

Current Union Tactics: From Picketing to Corporate Campaigns

Thursday, April 6, 4-7 p.m.
MBA, 20 West St., Boston
Course #: LEI06

From picket lines to corporate campaigns, unions employ many tactics to draw attention to employers who do not maintain wage and benefit standards. While constitutional protection of economic tactics is broad, the scope and limitations of that protection have been explored in recent cases.

This course will discuss: the limits on union access to employer property; the ins and outs of "top-down" and "bottom-up" union organizing tactics; the various forms of publicity used by unions against neutral employers; collective bargaining approaches; and the economic impact all of these have in the area of labor law.

Faculty: David G. Hanrahan, Dr. Elaine Bernard, Robert P. Joy, Paul F. Kelly, Roy M. Schoenfeld.

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New Developments in Testimonial Evidence Post Crawford

Tuesday, April 11, 4-6 p.m.
MBA, 20 West St., Boston
Course #: CJE06

Evidentiary issues are vital to criminal cases and it is imperative that attorneys thoroughly appreciate the new evidentiary developments within the court system. Hearsay has become one of the most critical and contentious evidentiary components, especially with the Supreme Court ruling in *Crawford v. Washington*, which redefined the rules for admitting certain out-of-court witness statements.

This seminar is designed to assist practitioners with how to recognize and distinguish admissible out-of-court statements form inadmissible statements, as well as how and when to seek limiting instructions. Further, this seminar will focus on how *Crawford* will impact juvenile proceedings and how *Crawford* works in conjunction with the Supreme Judicial Court's decision in *Commonwealth v. Gonsalves*. Attendees will also learn how to avoid ineffective assistance of counsel by failing to object in a timely manner.

Faculty: Hon. Margaret Hinkle, J.W. Carney Jr., Paul R. Rudof, Mark D. Zanini.

Representing Artists & Entertainers: A Day in the Life of a Practitioner

Thursday, April 20, 5:30-9 p.m.
MBA, 20 West St., Boston
Course #: YLE06

What does it mean to run an arts-related law practice? This program provides an introduction to the legal needs of artists and arts-related businesses and nonprofit organizations in Massachusetts. Substantive topics will include trademark and copyright proceedings and contract negotiations. Attendees will be provided a general introduction to running an arts-related practice, including an overview of the statewide legal market, specific practice tips, potential conflicts of interest that may arise and legal issues facing artists and entertainers today.

Faculty: James F. Grace, Valerie L. Lovely, Andrew D. Epstein.

Casemaker Training

Tuesday, April 25, 1-2 p.m.
Western New England College School of Law
Course #: CASEA06

Due to overwhelming member requests, the MBA will be holding Casemaker training. Casemaker has had many new features added, including: Casecheck, an enhanced case law *Search Results* function, Nationwide collections of combined Supreme Court and ethics opinions and more. This one-hour training session will be held in a "computer lab" setting that will provide the participants with use of a computer and online access to Casemaker. If you want to find out more about how Casemaker can be your first cost-saving step in legal research, sign up today!

▼ How to Register for Seminars

Fill out the registration form and send it with your payment to: Member Services Center, 20 West St., Boston, MA 02111-1218

If you are using American Express, MasterCard or Visa, you may fax your registration to us at (617) 542-3057, or call us at (617) 338-0530.

You may register on the Web at www.MassBar.org.

Caveat

★ Advance registration is strongly recommended in order for attendees to be guaranteed a materials book on the day of the seminar. Walk-ins will receive materials books on a first-come, first-serve basis. Otherwise, they will be mailed out the day after the seminar.

★ Payment must accompany all registrations.

Nonmembers

Get more than 25 percent off MBA seminar fees, membership in one sponsoring section and discounts on seminars offered by Massachusetts Continuing Legal Education by becoming an MBA member. Join the section that sponsors a seminar and your discount is 50 percent. To join now and qualify for member discounts right away, call (617) 338-0530.

Discounts

★ **Section members** receive automatic discounts on seminars sponsored by any section of which they are a member (e.g., Business Law Section members receive discounts on Business Law Section seminars).

★ **Law students and newly admitted attorneys:** MBA member law students and MBA member attorneys admitted to practice in 2004 or 2005 may attend all two-hour, three-hour and four-hour MBA programs for $40.

★ **Multiple registrations:** Individuals who register in advance using the attached registration form and a single payment for multiple seminars are eligible for bulk discounts as follows:

- Registering for three seminars, take $5 off each seminar registration or $15 off the sum total of the registration fees.
- Registering for four seminars, take $6 off each seminar registration or $24 off the sum total of the registration fees.
- Registering for five or more seminars, take $7 off each seminar registration.

CLE Accreditation

Most MBA seminars are approved for CLE credit in New Hampshire, Rhode Island and Vermont. Forms certifying attendance are available at each seminar. (Programs less than two hours in length are not approved for CLE credit.)

Refunds

Refunds will be provided if cancellations are received at least three business days in advance of the program.

Changes in date, time or place

Due to unforeseeable circumstances, changes in the dates, times or places for some seminars may occur after this catalog has gone to press. If you have registered in advance for a seminar, you will be informed of any changes by letter or by phone, and you may receive a refund or credit if the new scheduling is not convenient for you. If you have not pre-registered for a program, please call the MBA Education Office to verify whether it is still being held as originally scheduled.

Unable to attend?

★ If you have registered for a program and are subsequently unable to attend, the MBA will send all materials that were distributed at the seminar to the address on your registration form.

★ If you have not pre-registered but would like to obtain the materials, please call Member Services after the seminar for price and ordering info: (617) 338-0530.

MBI Program Fees

1 to 1 1/2 hour luncheon roundtables and section forums

Sponsoring section MBA members	$15
Other MBA members	$25
Nonmembers	$50

2 to 4 hour seminars

Sponsoring section members	$80
Other MBA members	$115
Nonmembers	$160
Law student/new lawyer members	$40

MASSACHUSETTS BAR INSTITUTE
Program Registration Order Form CLELJ

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Areas of Practice: _____

Program Registration

Course Number	*Title*	*Tuition*
_____	_____	$_____
_____	_____	$_____
_____	_____	$_____
_____	_____	$_____
_____	_____	$_____
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Payment Method

☐ Check enclosed (please make payable to **Massachusetts Bar Institute**)

☐ Charge my ☐ American Express ☐ MasterCard ☐ VISA

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Casemaker Training

Thursday, April 27, 5-6 p.m.
Western New England College School of Law
Course #: CASEB06

Due to overwhelming member requests, the MBA will be holding Casemaker training. Casemaker has had many new features added, including: Casecheck, an enhanced case law *Search Results* function, Nationwide collections of combined Supreme Court and ethics opinions and more.

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Family by Contract

Wednesday, April 26, 4-7 p.m.
Sheraton Hotel, Springfield
Course #: FLF06

It may shock you to consider the extent to which we create our families out of contracts. We like to indulge ourselves in the romantic belief that our intimate relationships and our families are created by luck and love.

In fact, we are acculturated to plan and memorialize our respective rights and obligations within intimate relationships and create families by entering into contracts and other instruments. We are also accustomed to battling out the terms of our most intimate relationships in open court.

This panel will provide drafting, planning and litigation tips and strategies to accomplish: family planning for relationships and property; family planning for children; parenting agreements; sperm donor agreements; and adoption, estate planning and advanced directive planning for personal, medical and financial decision-making by an agent as well as court override and revocations of such instruments. The seminar will discuss litigation for enforcement of contracts and agreements, litigation in the absence of agreements and instruments and legal trends and developments, as well as a practical view from the bench.

*Faculty: Lisa M. Cukier. *Additional faculty to be announced*

Maximizing Your Effectiveness in Employment & Collective Bargaining Mediations

Thursday, April 27, noon-2 p.m.
MBA, 20 West St., Boston
Course #: LEJ06 Luncheon roundtable (lunch provided)

Increasingly, mediation occurs prior to trial or arbitration. Preparation for mediation and strategy for settlement negotiations have a direct impact on the outcome of the case. Certain attorneys consistently achieve better results than others during mediations.

Specific topics will include: how to prepare a client for a joint mediation session and subsequent private sessions; how to present a case in a joint session; whether to prepare a memorandum for the mediator; strategies for conveying offers and demands; whether the more contentious settlement terms should be discussed sooner rather than later; how to manage client expectations; and how to perpetuate momentum toward settlement if settlement is not reached during the mediation session. As a majority of mediation sessions are successful, the effectiveness of your representation in this area may be as valuable to your client as your trial skills.

Faculty: Claudia T. Centomini, Christopher P. Kauders, Arnold M. Zack.